IN PRAISE OF FRIENDLY

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I.

It is indeed gratifying that the editorial board of the University of Pennsylvania Law Review has dedicated this issue to Henry J. Friendly. Judge Friendly has strong and enduring links with this University: the Judge's daughter, Professor Joan Goodman, is a leading member of the faculty of the School of Education. His son-in-law, Professor Frank Goodman, is a leading member of the faculty of the Law School. And his father-in-law, the late Horace Stern, was a revered alumnus of this University, who attained enduring eminence as Chief Justice of Pennsylvania. But these sentimental ties are not in themselves reasons for honoring Judge Friendly. They simply add cheerful dimension to a welcome event.

The reason for honoring Henry Friendly is that he has achieved greatly in the law. He has practiced law with great distinction. He has judged with even greater distinction. In twenty-five immensely productive years on the Second Circuit, Henry Friendly—like Learned Hand before him—has exercised more decisive influence on the development of American law than any other contemporary federal judge, save only certain of the Justices of the Supreme Court.

There is a particular aspect of Henry Friendly's work that is deserving of special comment. He is a judge who—in the tradition of Kent, Story, Holmes, Cardozo, and Frankfurter—has shaped the law not alone through his opinions but also through his extrajudicial writings. This paper will consider a subject—diversity jurisdiction—to which Friendly has, over a span of decades, devoted important scholarly efforts that have enriched our understanding of the federal judicial process.¹

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¹ This paper will not consider other areas of the law to which Judge Friendly has contributed scholarship of at least equal consequence; see, e.g., the lecture he delivered at Dartmouth on the sesquicentennial of the Dartmouth College Case, H. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA (1963), and his Roberts Lecture at the University of Pennsylvania, Friendly, Some Kind of Hearing, 123 U. PA. L. REV. 1267 (1975).
II.

A.

The steady expansion of the jurisdiction of the federal courts, especially since Reconstruction days, has been but a reflex of the general growth of federal political power. That growth will not abate, since it is responsive to deep social and economic causes. Only one aspect of the work of the federal courts is out of the current of these nationalizing forces—the jurisdiction based on diversity of citizenship. This had its origin in fears of local hostilities, which had only a speculative existence in 1789, and are still less real today. The unifying tendencies of America here make for a recession of jurisdiction to the states, rather than an extension of federal authority. The pressure of distinctively federal litigation may call for relief of business that intrinsically belongs to the state courts. How far, if at all, the United States courts should be left with jurisdiction merely because the parties are citizens of different states is a question which calls for critical reexamination of the practical bases of diversity jurisdiction. To such a reexamination the present study may serve as an introduction.

These magisterial words were written by the youthful Henry Friendly: they comprise the concluding paragraph of The Historic Basis of Diversity Jurisdiction, Friendly's first piece of published scholarship. Friendly's paper appeared in the Harvard Law Review in February of 1928, eight months after he graduated from Harvard Law School. The paper must have been conceived when the author was still in student status, for he was at pains to acknowledge his substantial indebtedness "to Professor Felix Frankfurter . . . both for suggesting the subject of this paper and for constant help in its preparation." But the bulk of work on the paper appears to have been done just after Friendly left Cambridge—in the summer of 1927, at the Bar Association of the City of New York. This would have been just before

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2 Friendly, The Historic Basis of Diversity Jurisdiction, 41 HARV. L. REV. 483, 510 (1928). Friendly calls this his "first signed piece of legal writing." H. FRIENDLY, FEDERAL JURISDICTION 140 (1973). One detects a negative pregnant signifying that some of the anonymous student work contained in volumes 39 and 40 of the Harvard Law Review was written or edited by Friendly: Friendly was an editor of volume 39 and President of volume 40.

3 Friendly, supra note 2, at 483.

Friendly went to Washington to take up his duties as law clerk to Justice Brandeis—a position for which, one may reasonably surmise, Friendly was warmly recommended by his professor.

The opening paragraph of Friendly's paper on the history of diversity jurisdiction announced its purpose—to answer questions posed by Professor James Bradley Thayer almost forty years earlier: "Why is it that a United States court is given this duty of administering the law of another jurisdiction? Why did the States allow it? Why was it important that the United States should have it?" These questions, Friendly said, were "not purely academic." Diversity jurisdiction was more and more being called into question. In 1914, a distinguished committee—Dean Roscoe Pound of Harvard Law School, President Charles W. Eliot of Harvard University, Louis Brandeis (not yet a Justice), Moorfield Storey, and Adolf J. Rodenbeck—had published a Preliminary Report on Efficiency in the Administration of Justice, which found, inter alia, that "concurrent jurisdiction of state and federal courts on the ground of diverse citizenship often causes much delay, expense, and uncertainty." By the time Friendly turned his attention to the matter, remedial legislation seemed a lively possibility. If such legislation were to be sensibly conceived, Professor Thayer's questions had to be addressed.

Friendly's article was and remains the authoritative study of the genesis and early days of diversity jurisdiction. Friendly first examined the intense debate (most of it in the ratifying conventions) generated by the inclusion of diversity jurisdiction among the heads of federal judicial power described in article III of the Constitution. Friendly then turned to the limitations on diversity jurisdiction written into the First Judiciary Act—limitations, for the most part (except for the one-year interlude of the abortive 1801 Judiciary Act), that have obtained ever since. Finally, Friendly discussed the principal cases on diversity jurisdiction decided by the Ellsworth and Marshall Courts—cases such as Bingham v. Cabot, Turner v. Bank of North America, Hepburn and

7 Friendly, supra note 2, at 483 n.2.
9 3 U.S. (3 Dall.) 382 (1798) (requiring that citizenship of parties be pleaded).
10 4 U.S. (4 Dall.) 8 (1799) (upholding Judiciary Act's assignee clause precluding suit on assigned chose in action unless suit could have been maintained by assignor); see Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850).

Since Friendly's focus was on the beginnings of diversity jurisdiction, he did not carry the case law discussion beyond the early Marshall years. In particular, Swift v. Tyson, decided in 1842, lay far beyond Friendly's horizon. There, it will be recalled, Justice Story, in concluding that an idiosyncratic New York rule of negotiable instruments law should not be held to govern a diversity case tried in a New York federal court, gave a very limited construction to the directive of the so-called Rules of Decision Act—section 34 of the First Judiciary Act—that "[t]he laws of the several States, except where the Constitution, treaties, or statutes of the United States 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." According to Justice Story,

the true interpretation of the 34th section limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate. . . . It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature . . . as, for example . . . questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies . . . what is the just rule . . . to govern the case. And just as Friendly, in his 1928 paper, did not have occasion to discuss Swift v. Tyson, so too he did not address the "new light" on section 34 shed by Charles Warren in a celebrated article in the Harvard Law


12 7 U.S. (3 Cranch) 267 (1806) (requiring all plaintiffs to be diverse from all defendants).

13 9 U.S. (5 Cranch) 61 (1809) (corporation not a "citizen" for diversity purposes). But cf. Louisville, C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844) ("[A] corporation created by doing business in a particular State is to be deemed . . . as a person . . . capable of being treated as a citizen of that state . . . .")


15 Section 34 is now codified at 28 U.S.C. § 1652 (1982).

Review five years before.\textsuperscript{17}

Friendly did, however, note that in the Virginia ratifying convention Patrick Henry had inquired: "I beg gentlemen to inform me of this—in which courts are they [diversity cases] to go, and by what law are they to be tried?"\textsuperscript{18} And included in the matter Friendly excerpted from the 1914 report of Dean Pound's committee was the observation: "Moreover, the difference in the view which state and federal courts respectively take as to the law applicable to the same case results in irritation which has somewhat impaired the usefulness of the federal courts in some localities."\textsuperscript{19}

B.

Friendly's study of the beginnings of diversity jurisdiction appeared in the issue of the \textit{Harvard Law Review} published in February of 1928.\textsuperscript{20} Two months later the Supreme Court decided \textit{Black and White Taxicab Co. v. Brown and Yellow Taxicab Co.},\textsuperscript{21} the most celebrated exemplar of the ills of diversity jurisdiction as exercised in the nearly one hundred years of \textit{Swift v. Tyson}'s ascendancy. The \textit{Taxicab} case presented the following question: Should a federal district court in Kentucky enforce a contract that, had it been the subject of litigation in a Kentucky state court, would have been invalidated as contrary to Kentucky public policy? The contract in question was between the Louisville & Nashville Railroad and Brown and Yellow Taxicab & Transfer Company. By its terms, Brown and Yellow, in return for good and valuable consideration, acquired the highly prized commercial advantage of being the only taxi company given access to the Bowling Green railroad station and its adjacent loading and parking areas. Black and White, a competitor of Brown and Yellow's, dispatched its taxis to the Bowling Green station in defiance of Brown and Yellow's monopoly. Thereupon Brown and Yellow decided to go to court to pro-


\textsuperscript{18} Friendly, \textit{supra} note 2, at 490.

\textsuperscript{19} Id. at 483 n.2.

\textsuperscript{20} Lacking direct evidence on the point, I conclude on the basis of circumstantial evidence that the February 1928 issue of the \textit{Harvard Law Review} was published in February of 1928. This conclusion appears to flout the venerable common law principle that law reviews come out late. I do not question the principle as an apt generalization of Anglo-American experience. But it is a principle which, when invoked in particular instances, is subject to rebuttal by competent evidence. The competent circumstantial evidence I find dispositive here is that the President of the \textit{Harvard Law Review} for volume 41 was Erwin N. Griswold, a celebrated champion of punctuality at Gannett House and even at lesser journals without the law.

\textsuperscript{21} 276 U.S. 518 (1928).
tect its entitlement. But, anticipating that Kentucky's courts would not look kindly on the arrangement it had made with the Louisville & Nashville, Brown and Yellow thought it would be prudent to litigate the issue in a federal court. This was managed by the simple expedient of dissolving Brown and Yellow as a Kentucky corporation and transferring assets to a newly created Tennessee corporation called Brown and Yellow. Having sloughed off its Kentucky corporate status, Brown and Yellow then brought suit in a Kentucky federal court against two Kentucky corporations, Black and White and the Louisville & Nashville, to enjoin Black and White from interfering with the railroad's contract with Brown and Yellow. The district court granted the requested relief, the Sixth Circuit affirmed, and the Supreme Court granted certiorari.

The Supreme Court, speaking through Justice Butler, affirmed. Justice Butler pointed out that no Kentucky statute nor any rule of "local" Kentucky jurisprudence, such as a legal rule governing title to Kentucky real property, was involved. Under those circumstances, since federal courts and most state courts had customarily sustained exclusive arrangements such as that made by Brown and Yellow and the railroad, the minority rule obtaining in Kentucky and Mississippi could be disregarded:

As respects the rule of decision to be followed by federal courts, distinction has always been made between statutes of a State and the decisions of its courts on questions of general law. The applicable rule sustained by many decisions of this Court is that in determining questions of general law, the federal courts, while inclining to follow the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment. That this case depends on such a question is clearly shown by many decisions of this Court.

Then Justice Butler cited a host of earlier Supreme Court decisions, of which the first and foremost was Swift v. Tyson.

Justice Holmes filed one of the last and most powerful of his great dissents, directly challenging the notion that there are "questions of general law" which the federal courts have independent authority to determine:

22 15 F.2d 509 (6th Cir. 1926).
24 276 U.S. at 530.
But the question is important and in my opinion the prevailing doctrine has been accepted upon a subtle fallacy that never has been analyzed. If I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct. Therefore I think it proper to state what I think the fallacy is.

Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeals, from the State Courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer's notions of a single theory. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found.

Mr. Justice Story in *Swift v. Tyson*, 16 Peters 1, evidently under the tacit domination of the fallacy to which I have referred, devotes some energy to showing that § 34 of the Judiciary Act of 1789, c. 20, refers only to statutes when it provides that except as excepted the laws of the several States shall be regarded as rules of decision in trials at common law in Courts of the United States. An examination of the original document by a most competent hand has shown that Mr. Justice Story probably was wrong if anyone is interested to inquire what the framers of the instrument meant. 37 Harvard Law Review 49, at pp. 81-88. But this question is deeper than that; it is a question of the authority by which certain particular acts, here the grant of exclusive privileges in a railroad station, are governed. In my opinion the authority and only authority is the State, and if that be so, the voice adopted by the State as its own should utter the last word. I should leave *Swift v. Tyson* undisturbed, as I indicated in *Kuhn v. Fairmount Coal Co.* [215 U.S. 349], but I would not allow it to spread the assumed dominion into new fields.28

28 Id. at 532-35. Justice Holmes's statement that he would "leave *Swift v. Tyson*...
Justices Brandeis and Stone joined Justice Holmes’s dissent.

Ten years, almost to the day, after *Taxicab* came the decision in *Erie Railroad v. Tompkins.*

Mr. Tompkins, a citizen of Pennsylvania, sued the Erie Railroad, a New York corporation, in a federal court in New York for injuries that befell him when, walking at night along a pathway adjacent to the Erie’s tracks in Pennsylvania, he was knocked down by some object protruding from a passing freight train. The Erie’s defense was that, under Pennsylvania case law, Mr. Tompkins was a trespasser to whom no duty of care was owed. Mr. Tompkins disputed the Erie’s reading of the Pennsylvania cases, and argued that in any event the case was governed not by the tort law prevailing in Pennsylvania but by "general law." The Second Circuit, sustaining a $30,000 jury verdict in Mr. Tompkins’s favor, found no need to resolve the question of Pennsylvania law, because it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. . . . Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains.

"Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, [the Supreme Court] granted certiorari." And the Court reversed.

"The question for decision," the opinion began, "is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."

undisturbed . . . but . . . not allow it to spread the assumed dominion into new fields" evidently reflected a view that the mischief to be abated was not so much the illusion dear to Justice Story’s heart of a "general commercial law" but the subsequently propagated illusions that a federal court could speak authoritatively, with reference to the case law of the state in which it sat, on matters of tort liability, title to land, and so forth. Cf. Justice Holmes’s dissent in *Kuhn v. Fairmount Coal Co.*, 215 U.S. 349, 371 (1910), in which he notes the difficulties encountered "the moment you leave those principles which it is desirable to make uniform throughout the United States and which the decisions of this Court tend to make uniform."

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26 304 U.S. 64 (1938).
27 Tompkins v. Erie R.R., 90 F.2d 603, 604 (2d Cir. 1937), rev’d, 304 U.S. 64 (1938).
28 *Erie,* 304 U.S. at 71.
29 Id. at 69. This formulation of the question presented must have surprised the parties, since counsel for the Erie, while challenging the Second Circuit’s sweeping application of *Swift v. Tyson* in the particular instance, had acknowledged that Justice Story’s decision was, within proper bounds, good law. *Id.* at 66.
The opinion then went on to show that the promised benefits of Justice Story's decision in *Swift v. Tyson* had not been forthcoming: in lieu of the hoped-for uniformity of "general law," there had developed intricate and pervasive differences between the doctrines applied in state and federal courts in the same state. "Thus, the doctrine rendered impossible equal protection of the law." Moreover, said the Court, Charles Warren's 1923 article—the article "by a most competent hand" to which Holmes had adverted in his *Taxicab* dissent—had "established" that the construction of section 34 of the First Judiciary Act on which Justice Story's doctrinal edifice rested was "erroneous"; properly understood, section 34 was intended "to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written." 

But the Court said it would not have overturned *Swift v. Tyson* merely because its statutory underpinning appeared to have crumbled:

If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so. . . .

[T]he doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' 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.

The opinion in *Erie* was written by Justice Brandeis. Joining him were Chief Justice Hughes and Justices Stone, Roberts, and Black. Justice Reed filed a concurring opinion: agreeing with the Court that

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30 *Id.* at 75.
31 *Id.* at 72-73. It will be recalled that Justice Holmes, in his *Taxicab* dissent, referred to Warren's findings about section 34 in rather more tentative fashion: "An examination of the original document by a most competent hand has shown that Mr. Justice Story probably was wrong if anyone is interested to inquire what the framers of the instrument meant." 276 U.S. at 535, quoted supra text accompanying note 25.
32 304 U.S. at 77-80.
Justice Story had misunderstood the command of section 34, Justice Reed would have overruled Swift v. Tyson on statutory grounds. In Justice Reed’s view, the availability of such a disposition made recourse to the Constitution unnecessary and hence inappropriate. Justice Butler filed a dissenting opinion in which Justice McReynolds joined. The ailing Justice Cardozo did not participate in the decision.

C.

In the closing decades of the era of Swift v. Tyson, the doctrinal flame lit by Justice Story cast a fitful light, giving uncertain guidance to those plotting their course across the vasty deep of American law. But extinguishing the glimmering beam, and directing all concerned to look to other lighthouses, did not immediately calm the waters or the mariners. Nor was all dubiety allayed by the spate of legal writing, judicial and otherwise, that followed the Court’s decision in Erie. For long years after Justice Brandeis’s pronouncement that “[t]here is no federal general common law” and that a new era had dawned, the Court was at work enlarging upon—and, occasionally, tending to obscure—what the Justice and his four colleagues of the Erie majority had determined. And, at the same time, the law reviews were awash in criticisms, defenses, refinements, elaborations, and qualifications of Erie.

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34 304 U.S. at 78.


Within a matter of weeks after *Erie* was decided, Yale's Arthur Corbin, one of the nation's most eminent and venerated legal scholars, published a brief essay appraising the new era Justice Brandeis had proclaimed. The quality of the federal judicial process would indeed suffer, Professor Corbin felt, if *Erie* meant that henceforth a federal judge trying a Pennsylvania case would look only to Pennsylvania precedents and not—as any sensible Pennsylvania state judge would do—look to the aggregate body of developing case law across the land. But Professor Corbin was confident that *Erie* was not intended to constrict the job of judging: "The overruling of *Swift v. Tyson*," wrote Corbin,
is a matter of much less importance than it may seem to many. On the whole, its effect may be beneficial. It will not affect "vested rights" or invalidate the numerous decisions rendered on the theory stated by Mr. Justice Story. In actual practice, it will not deprive the federal judge of the freedom and power that have been his. It is not an order by Brandeis, J., that hereafter Learned Hand, J., must take his law from the words of Finch, J. If it is an admonition to federal judges that there is no "federal general common law" that is to be found *solely* in the opinions of other federal judges, much is thereby gained. But if it is a direction to substitute an omnipresence brooding over Pennsylvania alone, in place of the roc-like bird whose wings have been believed to overspread forty-eight states, something has indeed been lost.37

Professor Harry Shulman, a junior colleague of Corbin's, wrote a companion piece. Shulman—like Friendly, a former Brandeis law clerk—was confident that federal judges implementing *Erie* would still have a useful role to play in the development of state law: "Federal judges may still analyze, expose, criticize or excoriate the rule which they may feel compelled to follow."38 But Shulman also felt that the Court could have overturned *Swift v. Tyson* without invoking the Constitution and without abandoning Justice Story's construction of section 34: this could have been accomplished, so Shulman explained, if the Court were to have adopted a new judge-made rule of deference to state decisions for those diversity cases to which section 34, as construed by Story, did *not* apply—that is, those in which no state statute was applicable. Some years later a sharper attack on *Erie* was mounted by a

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38 Shulman, *supra* note 36, at 1349.
professor-turned-judge, the redoubtable Charles E. Clark of the Second Circuit. Judge Clark also felt that the evils of *Swift v. Tyson* could have been cured by a remedy far less drastic than excommunicating it as unconstitutional.\(^{39}\)

Early in 1964, five years after he ascended the bench, Henry Friendly delivered the annual Cardozo Lecture at the Bar Association of the City of New York. Friendly’s brilliant paper was a proper sequel to the study of the origins of the diversity jurisdiction he had worked on in the library of the Association so many summers before. The paper was a proper tribute not only to Justice Cardozo but also to two of Friendly’s mentors, Justice Brandeis and Professor-turned-Judge Frankfurter. Twenty-five years after the event, Friendly gave his assessment of *Erie* and its implications.

*In Praise of Erie—and of the New Federal Common Law*\(^ {40}\) developed two themes. The first of them was that *Erie* was rightly decided and that the stated ground of decision—“the unconstitutionality of the course pursued” under *Swift v. Tyson*—was the right ground. The second theme was that, by getting federal courts out of the business of declaring law they had no authority to make, *Erie* had cleared the ground on which federal courts could erect an authentic federal legal structure. This authentic federal law was a federal common law commensurate with and supportive of the federal legislative power—a common law whose sensible articulation depends on judicial sensitivity to the clues, of whatever clarity, Congress may have provided as to the lines along which, and the constraints within which, legislative objectives may in some measure be implemented by the courts. This second theme is discussed elsewhere in these tributes. The first theme—the legitimacy of *Erie*—constituted the first half of Friendly’s paper. To attempt to condense his argument would be impertinent. Suffice it to say that Friendly canvassed the major (and minor) criticisms of *Erie* and left them pulverized. He showed that under the aegis of *Swift v. Tyson* federal courts established under article III of the Constitution

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\(^{39}\) Judge Clark suggested that a better opinion would have been crafted by Justice Cardozo’s “gentler touch.” Clark, *State Law in the Federal Courts*, 55 YALE L.J. 267, 295-96 (1946); see also Clark, *Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins*, 21 U. CHI. L. REV. 24, 33 (1953). In Professor Crosskey’s remarkable constitutional cosmology, what was unconstitutional was *Erie*: under Professor Crosskey’s Constitution, far from there being no “federal general common law,” the single legitimate form of American common law was federal common law, which it was a principal function of the federal courts, culminating in the Supreme Court, to determine, and which was binding on state courts. 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 610-674 (1953).

were encouraged to, and effectively did, fashion rules for the resolution of controversies arising out of conduct beyond the regulatory power vested in Congress by article I of the Constitution. That asymmetry of articles III and I had worked a fundamental distortion of the federal system. A basic postulate of the federal system is that the national authority, not simply of Congress but of all three branches of the government of the United States, is limited, with the balance of authority “reserved,” according to the tenth amendment, “to the States respectively, or to the people.” To redress the injury done by Swift v. Tyson to the federal system, and to prevent its recurrence, not only the decision in Erie but its constitutionally based ratio decidendi was essential. To have pitched the decision on other than constitutional grounds would have weakened it and invited its erosion.

Friendly did more than justify Erie. He was at pains to show its limits. In particular, Friendly made clear that nothing decided or announced in Erie prejudged, one way or another, the Court’s decision three years later, in Klaxon Co. v. Stentor Electric Manufacturing Co., that a federal court sitting in diversity must follow the choice of law rules of the state in which it sits. Friendly put the matter this way:

Published materials cast no certain light on how Brandeis would have voted when the choice of law issue first arose for decision, and speculation on that score seems rather idle. The questions are of the utmost difficulty and do not yield to any simple solution. I shall make only two observations—first, that the problems would exist however Erie was decided, and second, that, in my view, the constitutional basis of Erie does not apply to choice of law issues even when diversity is the sole basis of federal jurisdiction and a fortiori when it is not. For Congress to direct a federal court sitting

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41 It is limited, that is, except for such matters as the management of foreign and military matters and the governance of the District of Columbia and of territories and possessions, where all sovereignty is vested in the United States. Cf. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). Of course these sweeping national powers, like all other powers vested in the United States, are subject to the constraints of the Bill of Rights and other provisions of the Constitution.

42 313 U.S. 487 (1941).

43 Because Erie involved a Pennsylvania accident and was tried in New York, it could conceivably have posed a choice of law problem (assuming, as the Supreme Court did in fact decide, that “local” law was to be applied). But none of the opinions filed in Erie, either in the Supreme Court or in the Second Circuit en route to (90 F.2d 603 (1937)) and from (98 F.2d 49 (1938)) the Supreme Court, offers any ground for supposing that anyone at any point in the litigation posited any law other than Pennsylvania’s as the relevant “local” law.
in State A whether to apply the internal law of State A, B or C, or to use its own judgment which to apply, can well be said to be "necessary and proper" to enabling federal judges to function and consistent with the general role of the central government under the Constitution, in a way that prescription of a code of substantive law to supplant the otherwise applicable law of a state is not.44

Friendly's careful statement was not in terms a submission that Klaxon's insistence on federal court conformity with state choice-of-law rules yields bad results. Friendly went no further than saying that Klaxon was not compelled by the Constitution—an observation calculated to suggest to Congress, and obliquely to the Supreme Court, that Klaxon ought not be taken as a necessary consequence of Erie and was, therefore, open to independent reexamination. Others have reinforced Friendly's careful submission. Recently, two conflicts scholars have written:

Klaxon seems not to rest on the same Constitutional prohibitions, despite the Court's statement to the contrary. As a number of commentators have shown, the ordering of the relations among the States of the Union is a uniquely federal function. The reach of state laws, albeit limited by the loose standards of the Due Process and Full Faith and Credit Clauses, should no more be left to the unilateral determination by individual states than is the determination of their physical boundaries.45

And it would seem that reexamination of the utility of Klaxon is now overdue, given the radical shifts in choice-of-law method that have come about since Klaxon was decided. For in these past four decades the pendulum of choice of law has swung a long way from Bealian conceptualisms that purported to promise that every potential forum would look to the same state's substantive law to doctrines of, inter alia, "interest analysis," which, when the forum is one of two or more states with identifiable links to the controversy, avowedly favor the parochial claims of forum substantive law.46

44 Friendly, supra note 40, at 401-02. It is to be noted that Professor Shulman, in his prescient essay written right after Erie, pointed out that one of the important choices which would confront federal courts trying cases under the new dispensation would be, "[W]hat state's rule of conflict of laws is to govern?" Shulman, supra note 36, at 1351. It seems a fair inference that he did not see that choice foreclosed by the Erie decision itself.


46 See D. CURRIE, R. CRAMTON & H. KAYE, CONFLICT OF LAWS 201-309 (3d
The Klaxon question pinpointed by Henry Friendly in his scholarly paper was, and remains, a problem of significant academic interest. But in deciding cases, Henry Friendly has found the Klaxon question to be more than an academic problem. Shortly before he wrote his paper, his court had considered en banc a case in which the argument for following the forum's choice-of-law rule seemed to Friendly quite unpersuasive. The case was Pearson v. Northeast Airlines, a federal court replication of New York's celebrated Kilberg v. Northeast Airlines.

D.

Edward J. Kilberg and John S. Pearson, both New Yorkers, were passengers on a Northeast Airlines flight that, on August 15, 1958, left LaGuardia Airport bound for Nantucket. The plane crashed as it was about to land. Kilberg and Pearson both died in the crash. The suit arising out of Kilberg's death was brought in a New York state court; the suit arising out of Pearson's death was brought in a New York federal court. Because New York practice is hospitable to interlocutory appeals, Kilberg reached authoritative appellate disposition before Pearson.

The plaintiff-administrator in Kilberg sought to recover for breach of contract or, in the alternative, for wrongful death. The contract claim alleged breach of Northeast Airlines' undertaking to provide the decedent safe carriage, as embodied in the ticket purchased by Kilberg at LaGuardia Airport; the contract claim alleged, inter alia, "loss of accumulations of prospective earnings of the deceased," in support of an ad damnum of $150,000. The administrator's wrongful death claim was, however, confined to $15,000, the ceiling on damages contained in the Massachusetts statute under which the claim arose:

Damages for death by negligence of common carrier. If the proprietor of a common carrier of passengers ... causes the death of a passenger, he or it shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant or of his or its servants or agents.

ed. 1983).

47 309 F.2d 553 (2d Cir. 1962).
49 MAss. ANN. LAWS ch. 229, § 2 (Michie/Law. Co-op 1953). In 1961, the year in which Kilberg was decided by the New York Court of Appeals and the year before
Arguing that pursuit of a claim sounding in contract was not a proper device for circumventing the wrongful death damage limitation contained in the Massachusetts statute, Northeast Airlines moved to strike the contract claim. The trial court, sitting at Special Term, denied the motion, but the Appellate Division reversed. The New York Court of Appeals affirmed:

If the alleged contract breach had caused injuries not resulting in death, a New York-governed contract suit would, we will assume, be available. . . . But it is law long settled that wrongful death actions, being unknown to the common law, derive from statutes only and that the statute which governs such an action is that of the place of the wrong. . . . It follows, as the Appellate Division correctly held here . . . that the [contract] cause of action had to be dismissed.80

Since no other issues had been tendered on appeal to the Court of Appeals, one might have supposed—and three members of the court did suppose—that the propriety of the Appellate Division’s dismissal of the contract claim was all that the Court of Appeals had to rule on. But the majority saw more in the case. The unavailability of a New York contract claim alternative to the Massachusetts wrongful death claim “[did] not mean . . . that for this alleged wrong plaintiff cannot possibly recover more than the $15,000 maximum specified in the Massachusetts act.” And the court went on to explain why:

The number of States limiting death case damages has become small over the years but there are still 14 of them. . . . An air traveler from New York may in a flight of a few hours’ duration pass through several of those commonwealths. His plane may meet with disaster in a State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane’s catastrophic descent may begin in one State and end in another. The place of injury becomes entirely fortuitous. Our courts should if possible provide protection for our own State’s people against unfair and anachronistic treatment of the lawsuits which result from these disasters.

Since both Massachusetts . . . and New York . . . au-

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80 Kilberg, 9 N.Y.2d at 38-39, 176 N.E.2d at 527, 211 N.Y.S.2d at 135.
torize wrongful death suits against common carriers, the only controversy is as to amount of damages recoverable. New York’s public policy prohibiting the imposition of limits on such damages is strong, clear and old. Since the Constitution of 1894, our basic law has been . . . that “The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.”

As to conflict of law rules it is of course settled that the law of the forum is usually in control as to procedures including remedies. . . . As to whether the measure of damages should be treated as a procedural or a substantive matter in wrongful death cases, there is authority both ways. . . . It is open to us, therefore, particularly in view of our own strong public policy as to death action damages, to treat the measure of damages in this case as being controlled by our own State policies.

From all of this it follows that while plaintiff’s second or contract claim is demurrable, his first count declaring under the Massachusetts wrongful death action is not only sustainable but can be enforced, if the proof so justifies, without regard to the $15,000 limit. Plaintiff, therefore, may apply if he be so advised for leave to amend his first cause of action accordingly.

Judge Fuld, concurring without much enthusiasm on the contract claim, felt it inappropriate for the court to rule sua sponte on the unpresented wrongful death claim. Judge Froesssel, joined by Judge Van Voorhis, concurred on the contract claim and agreed with Judge Fuld that no other question was properly before the court; however, since the majority had undertaken to address the question, Judge

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81 Id. at 39-42, 176 N.E.2d at 527-29, 211 N.Y.S.2d at 135-38. “Kilberg’s administrator ultimately settled for less that $15,000 and did not seek leave to amend his first cause of action. Presumably, this was because he did not believe he could prove greater damages.” W. Reese & M. Rosenberg, Conflict of Laws 466 (8th ed. 1984).

82 Judge Fuld was “[i]mpressed . . . by the theoretical soundness” of the argument that entry into a contract of safe carriage in New York was “a more ‘significant contact’ than the adventitious occurrence of the crash in Massachusetts,” in view of which “it might well be . . . urged, this State’s wrongful death statute and not that of Massachusetts should apply.” But Judge Fuld felt this approach was “foreclosed by our decisions.” Kilberg, 9 N.Y.2d at 45, 172 N.E.2d at 531, 211 N.Y.S.2d at 140.
Froessel went on to express disagreement with the majority's treatment of the ceiling on damages under the wrongful death claim. Grafting New York's unlimited recovery on the Massachusetts statute was, according to Judge Froessel, not only bad choice of law but, very likely, in contravention of the full faith and credit clause.53

\textit{Kilberg} was decided in 1961. Whatever slender conceptual rooting it had—namely, the New York Court of Appeals's characterization of damages as a "procedural" issue to be determined by the law of the forum—vanished a year later. In \textit{Davenport v. Webb} the Court of Appeals, in explaining its decision to apply the Maryland rather than the New York rule on prejudgment interest in a wrongful death case arising in Maryland, distinguished \textit{Kilberg} by saying that it rested on "this State's strong policy with respect to \textit{limitations} in wrongful death actions,"54 not on the terra infirma that damages are procedural.

But recognition of the jurisprudential vacuity of \textit{Kilberg} did not need to await the opinion in \textit{Davenport v. Webb}. It would have been sufficient in 1961, and it remains sufficient today, to compare the \textit{Kilberg} opinion with Judge Cardozo's opinion over four decades before in \textit{Loucks v. Standard Oil Co.}.55

Everett Loucks, a New York resident, was killed when a Standard Oil truck hit his automobile on a Massachusetts highway. A wrongful death action was brought in a New York court. Suit was founded on a Massachusetts statute that provided:

> If a person or corporation by his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service, he or it shall be liable in damages in the sum of not less than $500 nor more than $10,000, to be assessed with reference to the degree of his or its culpability, or that of his or its servants.56

Special Term denied a motion for judgment on the pleadings. The Appellate Division reversed. The Court of Appeals, in its turn, reversed the Appellate Division, rejecting both of the grounds on which Standard Oil relied in contending that the suit was not cognizable in a New York court.

\footnotesize{53 \textit{Id.} at 51, 172 N.E.2d at 535, 211 N.Y.S.2d at 146.}
\footnotesize{55 224 N.Y. 99, 120 N.E. 198 (1918).}
\footnotesize{56 R.L. c. 171, § 2, as amended by 1907 Mass. Acts, ch. 375. The statute involved in \textit{Kilberg}, while closely comparable with this one, was addressed solely to the liability of a common carrier for negligently causing the death of a passenger.}
Judge Cardozo dealt first with Standard Oil's claim that the Massachusetts statute, couched in terms of degrees of culpability, was "penal" and hence not enforceable in a jurisdiction other than Massachusetts.

It is true that the offender is punished, but the purpose of the punishment is reparation to those aggrieved by his offense. . . . The executor or administrator who sues under this statute is not the champion of the peace and order and public justice of the commonwealth of Massachusetts. He is the representative of the outraged family. He vindicates a private right.67

Then Judge Cardozo turned to Standard Oil's second line of defense:

Another question remains. Even though the statute is not penal, it differs from our own. We must determine whether the difference is a sufficient reason for declining jurisdiction. A tort committed in one state creates a right of action that may be sued upon in another unless public policy forbids.

. . . .

This test applied, there is nothing in the Massachusetts statute that outrages the public policy of New York. We have a statute which gives a civil remedy where death is caused in our own state. We have thought it so important that we have now imbedded it in the Constitution. (Const. Art. 1, § 18). The fundamental policy is that there shall be some atonement for the wrong. Through the defendant's negligence, a resident of New York has been killed in Massachusetts. He has left a widow and children who are also residents. The law of Massachusetts gives them a recompense for his death. It cannot be that public policy forbids our courts to help in collecting what belongs to them. We cannot give them the same judgment that our law would give if the wrong had been done here. Very likely we cannot give them as much. But that is no reason for refusing to give them what we can.68

Kilberg had already been decided by the New York Court of Appeals when Pearson v. Northeast Airlines,69 arising out of the same

67 Loucks, 224 N.Y. at 103-06, 120 N.E. at 199-200.
68 Id. at 106-12, 120 N.E. at 200-02.
Nantucket crash, came on for trial in the Southern District of New York. On the authority of Kilberg, Judge McGohey denied Northeast Airlines's motion to limit the administratrix's maximum recoverable damages to Massachusetts's $15,000 ceiling. From a judgment for plaintiff in the sum of $134,043.77 (to which later was added $26,160.88 in interest), Northeast Airlines appealed to the Second Circuit. A divided panel reversed: Judge Swan, joined by Chief Judge Lumbard, held that Kilberg's disregard of the Massachusetts ceiling on wrongful death damages denied full faith and credit to a critical aspect of Massachusetts's statutory scheme. Judge Kaufman dissented.

Pearson was then heard by the Second Circuit en banc. This time the prevailing opinion was Judge Kaufman's, upholding the jury verdict. In rejecting the full faith and credit claim, Judge Kaufman acknowledged that "New York [in Kilberg] reiterated its partial adherence to the rule of lex loci delictus," but he added that

[i]n doing so New York is not bound to model all of the rules governing this litigation in which it is conceded it has a legitimate interest, on Massachusetts law . . . . New York may examine each issue in the litigation—the conduct which creates liability, the parties who may bring an action, the extent of liability, the period during which the liability may be sued upon . . . —and by weighing the contacts of various states with the transaction, New York may, without interfering with the Constitution, shape its rules controlling the litigation.

Judge Friendly, joined by Chief Judge Lumbard and Judge Moore, dissented. The heart of the dissent follows:

I find nothing in the Federal Constitution that would prevent the legislature of New York from amending its wrong-


60 199 F. Supp. at 540. Pearson is an instance in which the applicable choice-of-law rule is manifest. That is not always the case. In Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960), vacated and remanded, 365 U.S. 293, prior judgment reinstated, 290 F.2d 904, cert. denied, 368 U.S. 901 (1961), Judge Friendly stated that it was his court's "principal task . . . to determine what the New York courts would think the California courts would think on an issue about which neither has thought."


62 Id. at 136.


64 See id. at 564. As a senior judge, Judge Swan did not participate in the en banc review.
ful death act, Decedent Estate Law, § 130 et seq., to include the death in a sister state of a New York resident travelling on a flight from New York on a ticket purchased in New York, or the courts of New York from now reading its wrongful death act to cover such a case. . . .

It is common ground that New York has not followed any of the courses just outlined. . . . The [Kilberg] majority likewise disclaimed any idea that recovery might be had, in tort, under New York’s wrongful death act. Chief Judge Desmond said . . . with entire clarity: “We will still require plaintiff to sue on the Massachusetts statute but we refuse on public policy grounds to enforce one of its provisions as to damages”—“We . . . refuse to apply that part of the Massachusetts law.” . . . Appellant contends that the Full Faith and Credit Clause, Art. IV, § 1, and the Due Process Clause of the 14th Amendment forbid this.

A superficially attractive answer is that if New York could validly arrive at the [Kilberg] result on a theory of contract or through amendment or construction of its own wrongful death act, the Constitution does not demand a different conclusion because New York attains the same goal through excising or altering a provision of the Massachusetts Act. I say “superficially attractive” since the two processes differ not only conceptually . . . but practically as well. . . . Granted that whenever a New York court enters a judgment, it is enforcing New York “law”, and that New York may often make the same rules that govern transactions within New York apply to events in a sister state, it does not follow that when New York looks to a statute of a sister state as the source of a claim enforceable in its courts, the Constitution allows it to decline, in the Supreme Court’s words, “to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action or which name conditions on which the right to sue depend[s].” Tennessee Coal, Iron & R.R. Co. v. George, 233 U.S. 354, 360 (1914). . . .

An important reason why a forum state may not do this is that it thereby interferes with the proper freedom of action of the legislature of the sister state. . . . The Full Faith and Credit Clause insures that, in making its choice, the legislature creating the claim need not have to weigh the risk that the courts of sister states looking to its “public acts” as a
source of rights will disregard substantial conditions which it has imposed—a calculation that would involve variables so numerous and unpredictable as to preclude any intelligent choice.\textsuperscript{65}

The Supreme Court denied certiorari.\textsuperscript{66} This was unfortunate. Supreme Court review of the constitutional issues separating Judges Friendly and Kaufman might have broadened our understanding of the constraints full faith and credit imposes on choice of law.\textsuperscript{67}

E.

As of 1989, the First Judiciary Act, and the federal judiciary itself, will be two hundred years old. Throughout all this time—and notwithstanding criticism that began before the federal courts themselves began and that has continued almost without let-up to the present day—diversity jurisdiction has been a major component of federal judicial activity.

As of 1988, diversity jurisdiction will have been governed by \textit{Erie} for fifty years. \textit{Erie} has made more difference in the way federal judges handle diversity cases than Professor Corbin anticipated. Professor Corbin felt that \textit{Erie} was "not an order by Brandeis, J., that hereafter Learned Hand, J., must take his law from the words of Finch, J."\textsuperscript{68} But, as \textit{Erie} reaches middle age, Friendly, J., and Wisdom, J., and other conscientious federal judges are quite accustomed to taking their law from the words of the state court judges in the states in which they sit.\textsuperscript{69} Moreover—and more important—Professor Shulman's post-\textit{Erie

\textsuperscript{65} Id. at 564-65.
\textsuperscript{66} 372 U.S. 912 (1963).
\textsuperscript{67} In the Supreme Court's most recent consideration of the constraints the Constitution imposes on choice of law, the four plurality Justices (Justice Brennan, joined by Justices White, Marshall, and Blackmun) and the three dissenting Justices (Justice Powell, joined by the Chief Justice and Justice Rehnquist) appeared to agree that full faith and credit and due process impose the same demands. Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). In lonely concurrence (Justice Stewart did not participate), Justice Stevens acknowledged that there was substantial authority for the proposition that these two limitations are "indistinguishable." \textit{Id.} at 321. But Justice Stevens went on to argue that the two constitutional mandates are rooted in very different policies and should be kept distinct in analysis and application. The point is an important one, with significant implications. It is to be hoped that the Court will find an early opportunity to revisit the nexus between full faith and credit and choice of law.
\textsuperscript{68} See supra note 37 and accompanying text.
\textsuperscript{69} Adopting the colorful simile of his late colleague, Judge Jerome Frank, Judge Friendly has said that "when the state law is plain, the federal judge is reduced to a 'ventriloquist's dummy to the courts of some particular state.'" H. FRIENDLY, supra note 2, at 142 (quoting Judge Frank's opinion in Richardson v. Commissioner, 126 F.2d 562, 567 (2d Cir. 1942)). The job of a federal judge is very different when the
reassurance that "[f]ederal judges may still analyze, expose, criticize or excoriate the [applicable state court] rule" is not often vindicated in practice. Most federal judges do not relish skewering an unwise but clearly authoritative state court rule except in those rare instances, of which the dissent by Friendly, J., in *Pearson* is a notable example, in which the unwisdom of the state court rule is deemed so egregious as to be unconstitutional.

What *Erie* has accomplished is to cure the besetting problem noted by Dean Pound's committee in 1914—"the difference in the view which state and federal courts respectively take as to the law applicable to the same case." This was a problem created not by diversity jurisdiction itself but by *Swift v. Tyson*, whose doctrine, as Brandeis succinctly put it, "rendered impossible equal protection of the law." For this accomplishment, primary credit must go to Brandeis. But Holmes, the author of the *Taxicab* dissent, is entitled to a goodly measure of praise. So too is Frankfurter, who persuaded one of his ablest students to write a paper on the beginnings of diversity jurisdiction. And so too is the student, Henry Friendly, who wrote the excellent paper, then clerked for Brandeis in the year of *Taxicab*, and thirty-five years later returned to the lists to put to rout the doubters of *Erie*.

From Henry Friendly's point of view, *Erie* is merely a palliative. If Friendly had his "druthers," diversity jurisdiction—which today accounts for approximately one-fourth of the nationwide civil docket of the federal district courts—would be handed back to the state courts. Friendly came to the brink of so recommending in 1928, in the paper written at the urging of Professor Frankfurter. In 1973, Friendly wrote: "Mr. Justice Frankfurter said that '[a]n Act for the elimination of diversity jurisdiction could fairly be called an Act for the relief of federal courts'. . . . [T]he time for such relief has come." Perhaps so, but there seems little reason to expect that Congress will erect Frank-

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state law is murky. *See, e.g., supra* note 63.

70 *See supra* note 38 and accompanying text.

71 *See supra* note 19 and accompanying text.

72 *See supra* note 30 and accompanying text.

73 Of 224,774 civil cases (not counting land condemnation cases) terminated in district courts in the year ending December 31, 1983, 52,115 were diversity cases. Of the 11,890 civil cases that went to trial, 4556 were diversity cases. *Statistical Analysis and Reports Division, Administrative Office of the United States Courts, Federal Judicial Workload Statistics During the Twelve Month Period Ending December 31, 1983* A 24-25.

74 *See supra* note 2 and accompanying text.

furter's "Act for the relief of federal courts" into law much before the tercentenary of the First Judiciary Act. Until then, federal judges will follow the path charted by Brandeis.

III.

We honor an able lawyer who, in the twenty-five years since his appointment to the bench, has rendered extraordinary judicial service. The manifold skills Judge Friendly has brought to bear on the work of the Second Circuit would have enriched the judicial process at an even higher level of adjudication. One can, however, surmise that, if Henry Friendly had for these past many years been a Justice, he would not have undertaken more than a handful of the numerous scholarly works which have comprised so brilliant a counterpoint to his hundreds of circuit court opinions. It is true that, as noted at the beginning of this essay, a few renowned American judges have also been scholars of great consequence. But of these only Story—in a far more leisurely era—carried on sustained scholarly endeavors while serving on the Supreme Court.

An exemplary judge and scholar, Henry Friendly may fittingly appropriate to his own use the words of Robert Frost:

My object in living is to unite
My avocation and my vocation
As my two eyes make one in sight.78

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