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"We are to set the judges free."

JUDGES sometimes make mistakes. Many such mistakes are rectified by appellate courts; many others are ignored or distinguished in subsequent cases and thus do not become accepted rules of law. But some mistakes are affirmed or made by courts of last resort and become, through application of the principle of stare decisis, governing rules of law which no court, including the court of last resort, will re-examine. To correct such judicially unassailable mistakes in the shortest possible time, appeal must be made to the legislature which, as a co-ordinate law-making institution, has the power and duty to review and revise judge-made law.[1] The necessity—and the limited function—of such legislative action was outlined by Judge Cardozo in his plea for a "Ministry of Justice" to back-stop the New York courts:

> "Thus, again and again, the processes of judge-made law bring judges to a stand that they would be glad to abandon if an outlet could be gained. It is too late to retrace their steps. At all events, whether really too late or not, so many judges think it is that the result is the same as if it were. . . . There is need of a fresh start; and nothing short of a statute, unless it be the erosive work of years, will supply the missing energy. . . . Legislation is needed, not to repress the forces through which judge-made law develops, but to stimulate and free them. Often a dozen lines or less will be enough for our deliverance. The rule that is to emancipate is not to imprison in particulars. It is to speak the language of general principles, which, once declared, will be developed

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1 See generally HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 415, 476-78, 599, 722-23 (Tent. ed. 1957).

> and expanded as analogy and custom and utility and justice, when weighed by judges in the balance, may prescribe the mode of application and the limits of extension. The judicial process is to be set in motion again, but with a new point of departure, a new impetus and direction. In breaking one set of shackles, we are not to substitute another. We are to set the judges free."[2]

It is the thesis of this article that such legislative review and repair is required today on the part of the federal legislature in regard to the diversity jurisdiction of the federal courts. Such reconsideration is particularly appropriate where, as in the analogous commerce clause area, the subject matter has been committed specifically to the Congress by the Constitution.[3]

The Supreme Court stumbled badly in subjecting the diversity jurisdiction to the "outcome determinative" principle—a principle required neither by the Constitution nor by the holding of *Erie R.R. Co. v. Tompkins*.[4] The principle of the *Erie* case requires a federal judge sitting in a diversity jurisdiction case to differentiate between the applicable substantive law—which the Constitution requires to be state law—and the applicable procedural law—which is federal. Distinguishing between "substance" and "procedure" is a hard, sophisticated task which the Court tried to escape by adopting the mechanical "outcome determinative" test, a test which is not only non-responsive to the problem but logically leads to the obliteration of the role of the federal judiciary and the inapplicability of all federal procedural rules in diversity litigation.

The continued refusal of the Court to re-examine this mistake has created a situation which calls for corrective legislation by the Congress—either to abolish the diversity jurisdiction in its present form or to retain it and repair the damage done. Since the diversity jurisdiction continues to fulfill a vital role in the United States federal system, it should be retained and repaired.

2 Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 115-17 (1921). The suggested "Ministry of Justice" became the New York Law Revision Commission, created by the N.Y. LEGIS. LAW §§ 70-72. For a review of the work of the Commission, see the symposium, *The Commission and the Courts*, 40 CORNELL L.Q. 641 (1955).

3 U.S. CONST. art. I, § 8, cl. 9, cl. 18; art. III, § 1. Compare the impact of the legislative action of Congress under the commerce clause, art. I, § 8, cl. 3, as reflected by Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852) and Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855).

4 304 U.S. 64 (1938).

I. PRESENT STATUS OF DIVERSITY JURISDICTION

Under the reign of *Swift v. Tyson*,[5] the federal courts were under the heavy burden of developing a "federal common law." Since its deserved demise in *Erie R.R. v. Tompkins*, the role of the federal judge in diversity litigation has worsened drastically, until Mr. Justice Frankfurter could recently cite a judgment in which he concurred "as further proof of the mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction."[6] What has happened in the intervening years to bring this about has been an extension of *Erie* from a constitutional requirement that state substantive law control in diversity cases to a principle of uniformity of outcome of litigation within the borders of a state. Mr. Justice Frankfurter himself wrote the opinion in *Guaranty Trust Co. v. York*,[7] the case that made this logical leap, summarizing the principle in an oft-quoted sentence:

> "The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."[8]

Whatever the origin and justification for this uniformity principle, it has led the Court to hold that federal courts sitting in diversity jurisdiction cases must do what the state courts would do as to choice of law,[9] burden of proof,[10] limitation of actions,[11] availability of remedy,[12] commencement of suit[13] and qualification

5 41 U.S. (16 Pet.) 1 (1842).

6 Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 54 (1954). The Court upheld the Louisiana Direct Action Statute which in effect created diversity jurisdiction whenever one party to a local tort had a foreign insurance company, thereby giving the plaintiff a jury he could not get in the local state courts.

7 326 U.S. 99 (1945).

8 *Id.* at 109. The preceding sentence contained a potentially narrower standard of similarity of outcome: "so far as legal rules determine the outcome of litigation. . . ."

9 Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), approving Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940), *cert. den.*, 310 U.S. 650 (1940), and Waggaman v. General Fin. Co., 116 F.2d 254 (3d Cir. 1941).

10 Palmer v. Hoffman, 318 U.S. 109 (1943); Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208 (1939).

11 Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

12 Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956); Angel v. Bullington, 330 U.S. 183 (1947).

13 Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949).

to bring suit[14] notwithstanding litigants' reliance on the Federal Rules of Civil Procedure.[15] Thus the only difference remaining between suit in a state and in a federal court is that the federal suit will probably be judged by a local judge selected for life instead of a local judge elected for a term and will be governed by a uniform set of procedural rules, whose validity and application will diminish in direct proportion to their effect upon the outcome of the litigation.

In addition, while the role of the federal judge in diversity cases has been diminishing, the actual amount of such litigation has been increasing at a prodigious rate. From 1941 to 1956 the number of such cases filed per year increased 180 percent[16] and in 1956 alone the number of private diversity cases in the federal courts outnumbered the private federal question cases by three to one.[17]

While this situation might be tolerated if the load of litigation were being shared by federal and state courts equally competent to find and apply state law, this is not the case. For it is in this area of ascertaining what *is* the substantive law of the state that the federal judges are not even the equal of the state judges. Judge Charles Clark has called it "the most troublesome, the most unsatisfying in its consequences, of all the rules based upon the *Tompkins* case" that the federal courts "must act as a hollow sounding board, wooden indeed, for any state judge who cares to express himself."[18]

For, while *Erie* seemed to leave the federal trial judges free to determine for themselves the governing rule of state law, the Court two years later held that the district judges were bound to follow a decision of a lower state court of general jurisdiction "in the absence of more convincing evidence of what the state law is."[19] This was so, even though the inferior state court's

14 Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949).

15 Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (rule 3); Cohen v. Beneficial Industrial Loan Corp., *supra* note 14 (rule 23); Woods v. Interstate Realty Co., *supra* note 14 (rule 17(b)).

16 S. REP. No. 1830, 85th Cong., 2d Sess. 11 (1958).

17 *Id.* at 13.

18 Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 290-91 (1946).

19 Fidelity Union Trust Co. v. Field, 311 U.S. 169, 178 (1940). Four other cases decided at the same term brought the message home to the lower federal courts: Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1940); Stoner v. New York Life Ins.

decision was unsound, for whether the state's highest court would follow it was "merely a matter of conjecture."[20]

Thus the federal courts, far from being able to harmonize the state law and develop it by co-operative judicial craftsmanship side-by-side with the state courts, must take a second seat to the state courts and search only their holdings and dicta for their grounds of decision. That this is second-rate justice with a vengeance is illustrated in *Pomerantz v. Clark*[21] in which Judge Wyzanski denied relief to a plaintiff though the state courts had not spoken on the issue and a contrary result seemed to be a logical development of the law:

> "[T]he never-to-be-forgotten caution is that this Court is not free to render such decision as seems to it equitable, just and in accordance with public policy and responsive to all the jurisprudential criteria which so often enter into what Justice Cardozo called 'The Nature of the Judicial Process.' A federal judge sitting in a diversity jurisdiction case has not a roving commission to do justice or to develop the law according to his, or what he believes to be the sounder, views. . . . His task is to divine the views of the state court judges."[22]

And there is an echo of Brandeis' *Erie* rationale in a recent dissenting opinion of Judge Clark:

> "We are pressing the *Erie* doctrine to a dry and wooden extreme where citizens of other states, unlike the home folk, must submit to having their rights settled or lost by dead, and not 'living' law."[23]

Although this disabling of the federal judiciary does not rise to the level of deprivation of due process or right to a fair trial,[24]

Co., 311 U.S. 464 (1940); West v. American Tel. & Tel. Co., 311 U.S. 223 (1940); Six Cos. v. Joint Highway Dist. No. 13, 311 U.S. 180 (1940).

20 Fidelity Union Trust Co. v. Field, *supra* note 19, at 179. Eight years later the Court stopped short of carrying this rule to its logical extreme in King v. Order of United Commercial Travelers, 333 U.S. 153 (1948), unanimously affirming the refusal of a federal court to follow the unreported decision of a state court of limited territorial jurisdiction which would not be binding on any state court, including the court which handed down the decision.

21 101 F. Supp. 341 (D. Mass. 1951), noted critically in 100 U. PA. L. REV. 1065 (1952).

22 Pomerantz v. Clark, *supra* note 21, at 345. The issue was the creation of an exception to the Massachusetts rule barring shareholder derivative suits unless the plaintiff first presented his case to the shareholders.

23 Alford v. Noonan, 259 F.2d 113, 119 (2d Cir. 1958).

24 *But see* Clark, *supra* note 18, at 291.

it does give the litigants a far less vital brand of justice than would be available in the state court.[25] A litigant seeking to upset an unsound state precedent must avoid the federal court at all costs, and the specter of the much-feared evil of forum-shopping again raises its head.[26]

Not only are the litigants disadvantaged by such a narrow view of the role of the federal courts in diversity litigation, but the states themselves are deprived of any assistance from the federal judiciary. The number of available minds working at solutions to difficult problems is materially reduced. Professor Hart has said:

> "The healthy development of law is paralyzed without the creative participation of courts. If federal courts, in the exposition of state law, are not to have the freedom at least of the state courts immediately inferior to the state's highest court, federal justice in such matters is doomed to be second-rate justice, and the state systems will lose the benefit of valuable contributions to their growth."[27]

Taking as our basic datum this burdensome brand of second-rate justice, let us assay the adequacy of recent judicial and legislative attempts to correct the situation.

II. ATTEMPTED REMEDIES: JUDICIAL AND LEGISLATIVE

In *Byrd v. Blue Ridge Rural Elec. Co-op.*,[28] the Court announced a new approach to diversity jurisdiction that was at once both encouraging and dissatisfying—a surprising drawing-back

25 See, *e.g.*, Cooper v. American Airlines, Inc., 149 F.2d 355, 359 (2d Cir. 1945) (Frank, J.): "After prolonged cerebration, our prophetic judgment is that decision in that court would be for the plaintiff." In Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956), the Court reemphasized, at 204, the search for what the local judges would do, with no hint of any creative action by the federal court.

26 See Corbin, *The Laws of the Several States*, 50 YALE L.J. 762, 774-75 (1941): "Therefore, when the forum is a federal court, that court must determine the applicable law by recourse to all the juristic data that are available to the state court. If the federal judge is required to disregard some of those available data, the litigant is not getting the same justice he would get if the forum were a court of the state whose system of law is applicable; his rights, by reason of this limitation, will vary with the forum and will again depend upon the accident of diversity of citizenship. . . .

"When the rights of a litigant are dependent on the law of a particular state, the court of the forum must do its best (not its worst) to determine what that law is. It must use its judicial brains, not a pair of scissors and a paste pot."

27 Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 510 (1954).

28 356 U.S. 525 (1958).

from a pure "outcome determinative" test to a new two-step test. This was a diversity suit by a North Carolina resident against a South Carolina corporation for injury allegedly negligently inflicted while plaintiff was an employee of a contractor doing work for the defendant in South Carolina. The defendant raised the affirmative defense that the South Carolina Workmen's Compensation Act[29] barred the plaintiff from suing at law and remitted him to his exclusive remedy of benefits under the statute. The district court held the statute did not apply to plaintiff, struck the defense, and sent the case to a jury, which found for the plaintiff. The Fourth Circuit held the district court's reading of the statute erroneous, but did not order a new trial. Instead, it made its own determination on the record that plaintiff was within the statute and directed judgment for the defendant.[30] On appeal, the Supreme Court held this latter disposition to be error. Speaking for a majority of six, Mr. Justice Brennan agreed with the Fourth Circuit's interpretation of the statute, but held that plaintiff was entitled to try the issue of the applicability of the statute to him under that interpretation, inasmuch as the striking of the defense below deprived him of any reason to do so before.

The Court also considered the question whether on remand the factual issue upon which the application of the statute turned should be decided by the judge or by the jury. The defendant argued that the federal courts are bound under *Erie* to follow the state practice that the issue is for the judge alone, in order to secure uniform enforcement of the immunity created by the state. In resolving the question, the Court first looked to the state rule to determine whether it is "bound up with these rights and obligations in such a way that its application in the federal court is required."[31] Finding that the rule grew up in cases reviewing the orders of the state Industrial Commission and reflected merely a desire for judicial control of jurisdictional facts, the Court concluded:

> "We find nothing to suggest that this rule was announced as an integral part of the special relationship created by the statute. Thus the requirement appears to be merely a form

29 S.C. CODE §§ 72-111 (1952) extended the application of the act to workmen of subcontractors without defining that term.

30 238 F.2d 346 (4th Cir. 1956).

31 356 U.S. at 535.

and mode of enforcing the immunity, *Guaranty Trust Co. v. York*, 326 U.S. 99, 108, and not a rule intended to be bound up with the definition of the rights and obligations of the parties."[32]

But the Court did not feel free to stop there. Even though the state practice was not an "integral part" of the local law,

". . . cases following *Erie* have evinced a broader policy to the effect that the federal courts should conform as near as may be—in the absence of other considerations—to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule. *E.g., Guaranty Trust Co. v. York, supra; Bernhardt v. Polygraphic Co.*, 350 U.S. 198."[33]

Assuming that in the instant tort case the outcome would be substantially affected by whether the factual issue upon which the application of the state statute turned were tried by the judge or by the jury, the Court admitted a strong case could be made out for following the state practice, "were 'outcome' the only consideration."[34]

It was at this point that the Court reversed the trend of post-*Erie* cases and started the countermarch toward a solution more rational than the pure "outcome" test:

"But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, as-

32 356 U.S. at 536. The Court, on this basis, felt justified in distinguishing the converse situation, Dice v. Akron C. & Y.R., 342 U.S. 359 (1952), where it held the right to jury trial was so substantial a part of the FELA cause of action that it prevailed in an Ohio state court over the local practice of sending the issue of fraudulent release to the judge alone.

33 356 U.S. at 536-37. The Court's phrase bears a nostalgic similarity to the long-repealed Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196: "the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice . . . existing at the time in like causes in the courts of record of the state. . . ."

34 356 U.S. at 537.

> signs the decisions of disputed questions of fact to the jury. . . . The policy of uniform enforcement of state-created rights and obligations, see, *e.g., Guaranty Trust Co. v. York, supra,* cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury. *Herron v. Southern Pacific Co.,* 283 U.S. 91. Thus the inquiry here is whether the federal policy of favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court."[35]

Having posed the issue in this way, the Court held that the strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts should prevail "in the circumstances of this case." The Court bolstered this position with a cite to *Herron's* fighting words: "state laws cannot alter the essential character or function of a federal court."[36] Since the Fourth Circuit had not considered all the defendant's grounds of appeal, the case was remanded to it to pass upon the other grounds and, if not rendered unnecessary by their disposition, to remand to the district court for a new trial of such issues as the court of appeals should direct.[37]

35 *Ibid.*

36 356 U.S. at 539. Herron v. Southern Pac. Co., 283 U.S. 91 (1931), held that a federal trial court could direct a verdict on the issue of contributory negligence in the teeth of a provision in the Arizona Constitution that the issue must go to the jury. Having thus disposed of the case on the assumption that following the state practice would "substantially affect" the outcome, the Court felt obliged to fall back a bit by denying the assumption: "But clearly there is not present here the certainty that a different result would follow, *cf. Guaranty Trust Co. v. York, supra,* or even the strong possibility that this would be the case, *cf. Bernhardt v. Polygraphic Co., supra.* . . . We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome." 356 U.S. at 539-40.

37 356 U.S. at 540. That *York* is not at all a logical corollary of *Erie* but a new principle based on independent policies is something the Court never seems to have questioned. Concurring as to the remand for new trial but dissenting as to the *Erie* issue, Mr. Justice Whittaker revealed, at 548, in two sentences in his argument, the logical gap between *Erie* and *York:* "The Federal District Court, in this diversity case, is bound to follow the substantive South Carolina law that would be applied if the trial were to be held in a South Carolina court, in which State the Federal District Court sits. *Erie R. Co. v. Tompkins,* 304 U.S. 64. A Federal District Court sitting in South Carolina may not legally reach a substantially different result than would have been reached upon a trial of the same case 'in a state court a block away.' *Guaranty Trust Co. v. York,* 326 U.S. 99, 109."

The encouraging point about the *Byrd* case is that a majority of the Justices could be found willing to go beyond the mechanical "outcome" test to the more difficult task of finding some compromise position that gives full sway to the state substantive law without disembowelling the federal court system. It has been suggested[38] that the Court has, in effect, adopted the policy-weighing approach urged by Mr. Justice Rutledge in his dissent in *Cohen v. Beneficial Indus. Loan Co.*[39]

The discouraging point about the case, as far as further progress is concerned, is that it accepts as starting points for discussion the *Erie* progeny—particularly *York* and *Bernhardt*—that should themselves be re-evaluated. One might have hoped that the Court, in abandoning a mechanical approach, would return to the more difficult, but equally more judge-like, task of drawing the line between substance and procedure.[40] Instead, the Court has stopped mid-way, creating a new test that may be even more difficult for the lower courts to apply.

That the Court felt the need of a second part to the test at all is in itself disheartening. One would have thought that when the Court found that the state rule was not a rule "intended to be bound up with the definition of the rights and obligations of the parties," that that would have been the end of it. But instead of continuing with this approach through to the end, the Court abandoned it to return to the highly questionable practice of looking backward from result to origin, from "substantially affect" to "substantive." The Court's fondness for this approach seems

38 Comment, 72 HARV. L. REV. 77, 148-49 (1958).

39 337 U.S. 541 (1949). Dissenting in this and two other cases decided the same day, Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) and Woods v. Interstate Realty Co., 337 U.S. 535 (1949), Mr. Justice Rutledge feared impairment of congressional power: "It is the gloss which has been put upon the *Erie* ruling by later decisions, *e.g., Guaranty Trust Co. v. York,* 326 U.S. 99, which in my opinion is being applied to extend the *Erie* ruling far beyond its original purpose or intent and, in my judgment, with consequences and implications seriously impairing Congress' power, within its proper sphere of action, to control this type of litigation in the federal courts. . . . For, as the matter stands, it is Congress which has the power to govern the procedure of the federal courts in diversity cases, and the states which have the power over matters clearly substantive in nature. . . . The real question is not whether the separation shall be made, but how . . .; whether mechanically by reference to whether the states courts' doors are open or closed, or by a consideration of the policies which close them and their relation to accommodating the policy of the *Erie* rule with Congress' power to govern the incidents of litigation in diversity suits." 337 U.S. at 558-59.

40 See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 659-60 (1953) [hereinafter cited HART & WECHSLER].

too deeply embedded to be eradicated by anything short of congressional legislation.

A further reason why the *Byrd* case alone cannot be relied upon for a comprehensive judicial correction of the ills of diversity litigation is the fact that the case concerned the right to jury trial in the federal courts.[41] Despite all protestations to the contrary,[42] the concurrence of six Justices in the majority may be explained only by the existence of the seventh amendment. At any rate, whether or not the case is essentially a seventh amendment case, that handle exists for all to distinguish it readily in any future litigation where it might be hoped to be of some vitality as precedent.

The best effort of the Court, therefore, is unsatisfactory as a comprehensive solution and too shaky a reed to rely upon in its own domain. Has the Congress done any better?

Congressional response to the mounting problem of diversity litigation has so far taken the form of limiting the jurisdiction, not repairing it. This emphasis on quantity instead of quality is the dominant characteristic of the 1958 amendments to the judicial code,[43] the first congressional attempt to re-shape the federal jurisdiction in decades.[44]

In an attempt to keep abreast of the inflation of the dollar, the jurisdictional amount in general federal question and diversity cases was raised from 3,000 to 10,000 dollars, in both original and removal cases.[45] To discourage proportionate inflation of

41 U.S. CONST., amend. VII: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and 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."

42 In a footnote to the *Byrd* opinion, the Court denied expressly that the case was controlled by the amendment: "Our conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action." 356 U.S. 537 n.10. It has been suggested that when even an "integral" state policy directly conflicts with the amendment, the federal interest represented therein will outweigh all considerations in favor of applying the state practice in federal courts. 72 HARV. L. REV. 77, 149 (1958).

43 72 Stat. 415 (1958), 28 U.S.C. §§ 1331-32, 1445 (1958). The legislative history is contained in S. REP. No. 1830, 85th Cong., 2d Sess. (1958) [hereinafter cited as S. REP. No. 1830]; 104 CONG. REC. 12683-90 (1958) [hereinafter cited as 104 CONG. REC.]; *Hearing Before Subcommittee No. 3 of the House Committee on the Judiciary*, 85th Cong., 1st Sess., Ser. 5 (1957) [hereinafter cited as *1957 Hearings*].

44 For a list of the various unsuccessful prior bills, see the Report of the Committee on Jurisdiction and Venue, S. REP. No. 1830, at 17.

45 28 U.S.C. §§ 1331-32 (1958).

claims to meet the new requirement, the court is given discretion, in cases where the plaintiff ultimately recovers less than 10,000 dollars, to deny him costs and, in addition, to impose costs upon him.[46] The most significant change is a provision that, for purposes of diversity jurisdiction, corporations are "deemed" citizens not only of any state in which they are incorporated but also of the state in which they maintain their principal place of business.[47] A final amendment forbids removal of cases arising under state workmen's compensation acts.[48]

The complete absence of any provision for correcting or regulating the manner and mode of exercising the jurisdiction may be explained by the way in which the issue was posed—amendments to the jurisdictional grant sections of the judicial code.[49] In this posture, the only issues really debated were the Congress' constitutional power to treat corporations as citizens of their state of principal place of business,[50] and the desirability of going beyond such a minor limitation of jurisdiction to a total abolition of diversity jurisdiction.[51] The former was resolved in favor of congressional power without much opposition,[52] and the latter was resolved by following the recommendations of the Judicial Conference's Committee of Jurisdiction and Venue.[53]

The legislative hearings indicate an awareness of the growing bulk of diversity cases,[54] and the ineffectiveness of the mere numerical increase of federal judges.[55] Statistics presented indicated that the new provisions would have excluded about 20 percent, or 645 of the 3,186 diversity cases filed in the second quarter of 1957.[56] But, since the majority of diversity cases sound in tort, the plaintiff's claim can be easily increased to meet the new jurisdictional requirement, and the provision for imposition of costs

46 *Ibid.*

47 28 U.S.C. § 1332 (1958).

48 28 U.S.C. § 1445 (1958).

49 See Note, *Congressional Patchwork in Federal Jurisdiction*, 6 UTAH L. REV. 231 (1958); Note, 72 HARV. L. REV. 391 (1958).

50 See 104 CONG. REC., at 12686, *1957 Hearings*, at 28.

51 See S. REP. No. 1830, at 15-32, 53-54, *1957 Hearings*, at 9-27.

52 Representative Celler, during the House debate, introduced into the record a memo on "Power of Congress To Restrict Corporations Under Diversity of Citizenship by Declaring Them Citizens of States Where They Have Their Principal Place of Business." 104 CONG. REC. 12686.

53 S. REP. No. 1830, at 24.

54 104 CONG. REC. 12683; S. REP. No. 1830, at 11-13.

55 S. REP. No. 1830, at 16.

56 S. REP. No. 1830, at 15.

appears to constitute no effective deterrent. Not only is it slight punishment in itself, but the reluctance of federal judges to invoke such a penalty may be expected to render the provision of little practical effect.

Hence the long-awaited congressional legislation in the diversity area has resulted only in a limitation of the amount of such litigation and, in all probability, a minor one at that. The really serious ills of the administration of the jurisdiction retained, whatever its amount, still await legislative consideration and correction.

III. THE POSSIBILITY OF ABOLISHING DIVERSITY JURISDICTION

Congress thus remains at the crossroads. It may either proceed to regulate and improve the manner of adjudicating diversity cases or decide to abolish the diversity jurisdiction entirely. If Congress believes that the present "uniformity of outcome within a state" principle is either constitutionally required or federally desirable, then it should legislate to abolish the diversity jurisdiction. The Brief for the Proponents on this issue has already been eloquently written by Mr. Justice Frankfurter, the leading architect of the "outcome" principle.[57] Concurring in a recent decision upholding a state statute aimed at manipulating the diversity jurisdiction, the Justice demanded that Congress abolish the jurisdiction:

> "But our holding results in such a glaring perversion of the purpose to which the original grant of diversity jurisdiction was directed that it ought not to go without comment, as further proof of the mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction."[58]

Pointing out that diversity jurisdiction had only tepid support from the founding fathers, has always been subjected to abuse and, consequently, has often been the subject of controversy and

[57] See the opinion in Guaranty Trust Co. v. York, 326 U.S. 99 (1945), and Angel v. Bullington, 330 U.S. 183 (1947), and the dissent in First Nat'l Bank v. United Air Lines, 342 U.S. 396, 401 (1952).

[58] Lumbermen's Mut. Cas. Co. v. Elbert, 347 U.S. 48, 53-54 (1954). See also his dissents in National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) and Burford v. Sun Oil Co., 319 U.S. 315, 336 (1943).

opposition, Frankfurter chronicled the abortive congressional bills to curb the jurisdiction, concluding:

> "Legislative attempts at correction have thus far failed. But by overruling the doctrine of *Swift v. Tyson*, despite its century-old credentials, this Court uprooted the most noxious weeds that had grown around diversity jurisdiction. What with the increasing permeation of national feeling and the mobility of modern life, little excuse is left for diversity jurisdiction, now that *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, has put a stop to the unwarranted freedom of federal courts to fashion rules of local law in defiance of local law."[59]

Since he believes the federal diversity jurisdiction to be inherently "not founded in reason,"[60] Mr. Justice Frankfurter is not surprised that it has been subjected to abuses in the past and will be subject to new abuses in the future. But he is not so much disturbed by discriminatory advantages to litigants as by "an issue that cuts deeper than the natural selfishness of litigants to exploit the law's weaknesses. My concern is with the bearing of diversity jurisdiction on the effective functioning of the federal judiciary."[61] For it is in the sheer bulk of diversity cases that Frankfurter sees the greatest evil of the retention of the jurisdiction. The increase in business of the federal courts cannot be met by an increase in the number of federal judges; for, since the business of courts is "drastically unlike the business of factories," a steady increase in judges will result "in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficacy of the federal courts."[62] Having thus posed the issue as one of danger to the whole federal judiciary, Mr. Justice Frankfurter concludes with some sharp questions directed to Congress:

> "Madison believed that Congress would return to the state courts judicial power entrusted to the federal courts 'when they find the tribunals of the states established on a good footing.' 3 Elliot's Debates 536 (1891). Can it fairly be said that state tribunals are not now established on a sufficiently 'good footing' to adjudicate state litigation that arises between citizens of different States, including the artificial corporate citi-

59 Lumbermen's Mut. Cas. Co. v. Elbert, *supra* note 58, at 56.
60 *Ibid.*
61 *Id.* at 57.
62 *Id.* at 59.

zens, when they are the only resort for the much larger volume of the same type of litigation between their own citizens? Can the state tribunals not yet be trusted to mete out justice to non-resident litigants; should resident litigants not be compelled to trust their own state tribunals? In any event, is it sound public policy to withdraw from the incentives and energies for reforming state tribunals, where such reform is needed, the interests of influential groups who through diversity litigation are now enabled to avoid state courts?"[63]

There seems little doubt as to the power of Congress to eliminate diversity jurisdiction.[64] Whether or not the power should be exercised, however, has been the subject of prolonged debate. During the period from 1928 to 1933, the law journals bristled with arguments pro and con[65] and the Senate Judiciary Committee under Senator Norris twice—in 1930 and 1932—reported out bills to eliminate diversity jurisdiction.[66]

Whatever the merits of the debate over Senator Norris' bill, times have changed drastically since 1932. *Erie* has ended the hopes

63 *Id.* at 59-60.

64 Congressional control over the jurisdiction of federal courts was upheld in: Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330 (1938); Hallowell v. Commons, 239 U.S. 506, 509 (1916); Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850); Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845); McIntire v. Wood, 11 U.S. (7 Cranch) 504, 506 (1813); Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 9 (1799). Congress' power was summarized in an oft-quoted passage from Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922): "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. . . . The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. The *Mayor v. Cooper*, 6 Wall. 247, 252. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. *The Assessor v. Osbornes*, 9 Wall. 567, 575."

65 In chronological order, see Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928); Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869 (1931); Frankfurter, *A Note on Diversity Jurisdiction in Reply to Professor Yntema*, 79 U. PA. L. REV. 1097 (1931); Howland, *Shall Federal Jurisdiction of Controversies Between Citizens of Different States Be Preserved?*, 18 A.B.A.J. 499 (1932); Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A.J. 433 (1932); Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts*, 19 A.B.A.J. 499 (1933); Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States*, 19 A.B.A.J. 71, 149, 265 (1933); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356 (1933).

66 See S. REP. No. 530, 72d Cong., 1st Sess. (1932); S. REP. No. 691, 71st Cong., 2d Sess. (1930).

for using diversity jurisdiction to develop a uniform nation-wide body of substantive law which the United States citizen could invoke throughout the country. *Klaxon Co. v. Stentor Elec. Mfg. Co.*,[67] has deprived the federal courts of the power to develop a body of conflict of laws principles applicable to interstate disputes. *York, Bernhardt* and *Angel v. Bullington*[68] close the doors of the federal courts whenever the doors of the state courts are closed, thwarting any use of the federal courts to pursue a litigant into a "haven" state. *Ragan v. Merchants Transfer & Warehouse Co.*[69] threatens to invalidate all the Federal Rules of Civil Procedure. *Fidelity Union Trust Co. v. Field*[70] bars the federal judges from using their own minds to assist in the development of the law they are applying.

It was this last factor that moved Professor Wechsler in 1948 to urge the revisers of the judicial code to eliminate the jurisdiction:

> "What is needed is a total reconsideration of the jurisdiction, guided by the principle that federal judicial energy should be preserved for vindication of these interests which, because the Congress has considered them of national importance, have become the subject of the federal substantive law. Within that sphere and that alone, federal courts can function as creative agents, the authorized interpreters of Constitution, treaty, and statute, the acknowledged sources of that subordinate and interstitial legislation which must come in any system from the courts. In many ways the worst part of the diversity jurisdiction is that it debases the judicial process, reducing federal judges to what Judge Frank has called 'ventriloquist's dummy to the courts of some particular state'—because they lack the requisite authority to speak themselves. *Erie v. Tompkins* was a necessary corrective of an act of usurpation, but the federal system will be at its best when federal courts concern themselves primarily with federal law and there is smallest room within the range of their adjudication for the *Erie* doctrine to apply."[71]

In view of the restricted role of the federal judiciary in diver-

67 313 U.S. 487 (1941).
68 330 U.S. 183 (1947).
69 337 U.S. 530 (1949).
70 311 U.S. 169 (1940).
71 Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 238 (1948).

sity litigation, there seems no justification for continuing to support the jurisdiction merely because of the "superior quality" of the federal judges. The supporters of the jurisdiction must fall back upon the arguments based on bias and the advantages of minor federal housekeeping rules. But blatant bias is a federal question, and federal jurisdiction can be appropriately invoked in such cases.[72] And so it is only the subtle bias, the hypothecated ingrained willingness to do injustice to an out-of-stater, that the diversity jurisdiction protects against. Into the scales of practical politics, then, must go, on the one side, protection against such subtle bias and the advantages of federal housekeeping rules harmless enough to pass *Ragan*, and, on the other, the enormous cost in dollars and man-hours of retaining the jurisdiction, the impairment of the handling of federal question litigation, the threat to the quality of the federal judiciary by constantly increasing its numbers, and the escape through the federal steam valve of the local pressure that should be brought to bear upon the inadequacies of state courts. Reasonable men may differ as to how the scales tip, but to this observer they point decidedly in favor of abolishing the current brand of diversity jurisdiction.[73]

IV. RETENTION AND CORRECTION OF DIVERSITY JURISDICTION

Abolition is recommended upon the assumption that the present status of the diversity jurisdiction is either constitutionally required or federally desirable. If, however, diversity of citizenship jurisdiction does have a contemporary utility, which requires a different status, then the jurisdiction should be retained, and Congress should legislate to provide a suitable federal tribunal for the implementation of the purposes of the jurisdiction.

A. *The Continuing Function of Diversity Jurisdiction*

The mandatory and permissible characteristics of the diversity jurisdiction depend in the last instance on the function which the jurisdiction is conceived to fulfill. Hamilton stated it in *The Federalist*:

"It may be esteemed the basis of the union, that 'the

72 New York Central R.R. v. Johnson, 279 U.S. 310, 314, 319 (1929).

73 A recent article carrying the banner for abolition is Kurland, *The Distribution of Judicial Power Between National and State Courts*, 42 J. AM. JUD. SOC'Y 159 (1959).

> citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.' And if it be a just principle, that every government *ought to possess the means of executing its own provisions, by its own authority,* it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases, in which one state or its citizens are opposed to another state or its citizens."[74]

On the assumption that Hamilton meant only negative protection against deprivation of justice, Friendly labelled this argument "specious" and questioned the "sincerity" of Marshall's exegesis.[75] Almost all the debate over retaining the jurisdiction was based upon the view that the only purpose served was this negative protection against bias. Friendly saw the principal reason for the jurisdiction as a "desire to protect creditors against legislation favorable to debtors."[76] In similar fashion, Professor John Frank viewed the jurisdiction as wholly intended to serve the interests of the commercial classes.[77]

But it is at least equally possible that an affirmative purpose for the jurisdiction was intended. Not only was the citizen to be protected through enforcement of the privileges and immunities clause on appeal from discriminatory treatment in the state courts; he was also to have the affirmative institutional protection of his substantive rights in an impartial tribunal. This would work two

74 THE FEDERALIST No. 80, at 343 (Beard ed. 1948) (Hamilton).

75 Friendly, *The Historic Basis of the Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492-93 n.44 (1928).

76 *Id.* at 496-97. "Not unnaturally the commercial interests of the country were reluctant to expose themselves to the hazards of litigation before such courts as these. They might be good enough for the inhabitants of their respective states, but merchants from abroad felt themselves entitled to something better. There was a vague feeling that the new courts would be strong courts, creditors' courts, business men's courts." *Id.* at 498.

77 Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 28 (1948), concluding: "To summarize, the diversity jurisdiction in the federal Constitution may fairly be said to be the product of three factors, the relative weights of which cannot now be asserted:

"(1) The desire to avoid regional prejudice against commercial litigants, based in small part on experience and in large part on common-sense anticipation.

"(2) The desire to permit commercial, manufacturing, and speculative interests to litigate their controversies with other classes, before judges who would be firmly tied to their own interests.

"(3) The desire to achieve more efficient administration of justice for the classes thus benefited."

ways: the existence of such a tribunal enforcing state law in impartial manner side by side with the state courts would force the state courts, by self-esteem and popular criticism, to meet the same standard. This, in turn, would give a double-barreled encouragement to the citizen thinking of travelling into another state: that the climate for such travel was improving, and that he would always be able to litigate in one of his own courts. The salutary effects upon the growth of the nation of such encouragement have been translated into fact.

It is here that Judge Parker's remarks[78] that a citizen is entitled to litigate in his own sovereign's courts have relevance. For responsiveness to political pressure is one of the hallmarks of any democracy, and certainly of this American experiment. Just as a United States citizen is entitled and encouraged to bring political force to bear upon the national legislature in areas of substantive law within its power (*e.g.*, the countless congressional regulations of interstate commerce), so he is entitled and encouraged to bring that force to bear to produce the kind of national tribunal he feels himself entitled to. When the American leaves his home state and ventures elsewhere within his sovereign's domain, he has a call upon that sovereign for judicial service that is responsive to the need, *viz.*, a federal tribunal with uniform procedure and uniform remedial powers. Though the citizen must still employ a local lawyer to represent him in that tribunal, the assurance involved goes beyond the litigation stage to the planning stage.[79]

In addition, another basic trademark of American federalism is its proliferation of alternative routes for solution of problems, its belief that having fifty different legal systems experimenting with solutions to a difficult problem is healthier than having only one unitary system. This supports the diversity jurisdiction in both the substantive and procedural law areas. For not only is it

78 Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A.J. 433, 438 (1932): "When a citizen of the United States must go into a court in the United States to assert or defend his rights, he ought to have the right to go into a court which is as much his court as it is the court of his adversary. . . . The federal court represents all of the people of the United States. . . . If I go into a state court in New York, however, I am in a court which represents a sovereignty upon which I have no claim."

79 For example, if the citizen wants to know if he can enter a transaction in a foreign state, and still be able to obtain a declaratory judgment of his rights at an early stage if foreseeable complications develop, he can plan, or his home counsel can advise him to plan, on the availability in the federal courts of the Federal Declaratory Judgment Act. 28 U.S.C. §§ 2201-02 (1958).

useful to have the life-tenured, nationally-oriented federal judiciary working side by side with the state courts in the fifty substantive law laboratories but also it is beneficial to have fifty-one procedural law laboratories, with the ubiquitous federal system partaking of and giving to the others in a constant process of growth.

Another function of the diversity jurisdiction that has proved not only beneficial but crucial to the administration of justice in the nation is its ability to combine and settle in one suit the interests of many parties whose interests could not be properly handled in any one state court. The Federal Interpleader Act[80] has crystallized many of these advantages, and the Federal Rules of Civil Procedure promote other multi-party litigation. Another possible function—temporarily barred by *Klaxon* but certainly within the legislative competence of Congress—would be the development of uniform conflict of laws principles applicable to the difficult interstate conflicts, a function which seems particularly suitable for the federal judiciary.

At any rate, the inclusion of the diversity jurisdiction in the first Judiciary Act and its constant retention and re-affirmation by the political arm of the government through every Congress down to the present is in itself a strong argument for its vitality and for the desirability of the functions it serves. This being so, it is time to make sense out of the method of execution of the jurisdiction, through congressional legislation guaranteeing a uniform procedure and system of remedies.

What is needed is a federal court which is responsive to the federal citizen's needs. This means a tribunal whose judges are appointed by the federal government, whose procedure is as broad and as common as the character of the litigant who invokes it, that is, a uniform, national procedure, and whose remedies for state-given rights of action are equally uniform *and* available to the citizen whether or not such remedy exists in the state courts of the forum. All, of course, must remain subject to the basic principle of living, working federalism, that when the local interest is great enough to outweigh the national interest, uniformity must give way to diversity. A frozen example of this latter case is the whole field of substantive law not delegated by the states to the federal government, the whole regime of primary rights and duties

[80] 28 U.S.C. §§ 1335, 1397, 2361 (1958).

whose control was restored to the states by *Erie*. Flexible examples of the same situation are the cases where local policies are so strong that they outweigh, on a case-by-case basis, the national interest in uniformity.

Given the goal, does Congress have the power to effectuate it?

B. *Congressional Power To Shape Diversity Jurisdiction*

1. *Historical Exercise*

The history of congressional legislation leaves little doubt that Congress believed that the Constitution gave it authority not only to create inferior courts but to control the manner of their operation. In the first Judiciary Act of 1789,[81] the Congress dictated the character of the manner and mode of proceedings of the new federal courts in the exercise of all the jurisdiction conferred upon them. In the fields of equity, admiralty and bankruptcy, a uniform federal procedure was chosen.[82] The criminal procedure was left to development by the judiciary.[83] As to actions at law, the first Congress adopted the prevailing state procedure used in the supreme courts of the states where the federal courts sat.[84] When the Court held later changes in state procedure did not affect the federal duty to conform to the state procedure as of 1789,[85] the Congress first provided for "static" conformity with state procedure as of 1828,[86] and then passed the Conformity Act of June 1, 1872, ordering "dynamic" conformity "as near as may be" with the procedure "existing at the time in like causes in the courts of record of the State."[87] So many exceptions and qualifications were engrafted upon the act[88] that Congress finally decided to grant power to the Court to make uniform rules of federal procedure, and to merge law and equity and provide one set of rules for both.[89] This has been the law since 1938.

81 Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

82 See generally HART & WECHSLER 578-90.

83 Later, specific rule-making power was conferred upon the courts in 1933 and 1940. Act of Feb. 24, 1933, ch. 119, 47 Stat. 904, as amended by Act of March 8, 1934, ch. 48, 48 Stat. 399; Act of June 29, 1940, 54 Stat. 688, 18 U.S.C. § 3771 (1958).

84 Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93.

85 Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

86 The Process Act of May 19, 1828, ch. 68, 4 Stat. 278.

87 Conformity Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196.

88 See HART & WECHSLER 585.

89 Act of June 19, 1934, ch. 651, 48 Stat. 1064 [now 28 U.S.C. § 2072 (1958)]: "The Supreme Court shall have the power to prescribe, by general rules, for the district

With respect to substance, the first Congress provided for diversity in the applicable substantive law in actions at law:

> "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."[90]

Whether a statute was required for this purpose has been questioned, for the Court has often declared that the Rules of Decision Act "is merely declarative of the rule which would exist in the absence of the statute."[91]

2. *Judicial Precedent*

While the Congress has thus constantly exercised its supposed power to control the character of the inferior federal courts, the Court has been no less clear in holding that the power does in fact exist. Mr. Chief Justice Marshall, in upholding the earlier "static" conformity act over a contrary later state statute, declared:

> "That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer. The terms of the clause neither require nor admit of elucidation. The court, therefore, will only say, that no doubt whatever is entertained, on the power of Congress over the subject. The only inquiry is, how far has this power been exercised?"[92]

In the same year the Court re-affirmed the power of Congress

courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect. Sec. 2. The Court may at any time unite the general rules prescribed by it for cases in equity with those in action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

90 Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 [now 28 U.S.C. § 1652 (1958)].

91 Mason v. United States, 260 U.S. 545, 559 (1923); Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457, 464 (1831); Erie R.R. v. Tompkins, 304 U.S. 64, 72 (1938).

92 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22 (1825).

to control procedure, and also held that the Rules of Decision Act had no application to federal procedure:

> "But it does not rest altogether upon such implication; for express authority is given to congress to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the Constitution in the government of the United States, or in any department or officer thereof. The right of congress, therefore, to regulate the proceedings on executions, and direct the mode and manner and out of what property of the debtor satisfaction may be obtained, is not to be questioned, and the only inquiry is, how far this power has been exercised."
>
> ". . . [Section 34] has no application to the practice of the courts, or in any manner calls upon them to pursue the various changes which may take place from time to time in the state courts, with respect to their processes, and modes of proceedings under them."[93]

The decision in *Beers v. Haughton*[94] made it clear that state rules of procedure had effect in the federal courts only by virtue of adoption by the Congress, and that this power of Congress could be lawfully delegated to the Court in the form of rule-making power:

> "State laws cannot control the exercise of the national government, nor in any manner limit or affect the operation of the process or proceedings in the national courts. The whole efficacy of such laws in the courts of the United States, depends upon the enactments of congress. So far as they are adopted by congress, they are obligatory; beyond this, they have no controlling influence. Congress may adopt such state laws directly, by a substantive enactment, or they may confide the authority to adopt them to the courts of the United States."[95]

93 The Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 53-54 (1825).

94 34 U.S. (9 Pet.) 329 (1835).

95 *Id.* at 359. The Court added: "Examples of both sorts exist in the national legislation. The process act of 1789, ch. 21, expressly adopted the forms of writs and modes of process of the state courts, in suits at common law. The act of 1792, ch. 36, permanently continued the forms of writs, executions and other process, and the forms and modes of proceeding in suits at common law, then in use in the courts of the United States, under the process act of 1789; but with this remarkable difference, that they were subject to such alterations and additions as the said courts respectively should, in their discretion, deem expedient, or to such regulations as the supreme court of the United States should think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same."

When the validity of the new Federal Rules of Civil Procedure was challenged, the Court considered both the power of the Congress so to legislate and the validity of the delegation of rule-making power to the Court as closed issues:

> "Congress has undoubted power to regulate the practice and procedure of the federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States."[96]

The Court was no less emphatic that state rules of procedure not adopted by the Congress have no application in the federal courts. Having disposed of a state statute in *Beers*, it similarly rejected in *Herron v. Southern Pac. Co.*[97] a provision in a state constitution requiring the issue of contributory negligence to go to the jury:

> "The controlling principle governing the decision of the present question is that state laws cannot alter the essential character or function of a federal court. The function of the trial judge in a federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court under either the Conformity Act or the 'rules of decision' Act."[98]

The Court listed other state procedural provisions that had been held without force upon federal judges:[99] state procedural rules requiring that the court not give an instruction to the jury unless reduced to writing, that written instructions shall be taken by the jury in their retirement, that the court shall require the jury to answer special interrogatories in addition to their general verdict, that the court shall not express any opinion upon the facts, that the court shall not charge the jury with respect to matters of fact, or that that court shall not direct a verdict where the evidence is such that a verdict the other way would be set aside. Although *Herron* is pre-*Erie*, it has been expressly re-affirmed by the Court in its 1958 *Byrd* opinion.[100]

96 Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941).
97 283 U.S. 91 (1931).
98 *Id.* at 94.
99 *Id.* at 94-95.
100 Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525, 538 (1958). Diederich v.

In addition to thus upholding congressional power over *procedure*, the Court also held that the availability of a *remedy* in a federal court could not be defeated by state legislation either specifically attempting to oust the federal courts of jurisdiction or taking away the existence of the remedy in the state courts. In *Railway Co. v. Whitton's Adm'r*,[101] a Wisconsin statute conferred a right of action for wrongful death, subject to the proviso that the action be brought in a Wisconsin state court. Nevertheless, the Court allowed recovery in a federal court action, holding that state-given general rights can be enforced in any federal court with jurisdiction of the parties:

> "Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal Court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation."[102]

In its determination to protect the constitutional right of a nonresident to seek a remedy in a federal court, the Court has consistently held state statutes exacting agreement by a foreign corporation not to remove actions to a federal court to be void and ineffectual to oust jurisdiction from the federal court.[103]

In like manner, the Court early held that the absence of a remedy in the state court did not bar the existence of a remedy in the federal court. In *Suydam v. Broadnax*,[104] the defendant moved to dismiss a federal suit on the ground that a state statute barred any suit against anyone "represented to be insolvent." The Court held that even if the defendant had been judicially declared insolvent under the state statute, such action could not bar suit in a federal court by a non-party nonresident. Later, in *The Union Bank of Tenn. v. Jolly's Adm'rs*,[105] the defendant in a similar suit claimed that *Broadnax* meant only that the nonresident could sue, but that the state insolvency proceeding must be decisive of any

American News Co., 128 F.2d 144 (10th Cir. 1942) is a post-*Erie* case reaching the same result as *Herron* and cited with approval in *Byrd*.

101 80 U.S. (13 Wall.) 270 (1871).

102 *Id.* at 286.

103 Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874); Terral v. Burke Constr. Co., 257 U.S. 529 (1922).

104 39 U.S. (14 Pet.) 67 (1840).

105 59 U.S. (18 How.) 503 (1955).

remedy against the defendant. The Court rejected this argument, affirming the plaintiff's recovery in a federal suit:

> "But we do not deem it necessary to discuss them in detail, for the law of a State limiting the remedies of its citizens in its own courts cannot be applied to prevent the citizens of other States from suing in the courts of the United States in that State for recovery of any property or money there, to which they may be legally or equitably entitled."[106]

The Court has thus consistently upheld the power of Congress to control the character of the procedure and remedies available in diversity jurisdiction, within constitutional limits. It remains to consider the scope of these constitutional limits on the exercise of that power in the re-shaping of diversity jurisdiction.

3. *Constitutional Limits*

While there are several cases dealing with the constitutional limits on extension of the jurisdiction itself,[107] there is a dearth of precedent on the limits upon the manner of exercise of the jurisdiction. In fact, there are only two cases restricting the federal judiciary in diversity jurisdiction that speak in constitutional terms: *Erie R.R. v. Tompkins*[108] and *Bernhardt v. Polygraphic Co. of America.*[109]

Whether *Erie* really was constitutional doctrine has been, and is, the subject of debate.[110] Mr. Justice Brandeis certainly said it was, and it is hard to call dictum a consideration without which, according to the Court, the decision would have gone the other way. A superficial reading of the case would seem to indicate that the "unconstitutionality of the course pursued" was what Brandeis said it was:

106 *Id.* at 507. While these are pre-*Erie* cases, it would seem still to be the law that "no remedy at all" is substantive but "this remedy instead of that remedy" is procedural.

107 *E.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809).

108 304 U.S. 64 (1938).

109 350 U.S. 198 (1956).

110 See Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427, 541 (1958); Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187 (1957); *Symposium—Federal Trials and Erie Doctrine*, 51 NW. U.L. REV. 338 (1956); 66 HARV. L. REV. 1516 (1953); 62 HARV. L. REV. 1030 (1949). See also Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 557 (1949) (dissenting opinion).

> "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."[111]

While the Court did buttress its opinion with a discussion of the discrimination and "injustice and confusion" incident to the privilege of the nonresident in selecting the tribunal, the Court's conclusion seems to rest the unconstitutionality of *Swift v. Tyson* upon violation of the principles of allocation of powers within a federal system:

> "Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' 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."[112]

Thus *Erie* puts a basic restriction on the exercise of diversity jurisdiction—that the Constitution requires that the federal courts, in adjudicating diversity cases, look to the state law for the substantive law defining the rights and duties of the parties. This makes sense, for a system of law would seem to demand that individuals not be subject to conflicting basic legal commands in their everyday actions. That the Constitution requires this has been disputed by many commentators,[113] who maintain that Con-

111 304 U.S. at 78. The Court then quoted with approval, at 79, the dissent of Mr. Justice Field in Baltimore & O. R.R. v. Baugh, 149 U.S. 368, 401 (1893), when the doctrine of *Swift v. Tyson* was extended from commercial law into tort law: "[T]here stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the States and to that extent, a denial of its independence."

112 Erie R.R. v. Tompkins, 304 U.S. 64, 79-80 (1938).

113 COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 144-46 (1942); Cowan, *Constitutional Aspects of the Abolition of Federal "Common Law,"* 1 LA. L. REV. 161, 171 (1938); McCormick & Hewins, *The Collapse of "General" Law in the Federal*

gress could, if it desired, enact substantive law for diversity litigation. Mr. Justice Reed said as much in his concurring opinion in *Erie*[114] and Mr. Justice Rutledge has been even more explicit.[115] Those who doubt *Erie's* constitutional basis, however, uniformly approve of its result as a "just principle of federal comity and judicial administration."[116] And it is difficult to see how the tenth amendment and article three can be read to entitle the citizen not only to his own federal tribunal, but also to his own brand of law when he engages in transactions with residents of states other than his own.

A more difficult argument against the constitutional overtones of *Erie* has been based upon other enumerated powers given to Congress. It has been pointed out that Congress clearly had legislative power over the very fact situations involved in *Swift* and *Erie*. *Swift* involved an interstate commercial transaction; the commerce clause gives Congress power to legislate in this area, and Congress has repeatedly exercised it. *Erie* involved a tort committed by an agent of interstate transportation; that Congress can and has exercised control over the imposition of such burdens upon interstate transportation is demonstrated by statutes such as the Federal Employers Liability Act.[117] Therefore, an argument may be constructed as follows:

> (A) Congress could frame the substantive law applicable to such transactions whether litigated in state or federal courts;
> (B) And Congress can also do the lesser thing: make substantive law applicable to such transactions only if litigated in the federal courts;
> (C) Therefore the Supreme Court, whose judicial law-making power is of the same extent, can judicially evolve the law to be applied to such situations when litigated in a federal tribunal.

This argument that *Erie* is not constitutionally required is open to challenge on several grounds:

Courts, 33 ILL. L. REV. 126, 133-36 (1938); Schweppe, *What Has Happened to Federal Jurisprudence?*, 24 A.B.A.J. 421, 423 (1938); *cf.* Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 468-69 (1955).

114 304 U.S. at 90-92.

115 Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 558 (1949) (dissenting opinion).

116 See, *e.g.*, *Symposium—Federal Trials and the Erie Doctrine*, 51 NW. U.L. REV. 338, 342 (1956).

117 35 Stat. 65 (1908), as amended, 45 U.S.C. § 51 (1958).

First, it is not at all clear that Congress could enact substantive law in an area within its delegated powers, application of which will depend on access to a federal court. While perhaps not rising to the dignity of deprivation of equal protection of the laws, it would appear to be an abuse of the granted power, which is to make law on a subject for the whole nation. In short, the commerce clause gives Congress power to enact *substantive* law applicable to an *area*, not to certain litigants. The judiciary clause gives Congress power to enact *procedural* law applicable to certain *litigants*, not to an *area*. It seems unsound, as a matter of federalism, to claim these two powers may be added together mathematically to produce the power to enact *substantive* law applicable only to *litigants* who can invoke the proper tribunal.

Secondly, every decision by the Court would have to be preceded by a decision on the scope of the legislative power of Congress. Such forcing of decisions of constitutional scope would be inconsistent with the "great gravity and delicacy" with which the Court has approached its task of passing on the validity of an exercise of legislative power, and because of which the Court postpones if possible the decision of constitutional questions.[118]

Thirdly, the Court would be deciding whether a federal power, delegated but as yet dormant, will be now exercised. Since the power has been delegated to Congress, that is the body that should make the discretionary decision whether to exercise the power.

Thus, it may not lightly be concluded that *Erie* is not constitutionally required. Whether or not *Erie* is constitutional doctrine, it certainly rests on fundamental grounds, and any proposal for legislation to mend the diversity jurisdiction would do well to honor it.

Bernhardt v. Polygraphic Co. of America[119] involved an employment contract made in New York with clauses providing for arbitration of disputes and for the application of New York law "without regard to the jurisdiction in which any action or special proceeding may be instituted." Both contracting parties were New York residents, but the employee later became a resident of Vermont where the contract was to be performed. When he brought suit in a Vermont state court, the corporation removed, then moved to stay the proceedings while arbitration took place under

118 See Ashwander v. TVA, 297 U.S. 288, 341 (1936) (concurring opinion).
119 350 U.S. 198 (1956).

New York law. The district court held Vermont law applied, that Vermont law made such arbitration provisions revocable, and denied the stay. The court of appeals reversed, holding that the Federal Arbitration Act required arbitration and, in the alternative, that arbitration is merely a form of trial, a matter of procedure not governed by *Erie*.

The Supreme Court construed the Federal Arbitration Act as not intended to apply to such cases, because otherwise:

> ". . . a constitutional question might be presented. *Erie R. Co. v. Tompkins* indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases. . . . Our view, as will be developed, is that § 3, so read, would invade the local law field. We therefore read § 3 narrowly to avoid that issue."[120]

With the federal statute thus out of the way, the Court had no trouble holding that arbitration would "substantially affect" the outcome and that Vermont law must be applied under *York*.[121] Whether New York law applied to the contract was also to be governed by Vermont law, under *Klaxon*.[122] Mr. Justice Frankfurter, concurring, was even more explicit on the possibility of constitutional limitation.[123]

Bernhardt is a puzzling case. It may be nothing more than a reflection of the historic opposition of the judiciary to the "ouster" of its jurisdiction by arbitration; for it seems incredible that the Court would strike down the Federal Declaratory Judgment Act,

120 *Id.* at 202.
121 *Id.* at 203.
122 *Id.* at 205.
123 *Id.* at 207-08. "I agree with the Court's opinion that the differences between arbitral and judicial determination of a controversy under a contract sufficiently go to the merits of the outcome, and not merely because of the contingencies of different individuals passing on the same question, to make the matter one of 'substance' in the sense relevant for *Erie R. Co. v. Tompkins*. In view of the ground that was taken in that case for its decision, it would raise a serious question of constitutional law whether Congress could subject to arbitration litigation in the federal courts which is there solely because it is 'between citizens of different states,' U.S. Const., Art. III, Section 2, in disregard of the law of the State in which a federal court is sitting. Since the United States Arbitration Act of 1925 does not obviously apply to diversity cases, in the light of its terms and the relevant interpretive materials, avoidance of the constitutional question is for me sufficiently compelling to lead to a construction of the Act as not applicable to diversity cases. Of course this implies no opinion on the constitutional question that would be presented were Congress specifically to make the Arbitration Act applicable in such cases."

for example, on the ground that it might "substantially affect" the outcome. The opinion is unsatisfying because, like *York*, it makes nothing turn on which state's law governs the right to arbitration. The Court stated: "The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action."[124] But it proceeds to hold that the Vermont policy against arbitration governs the suit in the federal court, regardless of the fact that the "parcel of rights" is conferred by New York law. While, as will be discussed, this may be a wise policy of comity, it is difficult to find a constitutional mandate that the substantive law which admittedly creates the cause of action shall not be applied in a federal court sitting in a different state which neither grants such a substantive right nor allows its enforcement in its state courts.

Aside from *Erie* and *Bernhardt*, all the other cases responsible for the present condition of the diversity jurisdiction turn upon: (1) construction of the Rules of Decision Act—an interpretation of what Congress meant by it, as crystallized in *York*; (2) construction of the Enabling Act of the Federal Rules of Civil Procedure; (3) stare decisis—accepting as binding precedent the judge-made policy decision in *York* that a federal court adjudicating a diversity case should be "only another court of the State."

It is a major premise of this article that all these other decisions are perched like so many dominoes upon the above three bases, and will topple when the recommended congressional legislation shifts those bases.

4. *Underlying Principles*

Passing precedent to principle in the investigation of congressional *power* to re-shape diversity litigation, we find the diversity jurisdiction is but a phase of the larger problem of the meshing of the legal systems of two sovereigns in the territory of any state. In the state sovereign's courts, the procedural law is state-governed, the substantive law is federal if within the delegated national powers and state if not so delegated. In the federal sovereign's courts, the procedural law is federal, the substantive law is federal if within the delegated national powers and state if not so delegated. As long as each sovereign's law is enforced in his own courts, there

[124] *Id.* at 203.

is no problem, since the substantive law grows up within the procedural law. The inevitable conflict arises when one sovereign's substantive law is applied in the other sovereign's tribunal, for example, in the "forced" jurisdiction of the state courts over federal law,[125] or in federal diversity jurisdiction applying state law. When the forum's procedures qualify, modify or affect in any way the substantive rights in litigation, the cry is raised that the forum has exceeded its law-making power—that to "abridge" a right in an area is to "enact" a contrary right in that same area, which is, by hypothesis, beyond the legislative competence of the forum's sovereign. The traditional answer, of course, is that procedure has always qualified substance, that the whole history of the growth of our Anglo-American system of law has been that of substance growing within forms of action and being qualified thereby.

But here that answer breaks down, for that tradition is of the same sovereign's procedural law qualifying its own substantive law, and that will not justify a different sovereign's procedural law doing it. Were the sovereigns equal, a flat impasse would result. But they are not equal; article six of the Constitution provides that "the laws of the United States" shall be "the supreme law of the land," and it binds the state judges accordingly, "any thing in the constitution or laws of any state to the contrary notwithstanding."

Given congressional power to enact uniform rules of procedure, what of uniform independent federal remedies? When a state grants or denies a remedy inside its borders, does the Constitution order the federal court to obey? For much the same reasons as given above, the answer would seem to be no. Given a right of action created by some state's law, the availability of a remedy for it in a federal court would seem to be entirely a matter of federal law. To take an easy case, until recently there has been a private right of action to enjoin organizational picketing under the laws of several states,[126] but the Norris-LaGuardia Act,[127] as a matter of

125 See Testa v. Katt, 330 U.S. 386 (1947).

126 See Garner v. Teamsters Union, 346 U.S. 485 (1953) which eliminated this right on the ground that it conflicted with federal remedies under the National Labor Relations Act.

127 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1958). However, the National Labor Relations Act, as amended, exempts federal courts from the requirements of Norris-LaGuardia with respect to National Labor Relations Board petitions for injunctive relief. NLRA § 10(h), added by 61 Stat. 149 (1947), as amended, 29 U.S.C. § 160(h) (1958).

federal law, forbids a federal court to give such injunctive relief. The opposite case, where a federal remedy is available when a state remedy is not, is exemplified by *Guffey v. Smith*,[128] in which discovery and accounting were allowed in a federal equity suit for an injunction, even though the state had held equitable relief barred in such cases. Whether *Guffey* survives *York* is uncertain as matter of precedent,[129] but the congressional power to provide for such a result does not appear open to constitutional challenge.

A harder case exists when a state's law provides that gambling contracts made inside the state are unenforceable obligations and that those made outside the state will not be enforced in its courts because they are violative of "public policy." Certainly, as to gambling contracts entered into in that state, no court, state or federal, in any jurisdiction, should enforce them. Assuming that the appropriate conflicts rules applies the law of that state, there is no substantive right to take into any tribunal. But it seems equally certain that as to contracts made outside that state—in Nevada or Monaco—that substantive rights exist and will be enforced in those states' courts or any neutral tribunal. The federal tribunal in the "no-gambling" state is just as neutral and should be just as free to enforce those out-of-state contracts. To be sure, there is an extremely strong case for comity and for following the local policy and refusing to let "such things be done in our state." But it is as a matter of comity and not as constitutional command that the state policy is honored. In effect, the federal tribunal adopts as its own the local policy, but remains free to reject any policy it does not approve of. Once again, the desirability of "one-ness" against "many-ness" must be weighed, and the uniform national practice stayed if the local interest is deemed weighty enough.[130]

128 237 U.S. 101 (1915).

129 See HART & WECHSLER 650-59; Black & Yates, Inc. v. Mahogany Ass'n, 129 F.2d 227 (3d Cir. 1941).

130 Much of this has been said before, by Mr. Justice Rutledge in his dissents in *Ragan, Cohen* and *Woods*. In Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 558-60 (1949) he stated: "What is being applied is a gloss on the *Erie* rule, not the rule itself. That case held that federal courts in diversity cases must apply state law, decisional as well as statutory, in determining matters of substantive law, in particular and apart from procedural limitations upon its assertion—whether a cause of action exists. I accept that view generally and insofar as it involves a wise rule of administration for the federal courts, though I have grave doubt that it has any solid constitutional foundation.

"But the *Erie* case made no ruling that in so deciding diversity cases a federal court is 'merely another court of the state in which it sits,' and hence that in every situation in which the doors of state courts are closed to a suitor, so must be also

V. A PROPOSAL FOR CONGRESSIONAL REPAIR

Given the congressional power and the need for its exercise, how shall it be done? The propriety of the method to be used is something Congress continually must decide, for any legislature always has a variety of weapons in its arsenal.[131] The weapon needed here is one that is distinctively legislative—a wholesale removal of debris to clear the way for a fresh attack upon a difficult problem. Therefore, the method of disapproving specific decisions, if ever appropriate action for a legislature,[132] must be rejected here. Following along the lines of the basic "substance-procedure" distinction, the recommended legislation involves amending both the Enabling Act of the Federal Rules of Civil Procedure[133] and the Rules of Decision Act.[134]

A. *Statutory Amendments*

1. *The Enabling Act*

The Enabling Act grants to the Supreme Court the power to make general rules of procedure, but with the restriction: "Such

those of the federal courts. Not only is this not true when the state bar is raised by a purely procedural obstacle. There is sound historical reason for believing that one of the purposes of the diversity clause was to afford a federal court remedy when, for at least some reasons of state policy, none would be available in the state courts. It is the gloss which has been put upon the *Erie* ruling by later decisions, *e.g.*, *Guaranty Trust Co. v. York*, 326 U.S. 99, which in my opinion is being applied to extend the *Erie* ruling far beyond its original purpose or intent and, in my judgment, with consequences and implications seriously impairing Congress' power, within its proper sphere of action, to control this type of litigation in the federal courts.

"The accepted dichotomy is the familiar 'procedural-substantive' one. This of course is a subject of endless discussion, which hardly needs to be repeated here. Suffice it to say that actually in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible. But, even so, this fact cannot dispense with the necessity of making a distinction. For, as the matter stands, it is Congress which has the power to govern the procedure of the federal courts in diversity cases, and the states which have that power over matters clearly substantive in nature. Judges therefore cannot escape making the division. And they must make it where the two constituent elements are Siamese twins as well as where they are not twins or even blood brothers. The real question is not whether the separation shall be made, but how it shall be made: whether mechanically by reference to whether the state courts' doors are open or closed, or by a consideration of the policies which close them and their relation to accommodating the policy of the *Erie* rule with Congress' power to govern the incidents of litigation in diversity suits.

"It is in these close cases, this borderland area, that I think we are going too far."

131 See HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 730-48 (Tent. ed. 1957).

132 *Id.* at 800-10, 837-60.

133 28 U.S.C. § 2072 (1958).

134 28 U.S.C. § 1652 (1958).

rules shall not abridge, enlarge nor modify any substantive right and shall preserve the right of trial by jury . . . ."[135] This language is actually not open to challenge as it stands, if there were any guarantee that "substantive right" would be held to mean primary right and duty at the stage of everyday action, or what may be called "pre-litigation conduct." Since there is no such guarantee, however, this phrase sticks out as a handle for the federal rules to be held outside the statutory grant whenever they affect, as they must, the enforcement of such rights in litigation. Therefore this clause must be amended to prevent the voiding of the rules on the ground that what "substantially affects" the litigation of a right is "substantive" law. What is needed is a new proviso making it clear that *such rules may not create, deny or modify primary rights and duties at the stage of pre-litigation conduct, but may substantially affect the judicial enforcement of such rights* in the interest of perfecting and maintaining a uniform body of federal procedure. In other words, such rules may regulate court procedure, not the underlying substantive law to be applied. This is, in effect, a frozen weighing of interests of the kind proposed by Mr. Justice Rutledge, a presumption in favor of uniformity over diversity. Judge Goodrich put it in a slightly different manner:

> "In view of the admitted federal power over procedure in the federal courts, it is submitted that when the Congress has exercised that power, it has, in a sense 'occupied' the field and the test should be whether the rule has any relation as to how a federal court shall conduct its business. If it does, the rule should be upheld."[136]

2. *The Rules of Decision Act*

The Rules of Decision Act was enacted by the first Congress and has come down to the present time with but a minor change in form. It reads:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[137]

135 28 U.S.C. § 2072 (1958).
136 GOODRICH, CONFLICT OF LAWS 43 (3d ed. 1949).
137 28 U.S.C. § 1652 (1958).

At first glance, the language of this provision seems similarly unassailable, if there were any guarantee that "rules of decision" would be confined to substantive rules of law, that the Federal Rules of Civil Procedure would be allowed their proper status as acts of Congress, and that the concluding phrase would be read to empower the federal courts both to choose the applicable state substantive law and to weigh the local state "door-closing" and similar policies. Since there is no such guarantee, however, the act should be amended to make it clear that it is indeed "merely declarative of the rule which would exist in the absence of the statute," *i.e.*, that it merely restates the constitutional mandate that state substantive law governs what has not been delegated to the national government.

The act should be further amended to provide that *when there is a conflict as to which state's law is the applicable one, the choice of law shall be made by the federal court in accordance with its uniform choice-of-law principles* so as to make it clear that no litigant has a substantive right to choice-of-law doctrines, which characteristically vary with the forum and are everywhere called procedural. It also should be made clear that *a state's policy in closing the doors of its courts or prohibiting certain remedies is not automatically binding on the federal court, i.e.*, that some such policies may be "substantive" when all the contacts of the suit are with that state, but that in most cases they will not be and will fall outside the Rules of Decision Act. Provision should be made for the weighing of such policies and their adoption if the local outweighs the national interest. It would be desirable for the committee report on the amendments to state that their purpose was to eradicate the idea that, for diversity purposes, the federal court is "only another court of the state," and to declare that there is no "principle of uniformity within a state" and that these amendments are aimed at reviving the much-maligned but essential "substance-procedure" distinction in its proper constitutional dimension.

For the benefit of both the quality of diversity litigation and the development of state substantive law, the role of the federal judiciary in finding the state substantive law to be applied must be expanded. While the state's highest court, and, a fortiori, the state legislature, have the last say on any issue of state law, the federal court must be as free as the state's highest court in finding what that law is and reconciling conflicting decisions and statutes.

In the development of new areas of law, harmonizing the old and creating exceptions to old rules to conform to new conditions, the litigants are entitled to just as creative a role from the federal court as from the state court. Therefore, it should be provided that *the federal courts, in applying the applicable substantive law, shall be as free in ascertaining and applying that law as the highest court of that state would be.*

Finally, although it should not be necessary for the legislature to take such action, provision should be made for *dismissal without prejudice whenever a litigant seeking the aid of the federal courts is unable to comply with the federal qualifications of suit.* As will be discussed, this requires the overturning of the case of *Venner v. Great Northern Ry.*[138] This must be done in order to clarify the status of the federal rules and door-closing doctrines as matters pertaining solely to the federal forum and not partaking of the *Swift v. Tyson* invasion of the local law field.

B. *Operation and Effect of the Proposed Regime*

Were the recommended array of statutory changes enacted, the federal judges would be set free to work out a meaningful accommodation of state and federal interests in the diversity jurisdiction. The old shibboleths would be vitiated, the "uniformity" precedents wiped off the books or qualified, and all doubts that Congress has put its full constitutional power behind a uniform federal procedure dispersed. The full effect upon the existing precedents and the manner in which a federal judge should then go about his job remain to be examined.

1. *Finding and Applying the Applicable Substantive Law*

When a diversity case is presented to a federal district court, the judge has no doubt that the substantive law he will apply to that controversy will be state-created. *Erie,* whether constitutional doctrine or not, is unchanged by the proposed congressional action. But the judge must further decide: *Which* state's law applies? and: *What* is it?

The Rules of Decision Act, in its closing phrase, "in cases where they apply," certainly seemed to empower the federal judi-

138 209 U.S. 24 (1908).

ciary to make the "choice-of-law" decision in diversity litigation. And so the act was read down to *Erie*[139] and even after *Erie*[140] until the day *Klaxon v. Stentor*[141] and *Griffin v. McCoach*[142] were decided. In *Klaxon* the federal court sitting in Delaware in a diversity case held that a New York statute adding interest to a verdict went to the substance of the obligation under the New York contract at issue. The Supreme Court reversed, holding that the federal court must follow the Delaware conflicts law, not what the court of appeals had found to be "the better view," and enunciating the "principle of uniformity within a state."[143] The Court reached the same result in *Griffin*, without adverting to the circumstance that it involved a bill of interpleader which brought into the Texas federal court parties who could not possibly have been subjected to Texas law in a Texas state court.[144]

Both these decisions would be undone by the proposed congressional legislation, which is a mean between the two extremes of a congressional conflict-of-laws statute applicable in state as well as federal courts, as proposed by Professor Cheatham,[145] and complete state control over federal choice-of-law rules, as required by *Klaxon*. As has been noted before, the federal courts in diversity litigation are in a peculiarly advantageous position to develop uniform impartial conflicts rules. One of the most subtle forms of bias in state court litigation is that in favor of the court's own legal system. Since it takes an egregious manipulation of conflicts rules to violate due process[146] or the full faith and credit clause,[147]

139 See Boseman v. Connecticut Gen. Life Ins. Co., 301 U.S. 196 (1937); Burns Mortgage Co. v. Fried, 292 U.S. 487, 493-94 (1934); cases collected in Note, *Application by Federal Courts of State Rules on Conflict of Laws*, 41 COLUM. L. REV. 1403, n.3 (1941).

140 Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

141 313 U.S. 487 (1941).

142 *Id.* at 498.

143 *Id.* at 496: "The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. See *Erie R. Co. v. Tompkins, supra*, [304 U.S.] at 74-77. Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws."

144 See HART & WECHSLER 636, 669.

145 Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581 (1953).

146 See Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

147 See Order of United Commercial Travelers v. Wolfe, 331 U.S. 586 (1947).

and since all agree that diversity jurisdiction serves at least the purpose of combating subtle bias, a better case could hardly be found for requiring an independent federal decision on the choice of the law to be applied.[148]

This raises the specter of forum-shopping for a favorable substantive law and all the "injustice and confusion" of *Swift v. Tyson*. The local litigant who loses, it is said, does not care whether the opinion which refused to apply local law cites *Swift* or a contra-*Klaxon* rule. There are several answers to this. First, the federal court is choosing among state laws, not making "general" law, and hence the unconstitutional conduct condemned by *Erie* is not present. Second, a certain amount of forum-shopping is necessary in our fifty-one-sovereign union. A citizen who is favored by the conflicts rules of state *A* and prejudiced by those of state *B* must keep out of state *B*. But with a contra-*Klaxon* rule, as recommended, he could predict the outcome in every federal tribunal in every state. Third, the discrimination of forum-shopping has never been raised to constitutional dimensions. If it is felt serious enough, Congress could provide that any suit in a state court involving diversity of citizenship could be removed without regard to amount upon a showing of a substantial federal question of conflict of laws.[149] This would eliminate the discrimination of different results between 10,000-dollar and 9,999-dollar cases, and the "unfairness" of letting the out-of-state citizen choose the forum.

While this would put an added burden on the federal courts of developing a federal conflicts law, it should not add appreciably to the Supreme Court's burden. It is not necessary that choice of law in suits between diverse citizens in any tribunal become thereby a federal question. Short of an "all or nothing" rule, the federal courts can be allowed to develop federal conflicts rules for federal court litigation, leaving the state courts to apply their rules to suits brought into the state courts. The Supreme Court could umpire the process, granting certiorari when necessary to resolve conflicts between the circuits.

Having ascertained *which* state's law applies upon an independent basis, the federal court then embarks upon a partnership

148 *But see* Freund, *Federal-State Relations in the Opinions of Judge Magruder*, 72 HARV. L. REV. 1204 (1959).

149 Suggested in Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 514 (1954).

venture with the state courts to discover *what* that state law is. The recommended revisions give it the same power that the state's highest court has to harmonize existing precedents, statutes, and policies to come up with the rules of decision that apply to the facts before it. If an old precedent has become outmoded by changes in customs and other circumstances, the federal court should be as free as the state courts to refuse to follow it. Whether the federal court should be bound by the same doctrine of stare decisis as the state court follows is a different question. A court's approach to existing precedent smacks of court rule and procedure in which a federal interest exists; but the resulting "making" of law, where the state court would not, would be too close to the doctrine of *Swift v. Tyson* to be tolerable. A state whose courts regarded themselves as unable to overrule an unsound precedent would find out-of-state citizens were not bound by it and were getting a different law in the federal courts. While the resulting polical pressure by residents for a legislative overturning of the unsound rule might be a healthy prospect, the intervening federal-state friction would be highly undesirable. The federal court therefore should adopt the same attitude toward precedents as the state's highest court entertains.

2. *Door-Closing Policies*[150]

Having assumed jurisdiction of a suit involving diversity of citizenship, and having applied the substantive law to determine if a right of action exists, the federal court must next turn to consider whether its hand should be stayed by various local policies of the state in which it sits. These policies are but part of a larger, multifarious problem. Federal courts may close their doors to certain litigants or certain causes of action, or, accepting the suit, deny the availability of certain requested relief. Similarly, state courts may close their doors to certain litigants or causes of action, or, accepting the suit, deny the availability of a specified remedy. These are, essentially, independent actions on the part of each sovereign which should have no effect upon the other sovereign's courts.

However, rules of substantive law, which *Erie* requires the federal courts to follow, may be masked under such policies. Also,

150 See generally HART & WECHSLER 637-78.

some such policies are so strong that the federal court must, as a matter of practical working federalism, adopt and follow them. Therefore the federal court must carefully weigh these local policies. The essential point here is that the proposed legislation does away with mechanical application of the policies in both state and federal courts. Instead, an intelligent examination of such policies is substituted in order to discover:

(1) Is the policy really a principle of substantive law which is applicable to the controversy under the federal conflicts rule?

(2) If not, is the state policy intended to apply in the federal courts? By "intended" is meant both actual intent and implied intent where the application in the federal forum is necessary to the fruition of the policy.

(3) If it is, is there any *federal* interest which would move a federal forum to adopt and apply this state policy? In other words, is the paramount federal interest in keeping the union together better served in this case by uniformity or diversity? Is the local policy so strong that, as a matter of comity and not of command, the courts of the federal sovereign that happen to be sitting in that state should follow suit?

In making this policy decision, the fundamental consideration to be borne in mind is that the Constitution allots the control of the jurisdiction of the inferior federal courts to Congress, not to the states. The proposed legislation delegates that power to uphold jurisdiction to the federal courts, on a case-by-case evaluation of state door-closing policies.

In light of the foregoing summary of how a federal judge should approach his job on this subject, what remains of the precedents? *Guaranty Trust Co. v. York*[151] applied the forum state's statute of limitations to an equity suit in the federal court, without investigating whether the applicable substantive law was the law of the forum or the law of some other state. The primary importance of the case is that it selected the forum-shopping element in *Erie* and erected it into a new principle of decision that underlies all the cases enunciating the "uniformity within a state" doctrine. The proposed legislation not only eradicates that doctrine but compels the investigation into the underlying substantive law that *York* neglected to make. It is unfortunate that the key case in this

151 326 U.S. 99 (1945).

area of door-closing should involve statutes of limitation. The precise classification of these statutes as substance or procedure is in a state of flux and transition. It once was relatively clear that statutes of limitation were but procedural rules of the forum. Recently, however, periods of limitation "written into" statutes creating rights of action have begun to be honored as "substantive" by the forum state.[152] This being so, the federal court must first look to see if the forum state's law creates and controls the right of action. If it does, then the court must decide if the statute of limitations extinguishes the right ("substantive") or is merely directed at regulating the staleness of claims that will be entertained in the state courts. If the former, then the federal court should honor the limitation as any other substantive rule. If the latter, then the federal court is free to make its own decision on the staleness of claims that it will entertain, but probably should follow the state period unless there is some compelling reason not to do so. On the other hand, if the substantive law creating and controlling the right of action is that of some other state and not that of the forum state, then the force of the forum statute of limitations is greatly diminished. If, for example, the cause of action comes from state *B* with a built-in two-year statute of limitations, and the defendant has fled into state *A* because of its one-year statute of limitations, the federal court should apply the longer "substantive" period.[153] But if the cause of action comes with no such period of limitations, then the federal court is free to decide the staleness of suits it will hear, and probably will follow the forum period, as the federal courts generally do with federal rights of action without built-in limitation.

The problem is a little easier to visualize in the context of *Angel v. Bullington*[154] and *First National Bank v. United Air Lines*.[155] In both cases local statutes closed the doors of state courts to causes of action created by another state's laws. *Angel* held the statute closed the doors of the federal court, too, avoiding deciding the constitutional validity of the statute because the petitioner had lost that issue by res judicata. In *United* the Court reached the

152 See Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427, 541 (1958).

153 This would require the reversal of Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953).

154 330 U.S. 183 (1947).

155 225 U.S. 396 (1912).

constitutional issue and held the statute no bar to suit in the federal court because it violated the full faith and credit clause. Both cases accepted *York* and therefore the proposed congressional legislation requires their re-thinking or re-evaluation.

The policy of the statute in *United*—to cut down on the number of cases in the state courts—is obviously not intended to apply to the federal court calendar and should not deter the federal court from entertaining the suit. The policy of the statute in *Angel*—that mortgagees should not be entitled to deficiency judgments—was intended to apply throughout North Carolina. As to mortgages made in that state, there existed no substantive right to a deficiency judgment and the federal court was compelled under *Erie* not to award such a judgment. But as to mortgages entered into in Virginia, a substantive right to a deficiency judgment was created in the mortgagee which he could enforce anywhere except in the state courts of North Carolina. A federal court should enforce that substantive right, whether it sits in Virginia or in North Carolina. It may be that some such local policies are so strong that they should be followed by the federal court, but that would be a matter of adoption after weighing the local and national interests.

The difficulty of determining whether a local policy goes to the substantive rights or merely to the regulation of state court litigation is illustrated by three cases involving "qualifications of suitors": *David Lupton's Sons v. Automobile Club of America*,[156] *Woods v. Interstate Realty*,[157] and *Cohen v. Beneficial Industrial Loan Corp.*[158] *Lupton's Sons* was a 1912 case in which the forum state's law required corporations to qualify to do business in the state before suing in the state courts. The Court examined the policy, found that it did not make contracts entered into in the state by such corporations void but merely barred such corporations from suing on them in the state courts. The Court concluded that the non-qualifying corporation could enforce the contract in any other forum, including the federal court in that state:

> "The State could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitu-

156 225 U.S. 489 (1912).
157 337 U.S. 535 (1949).
158 337 U.S. 541 (1949).

tion and laws of the United States to resort to the Federal courts for the enforcement of a valid contract."[159]

This case was called "obsolete" in *Angel*[160] and overruled in *Woods*, which involved an almost identical Mississippi statute. In *Woods* the Court relied on *York* and *Angel*, neither of which involved a locally-created substantive right for which suit was barred only in the local courts. The proposed congressional legislation would eliminate the automatic approach of *Woods* and return to the *Lupton's Sons* requirement of evaluating the local policy. If it goes to the substantive right, then none exists to be enforced anywhere. If it goes only to the right to sue in New York courts, then it is not binding upon the federal courts, but would probably be followed as to such local contracts. But if it attempts also to bar suit in New York courts by such non-qualifying corporations to enforce other contracts created and governed by other states' law, then the federal court is not only *not* bound by this policy but should accept the jurisdiction conferred upon it by the diverse citizenship of the parties and not by the state law.

Cohen was a shareholders' derivative suit against a Delaware corporation and its officers in a New Jersey federal court. The Court first applied *Klaxon* to make applicable a New Jersey statute making the plaintiff, if unsuccessful, liable for the expenses of the defense, and requiring an adequate bond as condition precedent to suit. Feeling that the statute was substantive to the extent of creating a cause of action for expenses, and that the bond was a reasonable enforcement thereof, the Court held the bond was a condition precedent to suit in the federal court. Under the proposed legislation, this case will be up for re-examination on several grounds. First, the contra-*Klaxon* rule would make the New Jersey state statute inapplicable to this Delaware squabble. Secondly, federal rule 23 will control the qualifications of suit in the federal court on a state-given right of action. Thirdly, shareholders' derivative suits are within the tradition of federal equity and *Guffey v. Smith*[161] indicates the federal equitable remedy may be available even if there is no state equitable remedy.

If the state door-closing policies are to be inapplicable to the

159 225 U.S. at 500.
160 330 U.S. at 192.
161 237 U.S. 101 (1915).

federal courts, the same must be true in the converse situation. When the doors of the federal court are closed to a litigant with a state-created right of action, whether or not the state courts are also closed is a matter of their own jurisdiction. *Venner v. Great Northern Ry.*[162] reached the contrary result. A shareholder complied with the state's requirements to sue, but the suit was removed to the federal court where he could not comply with the predecessor of rule 23(b). Instead of remanding to the state court for lack of jurisdiction, the Court ordered dismissal for want of equity. Under the proposed legislation, this disposition must be changed, in order that the federal rules may be enforced as rules of procedure and not of substantive law. Whenever a litigant is barred from the federal court because of inability to comply with federal requirements, the dismissal of the suit must be without prejudice to his right to proceed in a state court.

3. *Remedy-Denying Policies*

Once the hurdle of state door-closing policies is past, the federal judge must consider state policies denying the availability of particular remedies. *Guffey v. Smith*[163] is the classic case allowing a remedy in federal equity where there was none available at state equity. Similarly, *Payne v. Hook*[164] allowed a federal equity suit based on fraud because the adequate remedy at state law was not available at federal law:

> "We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different States, cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' "[165]

York dismissed this "good deal of talk in the cases that federal equity is a separate legal system,"[166] but the proposed legislation will restore that freedom of the federal chancellor to grant the necessary equitable relief.

Under the rubric of availability of particular remedies, *Bern-*

162 209 U.S. 24 (1908).
163 237 U.S. 101 (1915).
164 74 U.S. (7 Wall.) 425 (1868).
165 *Id.* at 430.
166 326 U.S. at 105.

hardt v. Polygraphic Corp. of America[167] is up for re-examination and sub-division. What was at stake in that case was a local policy against granting specific performance of agreements to arbitrate. Vermont had never applied its policy to contracts made in other states; the Supreme Court did it in *Bernhardt*. Under the proposed legislation, all contracts made in Vermont will be governed by that principle of substantive law. As to contracts governed, under conflicts rules, by other states' law, they should be as enforceable in the federal court sitting in Vermont as in any other forum in the world.

As to the broader question in the *Bernhardt* case, whether Congress could constitutionally make the Federal Arbitration Act[168] applicable to contracts involved in diversity litigation, it is difficult to see why not. By hypothesis, the parties have agreed to the arbitration clause in their contract, and the question is whether the court will enforce it. Whether under the rubrics of remedy or procedure, whether or not such specific performance should be available in the federal courts seems within the power of Congress. Closely analogous situations are the Norris-LaGuardia Act[169] where Congress denied such a specific remedy, and the Federal Declaratory Judgment Act,[170] where Congress granted a new remedy. The issue will probably ultimately turn upon the seventh amendment, which may or may not be read as requiring that agreements to arbitrate be revocable in favor of jury trial. The important point is that it is Congress that gives or takes away the remedy, not the forum state.

4. *Federal Court Procedure*

Once the federal court has accepted jurisdiction, ascertained the existence of a right of action under some state's substantive law and decided that no state or federal policies bar it from proceeding to entertain the right of action for a remedy, the procedure it follows is entirely federal. The object of the proposed legislation is to make clear that the Federal Rules of Civil Procedure will govern the federal litigation, regardless of whether or

167 350 U.S. 198 (1956).
168 9 U.S.C. §§ 1-14 (1958).
169 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1958).
170 48 Stat. 955 (1934), as amended by 49 Stat. 1027 (1935) [now 28 U.S.C. §§ 2201-02 (1958)]. See *Developments—Declaratory Judgments, 1941-1946*, 62 HARV. L. REV. 787 (1946).

not a state rule of procedure would, if applied, produce a different result. In short, once the federal procedure is properly invoked, its rules—federal statutes—pre-empt the field. *Ragan v. Merchants Transfer & Warehouse Co.*[171] is immediately relevant at this point. The Court there held that a litigant who had complied with federal rule 3[172] by filing his complaint was not protected from the application of a state rule of procedure requiring the complaint to be served before the statute of limitations would be tolled. The right of action was for injuries received from a tort committed within the forum state, and the court of appeals had held that service within the period was an "integral part" of the state's statute of limitations. Under the proposed legislation, the state's statute of limitations would be substantive law binding upon the federal court. But the issue of whether a lawsuit has been instituted in a federal court is within the area of procedure where the federal rules hold sway.

Perhaps clearer areas of discrimination will be those involving the relationship of judge and jury in the federal tribunal. *Herron,* revived by *Byrd,*[173] is strong doctrine that what is for the judge and what is for the jury is a federal matter. However, in *Byrd,* the court intimated that if the right to have the judge pass on the issue of immunity had been an "integral part" of the special relationship created by the statute, it might have been binding in the federal court. However, if that issue were presented, it is difficult to believe the court would not hold that the seventh amendment requires jury trial, or that the allocation of fact-finding duties between judge and jury is a matter of federal concern, not state.

It is in the area of burden of proof that perhaps the most difficult problems of differentiating substance from procedure will be presented. The Court has held, in *Cities Service Oil Co. v. Dunlap*[174] and *Palmer v. Hoffman,*[175] that the burden of proof is a matter of substantive law and that state law must be followed. In the former case it was stressed that the legal title-holder was entitled to rely upon the "substantial right" that any attacker of

171 337 U.S. 530 (1949).

172 "A civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3.

173 See discussion accompanying notes 34-36 *supra.*

174 308 U.S. 208 (1939).

175 318 U.S. 109 (1943).

his title would carry the burden of proof. The latter case involved the burden of proving contributory negligence, and the Court held rule 8(c) merely meant the defendant must plead it, but that who must prove it was controlled by state law. An earlier case, *Stoner v. New York Life Ins. Co.*,[176] had held that the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the state-created right was established. It has been suggested [177] that this means only that what elements must be proved to make out a cause of action is a matter of state substantive law, but the amount of evidence necessary for the direction of a verdict one way or the other would be a matter for the forum. Some state rules of evidence, like that in *Cities Service,* really are rules of substantive law, and do affect "prelitigation conduct." Others are mere procedural matters for expediting trial and getting at the facts. The federal court, in this as in all other matters, must be free to sift the substance from the shadow, case by case.[178]

176 311 U.S. 464 (1940).

177 Note, *State Trial Procedure and the Federal Courts: Evidence, Juries and Directed Verdicts Under the Erie Doctrine,* 66 HARV. L. REV. 1516 (1953).

178 See Holtzoff, *The Federal Rules of Civil Procedure and Erie Railroad Co. v. Tompkins,* 24 J. AM. JUD. SOC'Y 57 (1940); *Symposium—Federal Trials and the Erie Doctrine,* 51 NW. U.L. REV. 338 (1956); Note, *The Erie Case and the Federal Rules—A Prediction,* 39 GEO. L.J. 600 (1951); Note, *Erie R.R. v. Tompkins and the Federal Rules,* 62 HARV. L. REV. 1030 (1949).