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FEDERAL INTERPRETATION OF STATE LAW

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I.

A federal system of government inherently raises difficult problems of cooperation. The demarcation of legislative powers between the central and state units, the overlapping of national and local administrative authorities, the interplay of federal and regional political parties and electoral machinery all produce situations that call for constant readjustments. Federalism, though undoubtedly desirable in a large and varied country, inevitably brings along with itself conflicts of power and jurisdiction; and these very clashes give birth to an intricate maze of delicate and finespun accommodations.

Federalism is generally characterized by a dual court system. Although it is possible for state courts to act as federal tribunals, and although this system was actually proposed in the first American Congress,¹ most federations, because of the desirability of strength in the central government, have superimposed a system of federal courts upon the already existing hierarchy of state tribunals.² And whenever this constitutional machinery is created, there inevitably arises the intricate problem of allocating functions to each set of courts. Moreover, since the amount of work performed by the courts exceeds that of the legislatures, since the courts deal not with general economic and social objectives alone, but with concrete cases involving rights and liabilities of definite individuals, and since party accommodations are far fewer in the judiciary than in the more political branches of the government, the points of conflict between state and federal tribunals accordingly become

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1. Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 65.

2. See, on the general problem, MOGI, *PROBLEM OF FEDERALISM* (1931).

more numerous and much sharper than even the clashes of legislative power. Similarly, although in the administrative branches of government a large amount of harmonious cooperation smooths over the innumerable points at which conflicts between central and local powers occasionally occur, no such working agreements have characterized the relations of our federal and state judges.

The framers of the Constitution, in their attempt at the distribution of judicial powers, gave to the federal courts a significant share. To them they allocated all cases involving a federal question—namely, “all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority”³ and all cases of admiralty and maritime jurisdiction—and controversies concerning various types of parties, the most important of such controversies being those in which the United States Government itself is a party, those between two or more states, and those between citizens of different states.⁴ Article III of the Constitution left the exact organization and powers of the federal judiciary indefinite, and the first Congress in the famous Judiciary Act of 1789⁵ undertook to settle more concretely this problem in federalism. That act provided on the one hand for a review by the United States Supreme Court of state decisions involving rights claimed under the national Constitution, laws, or treaties; and, on the other hand, it required that, in cases involving an interpretation of state law, “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.”⁶ The resulting legal system thus permits state tribunals to interpret federal laws and federal tribunals to interpret state laws. In the former case, by writ of error the Federal Supreme Court can correct a state court’s misinterpretation of the Federal Constitution, statutes, or treaties; in the latter instance, however, no machinery exists to enable a state to rectify a federal judge’s error in determining the meaning of a state law. And herein lies one of the most serious sources of conflict in the federal system.

Federal interpretation of state law occurs primarily in three respects. In the first place, the federal courts have jurisdiction in controversies between citizens of different states where the amount at issue is more than three thousand dollars.⁷ In such cases the federal district court is required to determine and apply the law of the state in which it is sitting. Today the most important diversity cases involve corporations chartered in one state

3. U. S. CONST. Art. III, § 2.

4. *Ibid.*, as amended by the Eleventh Amendment.

5. 1 STAT. 73 (1789), 28 U. S. C. A. § 141 and historical note (1928).

6. 1 STAT. 92 (1789), 28 U. S. C. A. § 725 (1928).

7. 48 STAT. 775 (1934), 28 U. S. C. A. § 41 (1) (Supp. 1937).

and doing business in another. In the second place, where a federal court has assumed jurisdiction on the basis of a federal question and there is involved in the same litigation a non-federal issue, it decides both issues;⁸ however, in the settlement of the non-federal issues the court is required to apply state law. Thus a corporation doing an intrastate business may in the same action sue a competitor both for infringement of patent rights and for unfair competition. And in the third place, the United States Supreme Court has the power to review decisions from state supreme courts involving a federal question,⁹ and it may happen that to determine this federal issue the Court may be required to interpret state constitutional, statutory, or common law. This situation arises most frequently under the contract clause of the Constitution.¹⁰

An adequate understanding of the problems and the conflicts that have resulted from such federal interpretations of state laws demands a review of the factors and influences behind the establishment of the federal judiciary. The Constitution was drafted by representatives of those economic and social classes that suffered from the post-Revolutionary conditions.¹¹ Not one member represented, in his intimate personal economic interests, the small farming or mechanic classes.¹² The agrarian legislature of Rhode Island refused to send delegates to the plutocratic gathering that it suspected the Philadelphia convention would become. Thus Patrick Henry, the populist leader of Virginia and a delegate from that state, "smells a rat" and refused to attend.¹³ The financial and mercantile groups in the new republic had suffered serious losses in the reaction that set in after the separation from England.¹⁴ Under the pressure of the revolutionary natural rights philosophy government had become weak and decentralized. State governments had powerless executives and omnipotent legislatures. The central Government under the Articles of Confederation possessed no authority over the individual nor power to raise taxes and could act only through the states; the Continental Congress accordingly constituted only an ineffectual symbol of a loose union. Colonial independence from Great Britain had meant withdrawal from the benefits, as well as the handicaps, of the British mercantile

8. *Mutual Film Co. v. Industrial Comm. of Ohio*, 215 Fed. 138 (N. D. Ohio, 1914), *aff'd*, 236 U. S. 230 (1915); *Young & Jones v. Hiawatha Gin & Mfg. Co.*, 17 F. (2d) 193 (S. D. Miss. 1927).

9. 45 STAT. 54, 28 U. S. C. A. § 344 (1928).

10. U. S. CONST. ART. I, § 10.

11. JACOBSON, *DEVELOPMENT OF AMERICAN POLITICAL THOUGHT* (1932) 168.

12. "Too much emphasis cannot be put upon the fact that the mercantile and financial interests were the weightiest of all the influences for the Constitution; the debtor and agricultural interests the strongest groups against it. It deserves repetition, for a proper understanding of the craft and force practiced by both sides in the battle over ratification, that those who owed debts were generally against the Constitution, and practically all to whom debts were due were for the new Government." 1 BEVERIDGE, *LIFE OF JOHN MARSHALL* (1919) 312. See BEARD, *ECONOMIC INTERPRETATION OF THE CONSTITUTION* (1913) 149-51.

13. BEARD, *RISE OF AMERICAN CIVILIZATION* (1930) 311.

14. JACOBSON, *op. cit. supra* note 11, at 164-168.

system. Since the impotent central Government could not negotiate favorable trade treaties with other European powers, the loss of foreign trade had threatened to wipe out the American merchants. Interstate trade had become even more chaotic: each state, jealous of its neighbors, had attempted by means of tariff walls and restrictive legislation to keep money from going beyond its own boundaries and had set up its own system of currency; the continuous fluctuations in and exchange difficulties of money had seriously discouraged trading; and the hostile attitude of the state courts toward non-resident creditors had frequently prevented the collection of debts contracted in interstate trade.

Chaotic finances likewise characterized the post-Revolutionary period. In an effort to finance the Revolution, the Continental Congress and the states had floated large bond issues and had printed much paper money. Both the securities and the money, unsupported save by the hope of victory and of possible repayment, depreciated rapidly in value. Thomas Jefferson recorded that he had sold some land before the issuance of paper currency, but that he had not received the money until "it was not worth Oak leaves".¹⁵ This depreciation of money resulted in a significant struggle between the creditor and debtor classes, in which, naturally, the former lost heavily. The debtor-creditor conflict, which had begun in pre-Revolutionary days, now took an acute form; and constant agitation, occasionally successful, in favor of fiat money, lax bankruptcy acts, and instalment laws punctuated politics. The depreciation of public securities and paper currencies led to speculation in bonds, money, and land certificates. The moneyed men gambled on the possibility of repayment; but as long as the central Government could not raise sufficient revenues, as long as the agrarian debtors controlled state legislatures, and as long as the central Government was too weak to build roads into the West or to afford protection to settlers against Indian attacks, the market for those securities remained depressed.

While American historians have long written the story of the Constitutional Convention as an epic of conflict and compromise, nevertheless virtual unanimity existed in its essential objectives. The delegates, members of financial, mercantile, and large planter classes, differed only in the means of achieving their common ends. Not the conflicts and compromises, but the uniform distrust of democracy and the universal desire for stability stand out in clear perspective.¹⁶ And the American Constitution is the result of the economic and political situation existing in the country after the Revolution and of the attitude which that situation inspired in the delegates at Philadelphia. Being practical men of affairs, the framers proceeded to write into the

15. From a letter to Meusnier, January 24, 1786, published in 4 JEFFERSON, WORKS (Ford ed. 1894) 138.

16. I BEVERIDGE, *op. cit. supra* note 12, at 252; JACOBSON, *op. cit. supra* note 11, at 169.

Constitution provisions which, they hoped, would eliminate the evils then disturbing their economic well-being. Only a few of the many devices for stability need be mentioned. In order to prevent agrarian state legislatures from passing lenient bankruptcy and instalment laws, the Constitution forbade the states to pass any law impairing the obligation of contracts.¹⁷ In order to provide an agency sufficiently strong to act as a bulwark of the conservative rights against agrarian attacks, the framers created an independent judiciary, chosen for life¹⁸ by what they hoped would be the most conservative organs of the new government—the President and the Senate;¹⁹ and they declared that the Federal Constitution, laws, and treaties should be the supreme law of the land, binding on the judges of every state.²⁰ And in order to enable merchants to collect their interstate debts and to circumvent the discrimination of state courts against non-resident creditors, the new federal courts were given jurisdiction in controversies between citizens of different states.²¹

The judiciary section of the Constitution was subject to the most devastating attacks by the anti-Federalists,²² and, as Beveridge has stated, it was "the weakest part of the Constitutionalists' battle line".²³ Even after the Constitution was ratified, the Federalists realized that the dangers of dissolution had not passed. The first Judiciary Act consequently was a compromise measure so framed as to satisfy those who insisted upon a minimum of powers and jurisdiction for the federal courts.²⁴ The bill underwent significant changes in order to appease the opponents of federal centralization.

17. U. S. CONST. Art. I, § 10.

18. *Id.* at Art. III, § 1.

19. *Id.* at Art. II, § 2.

20. *Id.* at Art. VI.

21. *Id.* at Art. III, § 2.

22. In the Virginia ratifying convention, George Mason launched a bitter and effective criticism of the diversity jurisdiction of the federal courts. "If I have a controversy with a man in Maryland—if a man in Maryland has my bond for £100, are not the state courts competent to try it? Is it suspected that they would enforce the payment if unjust, or refuse to enforce it if just? The very idea is ridiculous. What, carry me a thousand miles from home—from my family and business, where, perhaps it will be impossible for me to prove that I paid it? Perhaps I have a respectable witness who saw me pay the money, but I must carry him one thousand miles to prove it, or be compelled to pay it again. Is there any necessity for this power? It ought to have no unnecessary or dangerous power. Why should the federal courts have this cognizance? Is it because one lives on one side of the Potomac, and the other on the other? Suppose I have your bond for £1000—if I have any wish to harass you, or if I be of a litigious disposition, I have only to assign it to a gentleman in Maryland. This assignment will involve you in trouble and expense. . . . Thus, sir, it appears to me that the greater part of these powers are unnecessary, and dangerous, as tending to impair and ultimately destroy the state judiciaries, and by the same principle, the legislation of the state government." 3 ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (2d ed. 1836) 526-7. And a prominent Massachusetts opponent of the Constitution, James Winthrop, warned: "Causes of all kinds between citizens of different States are to be tried before a Continental Court. The Court is not bound to try it according to the local laws where the controversies happen; for in that case it may well be tried in the State Court. The rule which is to govern the new Courts must therefore be made by the Court itself, or by its employees, the Congress." Warren, *supra* note 1, at 84.

23. 1 BEVERIDGE, *op. cit. supra* note 12, at 444.

24. Warren, *supra* note 1, at 54.

Two changes are of particular importance for the purposes of this article. In the first place, the original draft contained no requirement of conformity to state decisions; the much litigated Section 34 of the Act—"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"²⁵—was inserted as a Senate amendment. And in the second place, the interlinear changes in Ellsworth's own draft of this amendment before its actual introduction indicate that the term "laws" used in this Section was intended to include the common as well as the statutory law of a state.²⁶

II.

The judicial history of Section 34 of the Judiciary Act of 1789 is intimately related to the problem of federal interpretation of state law in cases arising under the diversity clause of the Constitution. In fact, such an analysis offers an invaluable introduction to the whole study of federal interpretation of state law.

Early in its history the Supreme Court decided that in construing local statutes and unwritten law respecting real property the federal courts are governed by the decisions of the state tribunals.²⁷ In 1832, in *Green v. Neal's Lessee*,²⁸ the Court went so far as to declare that in cases of changing state decisions the federal courts were bound by the latest pronouncement from the supreme state tribunal. This case, which stands in sharp contrast to *Swift v. Tyson*²⁹ and *Gelpcke v. Dubuque*,³⁰ concerned a reversal by the Tennessee court of its doctrine concerning the relationship of the statute of limitations and the acquisition of land titles by adverse possession; the reversal occurred after the Federal Supreme Court had already followed the earlier interpretation. It was argued by counsel that if a state changes its rule, it does not comport with the consistency or dignity of the Supreme Court to adopt the new rule, since such a course would recognize that the state courts possessed a power to revise the decisions of the Supreme Court and to fix rules of property differing from the latter's solemn adjudications. Counsel also argued—and here the argument seems to foreshadow *Swift v.*

25. 1 STAT. 92 (1789), 28 U. S. C. A. § 725 (1928).

26. Warren, *supra* note 1, at 51, 85-88. Warren expressed the opinion that: "It may well be contended that had the Judges of the Supreme Court been familiar with these changes and with the history of the progress of the Bill in the Congress, several of the leading cases before that Court might have been decided differently. . . . Had Judge Story seen this original draft of the amendment, it is almost certain that his decision [*Swift v. Tyson*] would have been the reverse of what it was." *Id.* at 52.

27. *Slipp v. Miller's Heirs*, 2 Wheat. 316 (U. S. 1817); *Thatcher v. Powell*, 6 Wheat. 119 (U. S. 1821); *Elmendorf v. Taylor*, 10 Wheat. 152 (U. S. 1825); *Shelby v. Guy*, 11 Wheat. 361 (U. S. 1826); *Jackson ex dem. St. John v. Chew*, 12 Wheat. 153 (U. S. 1827).

28. 6 Pet. 291 (U. S. 1832).

29. 16 Pet. 1 (U. S. 1842).

30. 1 Wall. 175 (U. S. 1863).

Tyson—that a federal court, when sitting within a state, is the court of that state and, as such, has an equal right with the state courts to fix the construction of the local law. The Court, through Mr. Justice McLean, rejected this reasoning and instead announced:

“On all questions arising under the Constitution and laws of the Union, this court may exercise a revising power; and its decisions are final and obligatory on all other judicial tribunals, state as well as federal. . . . But the case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a state, should be considered as final by this court; not because the state tribunal, in such a case, has any power to bind this court; but because . . . ‘a fixed and received construction by a state in its own courts, makes a part of the statute law.’

The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favour of following it in the second, if the state tribunals should change the construction. . . . Are not the injurious effects on the interests of the citizens of a state, as great, in refusing to adopt the change of construction, as in refusing to adopt the first construction. A refusal in the one case as well as in the other, has the effect to establish, in the state, two rules of property.

. . . The exposition forms a part of the local law, and is binding on all the people of the state, and its inferior judicial tribunals. It is emphatically the law of the state; which the federal court, while sitting within the state, and this court, when a case is brought before them, are called to enforce.

. . . There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply, where the judicial branch of the state government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute, from what had at first been given to it.”³¹

In the light of this opinion the decision in *Swift v. Tyson*, rendered only ten years later, can be considered not otherwise than as an innovation, even a revolution, in the judicial aspects of American federalism. That case was brought in the federal court for New York by an indorsee of a bill of exchange against the acceptor who had been defrauded by the drawer, and turned upon the question whether a pre-existing debt constituted a valuable consideration applicable to negotiable instruments. The New York courts had held that it did not; but this rule the Supreme Court rejected. The New York courts, Mr. Justice Story indicated, did not base their doctrine on any local statute or fixed local usage, but rather deduced it from the general principles of commercial law; and, without examining into the history of Section 34 of the Judiciary Act of 1789, he contended that the term “the laws of the

31. 6 Pet. at 298-299.

several states" used in that section, meant only the enactments promulgated by legislative authority or long-established local customs having the force of laws.³² To his mind judicial decisions did not constitute laws, but were only evidence of what the laws were—evidence, moreover, which the courts themselves re-examined, reversed, and qualified whenever they found this evidence to be defective, ill-founded, or otherwise incorrect. And without a single citation to substantiate him, Story declared that:

"It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to 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 true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."³³

The fundamental postulate of Story's argument—that courts discover but do not make law—could not and did not long remain the orthodox doctrine of the Supreme Court. The Court abandoned this unrealistic jurisprudence in *Gelpcke v. Dubuque* and *Ohio Life Ins. & Trust Co. v. Debolt*.³⁴ Gray, in his *Nature and Sources of the Law*,³⁵ gives an interesting and plausible explanation of *Swift v. Tyson*'s emasculation of Section 34. Story, who in 1842 was the oldest judge on the bench in terms of service and a man of great learning and of reputation for learning greater even than the learning itself, was then occupied in writing a book on bills of exchange. This, Gray believed, would of itself lead him to dogmatize on the subject, especially so since he was fond of glittering generalities and was possessed by a restless vanity.

Since *Swift v. Tyson* the Supreme Court has expanded Story's doctrine of independent federal judgments on subjects of commercial law and general jurisprudence until Section 34 has been virtually nullified. Thus, if the state court vacillates in its interpretations, even of a statute, the federal tribunals

32. 16 Pet. 1, 18 (U. S. 1842).

33. *Id.* at 18-19.

34. 16 How. 416 (U. S. 1853).

35. (2d ed. 1927) 253.

are not bound by the latest state decision.³⁶ Where contracts have been entered into and rights have accrued under a particular set of state decisions, or when there has been no local decision, the federal courts adopt their own interpretation of the law applicable to the case, although a different interpretation may have been adopted by the state courts after such rights had accrued.³⁷ The wide scope of independent federal interpretation of state law is indicated by the following few examples: the federal courts are not bound by state decisions on the construction of insurance policies,³⁸ the construction of a will³⁹ or of a deed,⁴⁰ the validity of an alleged contract,⁴¹ the responsibility of a landowner for a dangerous area abutting on a highway,⁴² contract exemption by a carrier for negligent carriage,⁴³ construction of a contract of carriage by a carrier,⁴⁴ fellow servant rule,⁴⁵ liability of a carrier to a passenger for punitive damages,⁴⁶ the determination of what constitutes public use of land,⁴⁷ liability for damages caused by dynamite explosion,⁴⁸ and the determination of the questions whether negotiable bond coupons bear interest after maturity and at what rate.⁴⁹ A federal court has held, contrary to the state decisions in the state of the tribune,⁵⁰ that the negligence of an automobile driver cannot be imputed to a passenger in his car;⁵¹ the court stated that it need not follow the state rule, but merely "the trend of authority throughout the country".⁵² This same federal court decided, contrary to the state court,⁵³ that master-servant relationship did not exist between an automobile sales company and one of its salesmen working on a commission basis, with the result that a plaintiff injured by the negli-

36. *Gelpcke v. Dubuque*, 1 Wall. 175 (U. S. 1863); *Douglas v. Pike County*, 101 U. S. 677 (1879); *Burgess v. Seligman*, 107 U. S. 20 (1882); *Bolles v. Brimfield*, 120 U. S. 759 (1887); *Stutsman County v. Wallace*, 142 U. S. 293 (1892); *Knox County v. Ninth Nat'l Bank*, 147 U. S. 91 (1893); *Loeb v. Columbia Twp. Trustees*, 179 U. S. 472 (1900); *Julian v. Central Trust Co.*, 193 U. S. 93 (1904); *Gundall v. Manhattan Ry.*, 205 Fed. 410 (S. D. N. Y. 1913); *Dernberger v. Baltimore & Ohio Ry.*, 243 Fed. 21 (C. C. A. 4th, 1917); *Ware County v. National Surety Co.*, 17 F. (2d) 444 (S. D. Ga. 1927).

37. *Burgess v. Seligman*, 107 U. S. 20 (1882).

38. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495 (U. S. 1842); see *Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 14, 15 (1900). But see *Mutual Life Ins. Co. v. Johnson*, 293 U. S. 335, 339 (1934), 83 U. OF PA. L. REV. 523 (1935), 44 YALE L. J. 1113.

39. *Lane v. Vick*, 3 How. 464 (U. S. 1845).

40. *Foxcroft v. Mallett*, 4 How. 353 (U. S. 1846).

41. *Oates v. National Bank*, 100 U. S. 239 (1879).

42. *Chicago v. Robbins*, 2 Black 418 (U. S. 1863).

43. *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397 (1889); see *Railroad Co. v. Lockwood*, 17 Wall. 357, 367 (U. S. 1873).

44. *Myrick v. Michigan Cent. R. R.*, 107 U. S. 102 (1882).

45. *Baltimore & Ohio R. R. v. Baugh*, 149 U. S. 368 (1893).

46. *Lake Shore & M. S. Ry. v. Prentice*, 147 U. S. 101 (1893).

47. *Yates v. Milwaukee*, 10 Wall. 497 (U. S. 1870).

48. *Exner v. Sherman Power Constr. Co.*, 54 F. (2d) 510 (C. C. A. 2d, 1931).

49. *Sears v. Greater N. Y. Development Co.*, 51 F. (2d) 46 (C. C. A. 1st, 1931).

50. *Jewell v. Rogers Twp.*, 208 Mich. 318, 175 N. W. 151 (1919); *Lett v. Summerfield & Hecht*, 239 Mich. 699, 214 N. W. 939 (1927).

51. *Commercial Elec. Supply Co. v. Greschner*, 59 F. (2d) 512 (C. C. A. 6th, 1932).

52. *Id.* at 514.

53. *Standard Motor Sales Co. v. Miller*, 30 Ohio App. 7, 164 N. E. 55 (1928).

gence of the salesman could not collect from the company.⁵⁴ In these two automobile cases the ironical consequence of independent federal judgment is that, had citizens of the same state also been injured in these accidents, they could have collected their damages in the state courts. The court has maintained that, in the absence of local statute or usage, the question whether prior notice to the debtors of the later of two assignments of an account receivable subordinates the rights of the earlier to those of the later assignee is one of general law⁵⁵—this despite the fact that in Massachusetts, the state of the tribunal, in the absence of estoppel the claim of the first assignee will prevail against that of a subsequent assignee regardless of notice to the obligor.⁵⁶ And in *Kuhn v. Fairmont Coal Co.*⁵⁷ the Supreme Court stated that it need not follow the state rule⁵⁸ that there is no implied term in a contract for the sale of substrata coal that the buyer leave enough coal in place to support the surface of the land.⁵⁹ In the field of labor law, especially prior to the enactment of the Norris-LaGuardia and National Labor Relations Acts, the gap between federal and state interpretations of local law had widened into such a chasm that the federal courts seldom bothered to examine the state holdings.⁶⁰

While state courts differ as to the right of strikers to engage in "peaceful picketing", the tendency in the more advanced courts is to permit this technique of the labor struggle. The Supreme Court, by forming an independent judgment, has heretofore too frequently followed a reactionary trend in labor law. In *American Steel Foundries Co. v. Tri-City Trades Council*,⁶¹ although apparently the federal court secured jurisdiction through

54. *Luff Co. v. Capece*, 61 F. (2d) 635 (C. C. A. 6th, 1932).

55. *Salem Trust Co. v. Manufacturers' Fin. Co.*, 264 U. S. 182 (1924).

56. *Id.* at 191, citing *Putnam v. Story*, 132 Mass. 205 (1882).

57. 215 U. S. 349 (1910).

58. *Griffin v. Fairmont Coal Co.*, 59 W. Va. 480, 53 S. E. 24 (1905).

59. Mr. Justice Harlan rationalized this refusal to follow *Green v. Neal's Lessee*, 6 Pet. 291 (U. S. 1832), and the consequent federal invasion into the field of real property by arguing that, where the state law has not been settled or where contracts are entered into and rights have accrued under a particular state of the local decisions, or where there have been no state decisions on the particular question involved, then the federal courts may properly claim the right to give effect to their own judgment as to the state law applicable to the case, even though a different view has been expressed by the state court after the rights of the parties have accrued. In substance, he advanced the novel proposition in jurisprudence that state judicial decisions may not be retrospective. 215 U. S. 349, 357-370 (1910). It is interesting to note that the circuit court of appeals, upon the return of the case to it, decided to adopt the West Virginia rule. 179 Fed. 191 (C. C. A. 4th, 1910).

60. See *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811 (C. C. N. D. Ohio, 1897); *Pope Motor Car Co. v. Keegan*, 150 Fed. 148 (C. C. N. D. Ohio, 1906); *Goldfield Consol. Mines Co. v. Goldfield Miners' Union*, 159 Fed. 500 (C. C. Nev. 1908); *Kolley v. Robinson*, 187 Fed. 415 (C. C. A. 8th, 1911); *Vonnegut Machinery Co. v. Toledo Machine & Tool Co.*, 263 Fed. 192 (N. D. Ohio, 1920); *Buyer v. Guillan*, 271 Fed. 65 (C. C. A. 2d, 1921); *Western Union Telegraph Co. v. International Brotherhood of Elec. Workers*, 2 F. (2d) 993 (N. D. Ill. 1924), *aff'd*, 6 F. (2d) 445 (C. C. A. 7th, 1925).

61. 257 U. S. 184 (1921). The circuit court of appeals had modified the district court's decree by striking out a restraint against "persuasion" and by inserting after a restraint against picketing the limitation "in a threatening or intimidating manner." 238 Fed. 728 (C. C. A. 7th, 1916). The Supreme Court sustained the first modification and reversed the sec-

diversity of citizenship and although, in legal theory, it was to determine the Illinois law on picketing, the Supreme Court gave no special attention to the Illinois decisions; rather it dealt with them along with a large group of cases from other states and from the federal courts, and it arrived at its conclusions independently of the Illinois law.

Where the federal courts acquire jurisdiction in a labor case on the basis of the Sherman or Clayton acts, and where a conspiracy to restrain trade is proven, an injunction is issued or money damages awarded. The doctrine of conspiracy, however, is nowhere defined or outlined in Congressional legislation; it is rather a concept derived from the common law. Thus the federal and state courts within a single commonwealth may differ in their conclusions as to what constitutes common law conspiracy or unlawful combination in restraint of trade. This situation is well brought out in the case of *Buyer v. Guillan*.⁶² Employees of a steamship company, union members, refused to check, weigh, or load merchandise offered by the complainant for interstate shipment because the goods were brought to the pier by a transfer company which employed both union and non-union men. The court held that an agreement among longshoremen and others concerned with the handling of merchandise shipped by water at New York not to handle any merchandise transported or in any way operated on by a company that refused to recognize unions, constituted an unlawful combination in restraint of interstate commerce contrary to the Sherman Act. The defendants contended and the district court held that a New York case applied,⁶³ which declared that a combination whose primary interest was the protection of their own interests, so as to establish complete unionization of longshore work not accompanied by violence or intimidation and not aimed at the gratification of malice, was lawful. But the circuit court, on the basis of the *Duplex Printing* case,⁶⁴ refused to accept this New York ruling. In an injunction⁶⁵ against picketing in a St. Louis building strike, the federal cir-

ond on the ground that the very term picketing conveyed a "necessary element of intimidation" (257 U. S. at 207); and by the final decree the strikers were specifically limited to one representative at each mill gate.

62. 271 Fed. 65 (C. C. A. 2d, 1921); cf. *Quinlivan v. Dail-Overland Co.*, 274 Fed. 56 (C. C. A. 6th, 1921).

63. *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582 (1917).

64. *Duplex Printing Press Co. v. Deering*, 254 U. S. 443 (1921).

65. *Kolley v. Robinson*, 187 Fed. 415 (C. C. A. 8th, 1911). A similar disregard of state law occurred in the case of *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811 (C. C. N. D. Ohio, 1897), where the court enjoined picketing; the federal judge handed down a lengthy opinion in which he cited federal, state, and English cases, but not a single Ohio decision.

Western Union Telegraph Co. v. International Brotherhood of Elec. Workers, 2 F. (2d) 993 (N. D. Ill. 1924), *aff'd*, 6 F. (2d) 444 (C. C. A. 7th, 1925), likewise offers an interesting example of federal misinterpretation of state law. The complainant, basing its petition on conspiracy to interfere with interstate commerce and on diversity of citizenship, sought to enjoin the defendants from interfering with its installation of call-boxes in Chicago buildings on an open-shop basis. The major part of the district court's opinion, granting the injunction, was based upon interference with interstate commerce; but Judge Wilkerson, apparently fearful that the circuit court of appeals might not agree that messenger-boy call-boxes were instruments of interstate commerce, added that: ". . . if it were held that the intent to ob-

cuit court declared that while the workers have the right to strike and may use peaceful methods to persuade others to quit, they may not attempt to induce laborers who have filled the places they vacated to stop work by actual assaults, threats, abusive language, or other means calculated to intimidate them. To support this decision the court cited no Missouri cases, but merely announced that "The authorities are all in harmony" ⁶⁶ In its interpretation of industrial negligence law, the Supreme Court has likewise disregarded state holdings. Thus it has been held that a railroad employe engaged in a repair yard is a fellow servant of a switching engine crew engaged in running into the yards cars needing repairs. ⁶⁷

III.

The doctrine, problems, and consequences of independent federal interpretation of state law can be best analyzed through a study of the famous *Railroad Aid Bond* cases that crowded the Supreme Court docket during the third quarter of the last century. Exponents of the *Swift v. Tyson* rule have pointed to this set of decisions as indicating its value in the economic development of the country. The passage of time and the resulting cooling of the temper of that litigation enable us to examine more detachedly the interest in conflict and the judicial attitudes and dogmas that those cases stimulated, and we can now clearly see through such analysis the legal evils in independent federal interpretation of state law.

Governmental largess stimulated the early construction of railroad systems. While engineers might survey mountain passes and mechanical in-

struct interstate commerce is not established, a case for equitable relief against an unlawful boycott is made out, in my opinion, in view of the diversity of citizenship of the parties." *Ibid.* And in support of his conclusion, he cited, but did not discuss, four Illinois cases, not one of which was to the point. The first, *Carlson v. Carpenter Contractors' Ass'n*, 305 Ill. 331, 137 N. E. 222 (1922), awarded damages to an employe because contractors and employes agreed not to furnish material to union men or to those employing union labor; the second, *Wilson v. Hey*, 232 Ill. 389, 83 N. E. 928 (1908), was an injunction restraining a teamsters' union from placing the complainant's name on its "unfair list"; the third, *Franklin Union v. People*, 220 Ill. 355, 77 N. E. 176 (1906), concerned contempt proceedings where union officials violated an injunction and the issue at controversy did not involve the right to issue the injunction; and the fourth case, *Chicago, W. & V. Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770 (1905), was a criminal charge against coal companies for combination to prevent competition in the sale of coal.

A similar but more far-reaching illustration of federal misinterpretation of state labor law is the now famous case of *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229 (1917). Although the circuit court of appeals had based its jurisdiction on interference with interstate commerce, the Supreme Court grounded it entirely on diversity of citizenship and dealt with the case as a common law controversy. And to support the injunction against persuading employes to leave their jobs, the Court cited only one West Virginia precedent, *Thacker Coal Co. v. Burke*, 59 W. Va. 253, 53 S. E. 161 (1906), which had been decided on a demurrer and in which, consequently, the element of malice had been supplied by the averments of the complaint and had been admitted by the demurrer.

66. 187 Fed. at 417.

67. *Beutler v. Grand Trunk Ry.*, 224 U. S. 85 (1912); cf. *Baltimore & Ohio R. R. v. Baugh*, 149 U. S. 368 (1893). State decisions reaching a contrary result are *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57, 29 N. E. 186 (1885); *Indiana, I. & I. R. R. v. Otstot*, 212 Ill. 429, 72 N. E. 387 (1904).

ventors solve technical problems, the financiers experienced difficulties in enlisting the capital essential for surveying and purchasing rights of way, grading, laying rails, buying equipment, and keeping it rolling.⁶⁸ Meanwhile, communities that had envisaged a high plateau of prosperity at the end of the rails insistently demanded railroad construction. Thus "Public credit could rush in where private feared to tread".⁶⁹ The Federal Government donated to the railroads princely portions of the public domain; the states gave gifts of money as well as of land, or guaranteed the interest on railroad securities; and local units—cities, counties, towns, and townships—subscribed to railroad stock and gave, in return, their municipal bonds. The aggregate amount of such local subsidies has never been accurately determined, but undoubtedly it ran into millions.⁷⁰

Various motives prompted these local subsidies. Communities desired trade expansion and looked upon railroad construction as a device either for opening new markets for their products or for tapping the resources of the hinterland. Among the larger cities a desire to secure trade advantages over competitive communities stimulated governmental subsidies and railroad construction. In some instances the communities believed that railroad stock would pay dividends sufficiently high to relieve them from taxation.⁷¹

While there is no way to measure accurately the benefits from local subsidies, there is, on the other hand, ample evidence to indicate that this device for financing was of questionable value to the railroads and was productive of extravagance and fraud.⁷² The subsidizing of railroad construction attracted financial buccaneers who organized companies primarily to obtain the governmental largess and who hired lawyers to solicit favors from the state legislatures and municipal councils. Money was obtained from the public treasury through all sorts of misrepresentations. Thus in some instances the government offered as a subsidy half the amount the company raised through private stock subscription; and to increase the subsidy the directors bought rights of way and equipment, frequently from themselves, and paid for that property by the issuance of stock; and occasionally, after receiving the governmental donation, the railroad would sell back the land in return for the stock certificates. Where government subsidies were based upon railroad mileage, the companies purchased or leased, rather than con-

68. See KIRKLAND, HISTORY OF AMERICAN ECONOMIC LIFE (1932) 386.

69. *Ibid.*

70. *Ibid.* In 1871 the local debts of Kentucky incurred in aiding railroad construction reached almost \$14,000,000; those of Illinois, in 1873, over \$16,000,000; Wisconsin, in 1874, \$8,500,000; New York, over \$30,000,000; Iowa, as early as 1856, in excess of \$7,000,000. CLEVELAND AND POWELL, RAILROAD PROMOTION AND CAPITALIZATION IN THE UNITED STATES (1909) 204.

71. *Id.* at 206-207.

72. "If some lines were built earlier than would have been possible without public aid, many others were constructed over routes which could not furnish enough traffic to support them. This not only involved a great loss of public money, but it was in large part responsible for much of the subsequent controversy over the matter of rates." *Id.* at 232.

structed, the necessary mileage. Where the state legislature authorized the local governments to subscribe to railroad stock, either with or without a popular referendum, the railroad promoters employed high pressure salesmanship, misled the towns as to the exact location of the route, deluded the farmers by extravagant promises of increased land and market values, and undoubtedly, in some cases, resorted to bribes. A portion of these subsidies, ironically enough, went to pay the costs of state and local lobbying for government aid.⁷³

When a railroad received local bonds, it would sell them in New York or in Europe, or in other available markets, and often at a considerable loss from discounts and commissions,⁷⁴ despite the frequent governmental prohibition against the sale of the bonds below par. In other cases, the railroads used the bonds to pay the contractors and the manufacturers of equipment; or the railroad directors would sell the bonds to themselves at a discount. While the financial history of these bonds unfortunately is incomplete, the facts given in some of the federal cases indicate that speculators bought up these securities at low prices⁷⁵ and that in some instances the speculators were railroad directors.⁷⁶ Having secured governmental funds at little cost to themselves, the financial adventurers in some cases never built the roads;⁷⁷ or, where the subsidy was conditioned upon the construction of the railroad, they built and then soon abandoned the road,⁷⁸ permitted its foreclosure,⁷⁹ or sold it to some other corporation.⁸⁰ In any case the local governments' stock in the railroad company became worthless, although they had to continue the interest payments on the bonds they issued in exchange for the stock.

73. *Id.* at 232-6. There were a number of instances in which the local officials violated the terms of the state statute concerning the procedure for issuing bonds or where they falsified the recitals on the bonds. See *infra* notes 95, 96, 106, 109, 111.

74. *Id.* at 208.

75. See *Mercer County v. Hackett*, 1 Wall. 83 (U. S. 1863); *Anthony v. Jasper County*, 101 U. S. 693 (1879); *Stewart v. Lansing*, 104 U. S. 505 (1881); *Lewis v. Shreveport*, 108 U. S. 282 (1883).

76. See *Bissell v. Jeffersonville*, 24 How. 287 (U. S. 1860); *Lexington v. Butler*, 14 Wall. 282 (U. S. 1871); *Greene County v. Daniel*, 102 U. S. 187 (1880); *Norton v. Dyersburg*, 127 U. S. 160 (1887); *Hill v. Memphis*, 134 U. S. 198 (1889); *POOR'S MANUAL* (1870-1871) 219, (1875-1876) 416, 479, 708.

77. See *Woods v. Lawrence County*, 1 Black 386 (U. S. 1861); *East Lincoln v. Davenport*, 94 U. S. 801 (1876); *Harter v. Kernochan*, 103 U. S. 562 (1880); 1 SMYTHE, *OBSCURE AMERICAN SECURITIES AND CORPORATIONS* (1904) 358.

78. See *Norton v. Dyersburg*, 127 U. S. 160 (1887); *Young v. Clarendon Twp.*, 132 U. S. 340 (1889); *Rich v. Mentz Twp.*, 134 U. S. 632 (1889); 1 SMYTHE, *op. cit. supra* note 77, at 162, 457, 561, 907.

79. See *St. Joseph Twp. v. Rogers*, 16 Wall. 644 (U. S. 1872); *Commissioners of Douglas County v. Bolles*, 94 U. S. 104 (1876); *Scotland County v. Thomas*, 94 U. S. 682 (1876); *Cass County v. Johnston*, 95 U. S. 360 (1877); *Warren County v. Marcy*, 97 U. S. 96 (1877); *Schuyler County v. Thomas*, 98 U. S. 169 (1878); *Empire v. Darlington*, 101 U. S. 87 (1879); *Taylor v. Ypsilanti*, 105 U. S. 60 (1881); *Kirkbride v. LaFayette County*, 108 U. S. 208 (1883); *Jonesboro v. Cairo & St. Louis R. R.*, 110 U. S. 192 (1884); *Enfield v. Jordon*, 119 U. S. 680 (1887); *Hill v. Memphis*, 134 U. S. 198 (1890); 1 SMYTHE, *op. cit. supra* note 77, at 150, 469, 622, 659.

80. See *Nugent v. Supervisors*, 19 Wall. 241 (U. S. 1873); *Scotland County v. Thomas*, 94 U. S. 682 (1876); *East Lincoln v. Davenport*, 94 U. S. 801 (1876); *Wilson v. Salamanca*, 99 U. S. 499 (1878); *Harter v. Kernochan*, 103 U. S. 562 (1880).

These abuses naturally produced a reaction against government subsidies. In the east this reaction began after the panic of 1837, which had forced many states into financial delinquency;⁸¹ and in the west, with its later railroad development, it came during the Civil War period. State statutes and constitutions either prohibited entirely or rigidly restricted the right of local governments to subscribe to any corporation stock; some commonwealths and municipalities openly repudiated their debts incurred in aiding railroad construction; and the state judges, being popularly elected, strictly construed the earlier local subsidies and the statutes permitting them, so as to reduce municipal liabilities. Faced with the problem of compelling cities, counties, and townships to continue the interest payments on their railroad aid bonds, the purchasers of these securities and the speculators sold or transferred their holdings to citizens of other states, who, on the basis of diversity of citizenship, flocked to the federal courts to bring suit against the local authorities. During the course of a quarter century three hundred cases, arising in almost every state in the Union, were adjudicated by the federal tribunals.⁸²

The two leading cases in this field of litigation are *Gelpcke v. Dubuque*⁸³ and *Mercer County v. Hackett*,⁸⁴ both decided in the same term of the court. Although the former case is found in casebooks on constitutional law under the topic of impairment of the obligation of contract, it is important to point out that the situation therein differs fundamentally from that arising on an appeal from the state supreme court. In the latter type of case, as we shall see, there must be a federal question to form the ground for an appeal to the United States Supreme Court, and that tribunal has reiterated that a change in state decisions does not constitute a federal question under the impairment clause. Thus in *Railroad Co. v. McChure*,⁸⁵ where an appeal took place from the Iowa Supreme Court, which had enjoined the collection of taxes to pay the bond interest, the case was dismissed for want of jurisdiction. In *Gelpcke v. Dubuque* and the cases following it, the federal courts acquired jurisdiction through diversity of citizenship and, therefore without being compelled to examine the constitutional doctrine of impairment of contract obligation, they could safeguard the interests of investors and speculators merely by refusing to follow the state interpretations of local laws; and, upon appeal from an inferior federal court, the Supreme Court could exercise unlimited review of all questions arising in the record. The inevitable consequences of the differences in these doctrines were that foreign creditors received more favorable treatment than domestic bondholders, that the latter at-

81. CLEVELAND AND POWELL, *op. cit. supra* note 70, at 237.

82. 3 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1922) 254.

83. 1 Wall. 175 (U. S. 1863).

84. 1 Wall. 83 (U. S. 1863).

85. 10 Wall. 511 (U. S. 1870).

tempted to transfer their holdings to citizens of other states, and that clashes occurred between state and federal courts.

In *Gelpcke v. Dubuque* the Iowa legislature in 1851 had authorized the city council to borrow money for any public purpose upon a two-thirds vote at a popular referendum, and in 1857 had authorized the city to aid railroad construction. After the city issued its bonds in return for stock in the Dubuque Western Railroad, the Iowa Supreme Court declared the legislation void and the bonds invalid.⁸⁶ In a suit by a foreign citizen in the federal district court and an appeal to the United States Supreme Court, that body refused to follow the Iowa ruling. Mr. Justice Swayne, writing the majority opinion, emphasized that the federal courts are called upon to follow only "the latest settled adjudications". . . . It cannot," he declared, "be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur."⁸⁷ While it is the settled rule to follow the state decisions, there are exceptional cases and, undoubtedly hitting at the Iowa court, he concluded: "We shall never immolate truth, justice, and the law, because a State tribunal has erected an altar and decreed the sacrifice."⁸⁸ Against the majority opinion, Mr. Justice Miller wrote a sharp dissent in which he emphasized the desire for uniformity in interpreting state laws and warned that the Court's decision would lead to judicial conflicts. It is significant to note that the earlier Iowa decisions,⁸⁹ cited by Mr. Justice Swayne to demonstrate that the settled Iowa doctrine at the time of the bond issue favored the validity of railroad aid bonds, related to the authority of counties, and not of cities, to issue them; and since in the middle of the last century standard municipal charters did not exist, city charters were as variant as the cities themselves and, upon the terms of its peculiar charter, the authority of each city government rested.

In *Mercer County v. Hackett* the Pennsylvania legislature in 1852 had authorized the county commissioners to subscribe to the stock of the Pittsburgh & Erie Railroad Company. The act placed restrictions as to the manner of subscription, including a prohibition against the railroad's selling or assigning the bonds at less than par value. In a suit in the lower federal court on the interest payment, the county contended that the statutory conditions had not been complied with and that the railroad had given the bonds to contractors at 66 2/3 cents on the dollar. The Supreme Court refused to follow a state case dealing with the same problem,⁹⁰ and held on behalf of the bondholder. In an opinion written by Mr. Justice Grier, the Court declared that, where the bonds on their face import a compliance with the

86. *Iowa ex rel. Burlington & M. R. R. v. Wapello County*, 13 Iowa 388 (1863).

87. 1 Wall. 175, 205 (U. S. 1863).

88. *Id.* at 206-207.

89. *McMillen v. Boyles*, 6 Iowa 304 (1858); *McMillen v. Lee County*, 6 Iowa 391 (1858).

90. *Mercer County v. Pittsburgh & E. R. R.*, 27 Pa. 389 (1856).

law under which they were issued, a bona fide purchaser for value need not look further than the bond recital. While the decision of the county commissioners might not be conclusive in a direct proceeding to inquire into the facts before the rights and interests of other parties had been attacked, nevertheless, after the authority had been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it was too late, even in a direct proceeding, to question the decision of the commissioners. Evidence that fraud had been practised by the railroad company or that it had negotiated the bonds at less than par value, the court continued, could not defeat the rights of bona fide holders.

In the many cases⁹¹ involving local railroad aid bonds settled by the Supreme Court, usually in favor of the bondholder, that tribunal enunciated a number of doctrines to sustain the validity of the bonds. As the facts varied from case to case, so naturally the emphasis of the Court changed. Where the bonds, when issued, were held valid under the state constitution or statutes, no subsequent legislative or judicial action could impair their obligation.⁹² In some instances the local governments argued that the state legislature never had authority to pass the act enabling local subsidies; usually the Court, through its independent examination of state law, would sustain the legislation.⁹³ Where it was contended that the state decisions declared such legislation void, the Court curtly announced that it need not follow state decisions on negotiable instruments, since they came within the purview of commercial law and general jurisprudence.⁹⁴ If the defendant argued that the local officials had violated the restrictions of the legislation, which aimed to safeguard the community against collusion between them and the railroad promoters, the Court replied that, since the bonds on their face imported compliance with the statute, the buyer need not look further to determine their

91. The most interesting of these many cases are: *Knox County v. Aspinwall*, 21 How. 539 (U. S. 1858); *Butz v. Muscatine*, 8 Wall. 575 (U. S. 1869); *Lexington v. Butler*, 14 Wall. 282 (U. S. 1871); *Olcott v. Supervisors*, 16 Wall. 678 (U. S. 1872); *Pine Grove v. Talcott*, 19 Wall. 666 (U. S. 1873); *Venice v. Murdock*, 92 U. S. 494 (1875); *Callaway County v. Foster*, 93 U. S. 567 (1876); *Warren County v. Marcy*, 97 U. S. 96 (1877); *Empire v. Darlington*, 101 U. S. 87 (1879); *Roberts v. Bolles*, 101 U. S. 119 (1879); *Harter v. Kernochan*, 103 U. S. 562 (1880); *Thompson v. Perrine*, 103 U. S. 806 (1880); *Moultrie County v. Fairfield*, 105 U. S. 370 (1881); *Enfield v. Jordon*, 119 U. S. 680 (1887); *Stanley County v. Coler*, 190 U. S. 437 (1903).

92. *Gelpcke v. Dubuque*, 1 Wall. 175 (U. S. 1863); *Meyer v. Muscatine*, 1 Wall. 384 (U. S. 1863); *Havemeyer v. Iowa County*, 3 Wall. 294 (U. S. 1865); *Thompson v. Lee County*, 3 Wall. 327 (U. S. 1865); *Riggs v. Johnson County*, 6 Wall. 166 (U. S. 1867); *Olcott v. Supervisors*, 16 Wall. 678 (U. S. 1872); *Douglass v. Pike County*, 101 U. S. 677 (1879); *Taylor v. Ypsilanti*, 105 U. S. 60 (1881).

93. *Meyer v. Muscatine*, 1 Wall. 384 (U. S. 1863); *Sheboygan County v. Parker*, 3 Wall. 93 (U. S. 1865); *Pine Grove v. Talcott*, 19 Wall. 666 (U. S. 1873); *Cass County v. Johnson*, 95 U. S. 360 (1877); *Tipton County v. Locomotive Works*, 103 U. S. 523 (1880).

94. *Olcott v. Supervisors*, 16 Wall. 678 (U. S. 1872); *Pine Grove v. Talcott*, 19 Wall. 666 (U. S. 1873); *Venice v. Murdock*, 92 U. S. 494 (1875); *Roberts v. Bolles*, 101 U. S. 119 (1879); *Thompson v. Perrine*, 103 U. S. 806 (1880); *Taylor v. Ypsilanti*, 105 U. S. 60 (1881); *New Buffalo v. Iron Co.*, 105 U. S. 73 (1881); *Enfield v. Jordon*, 119 U. S. 680 (1887); *Stanley County v. Coler*, 190 U. S. 437 (1903).

validity and the municipality was estopped by the recitals on the bonds.⁹⁵ If it was argued that the railroad had defrauded the community or had never been built, the Court emphasized the necessity of protecting innocent purchasers,⁹⁶ although in some cases the "innocent purchasers" were undoubtedly speculators, the railroad promoters themselves, or their agents.⁹⁷ Where it was argued that the legislature had never specifically granted the local unit authority to issue its bonds to the railroad, the Court replied that this power could be implied from the power to borrow money.⁹⁸ In a few instances, taxpayers had brought actions in the state courts to enjoin the issuance of the bonds, but during the pendency of the suit the local officials had nevertheless, issued the securities; the Court here held that the doctrine of *lis pendens* did not apply to negotiable securities.⁹⁹ The consolidation of the railroad with another between the time of the local stock subscription and the delivery of the bonds did not constitute a defense against the validity of the bonds,¹⁰⁰ nor did the contention that the community's taxable property was insufficient under state law for a valid bond issue.¹⁰¹ And a judgment in the state court against a bondholder on the validity of the same set of securities was not *res adjudicata* against another bondholder suing in the federal court.¹⁰²

95. *Knox County v. Aspinwall*, 21 How. 539 (U. S. 1858); *Moran v. Miami County*, 2 Black 722 (U. S. 1862); *Mercer County v. Hackett*, 1 Wall. 83 (U. S. 1863); *Rogers v. Burlington*, 3 Wall. 654 (U. S. 1865); *Pendleton County v. Amy*, 13 Wall. 297 (U. S. 1871); *Lexington v. Butler*, 14 Wall. 282 (U. S. 1871); *Grand Chute v. Winegar*, 15 Wall. 355 (U. S. 1872); *Lynde v. Winnebago County*, 16 Wall. 6 (U. S. 1872); *St. Joseph Twp. v. Rogers*, 16 Wall. 644 (U. S. 1872); *Coloma v. Eaves*, 92 U. S. 484 (1875); *Venice v. Murdock*, 92 U. S. 494 (1875); *Marcy v. Oswego*, 92 U. S. 637 (1875); *Humboldt v. Long*, 92 U. S. 642 (1875); *Douglas County v. Bolles*, 94 U. S. 104 (1876); *Johnson County v. January*, 94 U. S. 202 (1876); *Henry County v. Nicolay*, 95 U. S. 619 (1877); *Weyauwega v. Alying*, 99 U. S. 112 (1878); *Roberts v. Bolles*, 101 U. S. 119 (1879); *Harter v. Kernochan*, 103 U. S. 562 (1880).

96. See *Mercer County v. Hackett*, 1 Wall. 83 (1863); *Brooklyn v. Insurance Co.*, 99 U. S. 362 (1878).

97. See cases cited *supra* note 76.

98. *Rogers v. Burlington*, 3 Wall. 654 (1865).

99. *Lee County v. Rogers*, 7 Wall. 181 (U. S. 1868); *Lexington v. Butler*, 14 Wall. 282 (U. S. 1871); *Warren County v. Marcy*, 97 U. S. 96 (1877); *Enfield v. Jordon*, 119 U. S. 680 (1887).

100. *Nugent v. Supervisors*, 19 Wall. 241 (U. S. 1873); *Scotland County v. Thomas*, 94 U. S. 682 (1876); *East Lincoln v. Davenport*, 94 U. S. 801 (1876); *Wilson v. Salamanca*, 99 U. S. 499 (1878); *Harter v. Kernochan*, 103 U. S. 562 (1880).

101. *Marcy v. Oswego*, 92 U. S. 637 (1875); *Wilson v. Salamanca*, 99 U. S. 499 (1878); *Moultrie County v. Fairfield*, 105 U. S. 370 (1881).

102. *Cromwell v. Sac County*, 96 U. S. 51 (1877); *Brooklyn v. Insurance Co.*, 99 U. S. 362 (1878); *Empire v. Darlington*, 101 U. S. 87 (1879). Subsequent prohibition against railroad aid was held not to invalidate bonds contracted for with a railroad before such a prohibition. *Moultrie County v. Rockingham Savings Bk.*, 92 U. S. 631 (1875). The local officials were held authorized to determine whether the requisite number of voters had approved a subscription to railroad stock. *Bissell v. Jeffersonville*, 24 How. 287 (U. S. 1860); *Van Hostrup v. Madison*, 1 Wall. 291 (U. S. 1863); *Venice v. Murdock*, 92 U. S. 494 (1875). Similarly they were authorized to determine whether the conditions precedent had been satisfied. *St. Joseph Twp. v. Rogers*, 16 Wall. 644 (U. S. 1872); *Coloma v. Eaves*, 92 U. S. 484 (1875); *Douglas County v. Bolles*, 94 U. S. 104 (1876); *Warren County v. Marcy*, 97 U. S. 96 (1877); *Menasha v. Hazard*, 102 U. S. 81 (1880).

In a number of cases, most of which were decided about 1870, the Supreme Court's decisions were favorable to the defaulting local governments. The legal principles upon which these decisions were based offer an interesting contrast with the above doctrines and indicate that probably judicial attitudes as well as legal dogmas played a role in these adjudications. Thus the Court held that at the time of the railroad stock subscription the state constitution forbade subsidies;¹⁰³ that the legislature had not authorized such a subscription;¹⁰⁴ that the legislative authorization, which had forbidden the bond issue until the railroad was built, had been repealed before the completion of the road;¹⁰⁵ that the bonds were not issued according to the statutory requirements;¹⁰⁶ that the authority to subscribe to railroad stock did not constitute authority to issue bonds;¹⁰⁷ that where the municipal corporation never had any authority to issue bonds an innocent purchaser had no rights.¹⁰⁸ The Court threw out some cases on the ground that the holder of a bond which has a fraudulent or illegal inception must prove that he is a bona fide holder for value.¹⁰⁹ It held that the bondholder was chargeable with notice of the statutory provisions under which the bonds were issued;¹¹⁰ that the bond recitals showed their failure to comply with the statutory requirements;¹¹¹ that the estoppel doctrine did not apply where the municipal corporation was without any authority to issue the bonds.¹¹² Other bonds were invalidated because they were issued for a greater amount than authorized¹¹³ or because a railroad consolidation had occurred between the time of the popular referendum and that of the stock subscription.¹¹⁴ In a few instances the Court refused to mandamus the local authorities to levy a tax in order to pay the bond interest, since the plaintiff had not reduced his demand to a judgment and then demonstrated that the judgment remained unsatisfied;¹¹⁵ and in one case, where the municipal officials

103. *Aspinwall v. Daviess County*, 22 How. 364 (U. S. 1859); *Katzenberger v. Aberdeen*, 121 U. S. 172 (1887).

104. *East Oakland v. Skinner*, 94 U. S. 255 (1876); *Lewis v. Shreveport*, 108 U. S. 282 (1882).

105. *Concord v. Portsmouth Bk.*, 92 U. S. 625 (1875).

106. *Anthony v. Jasper*, 101 U. S. 693 (1879); *Young v. Clarendon Twp.*, 132 U. S. 340 (1889).

107. *Wells v. Supervisors*, 102 U. S. 625 (1880); *Ogden v. Daviess County*, 102 U. S. 634 (1880); *Norton v. Dyersburg*, 127 U. S. 160 (1888); *Hill v. Memphis*, 134 U. S. 198 (1890).

108. *Marsh v. Fulton County*, 10 Wall. 676 (U. S. 1870); *Kelley v. Milan*, 127 U. S. 139 (1888).

109. *Stewart v. Lansing*, 104 U. S. 505 (1881); *Lewis v. Shreveport*, 108 U. S. 282 (1883).

110. *Ogden v. Daviess County*, 102 U. S. 634 (1880).

111. *Harshman v. Bates County*, 92 U. S. 569 (1875); *Lewis v. Shreveport*, 108 U. S. 282 (1883); *Rich v. Mentz Twp.*, 134 U. S. 632 (1890).

112. *Lewis v. Shreveport*, 108 U. S. 282 (1883); *Northern Bk. v. Porter Twp.*, 110 U. S. 608 (1884).

113. *Daviess County v. Dickinson*, 117 U. S. 657 (1886).

114. *Harshman v. Bates County*, 92 U. S. 569 (1875).

115. *Bath County v. Amy*, 13 Wall. 244 (U. S. 1871); *Davenport v. Dodge County*, 105 U. S. 237 (1881).

evaded mandamuses through timely resignations, the Court refused to order the federal marshal to levy the tax necessary to pay the bonds.¹¹⁶ Moreover, in a number of cases that clearly conflict with *Gelpcke v. Dubuque*, the Court merely decided to follow an "unbroken series" of state decisions.¹¹⁷

The effects of independent federal interpretation of state law in cases arising under the diversity clause of the Constitution, as indicated by the above analysis, are serious and deserve more attention than legal scholars have thus far granted to them. In the first place, the decisions of the Supreme Court on cases arising through diversity of citizenship have a tendency to acquire the attributes and rigidity of constitutional declarations. Its refusal to permit lower federal judges to follow their state brethren and "immolate truth, justice, and the law"¹¹⁸ frequently constitutes a subtle warning to local legislatures that, if they transmute the state judicial doctrines into the more definitive form of legislative enactments, then the Supreme Court may declare such statutes unconstitutional under the impairment or due process clauses. This situation is well illustrated by a comparison of *Black and White Taxi Co. v. Brown & Yellow Taxi Co.*¹¹⁹ with *Delaware, L. & W. R. R. v. Morristown*.¹²⁰ Both involved the right of a railroad company to make a contract with a cab company giving it the exclusive privilege of soliciting patronage on the railroad station premises. The Kentucky court had held such contracts invalid as contrary to the common law and public policy;¹²¹ nevertheless, in the *Black & White Taxi* case, arising on diversity of citizenship, the Supreme Court refused to follow the Kentucky precedents and sustained the contracts. For the discovery of the applicable common law principles, Mr. Justice Butler declared, investigation is not limited to the decisions of the courts of the state in which the controversy arises; those principles are included in the body of law constituting the general jurisprudence prevailing wherever the common law is recognized. In the *Morristown* case a similar contract existed, but there the town attempted to circumvent it by enacting an ordinance establishing a public hackstand in the railroad station driveway. The practical consequences of the *Morristown* ordinance were the same as the Kentucky judicial doctrine; but here the Supreme Court permitted an injunction to restrain the enforcement of the ordinance on the ground that it deprived the railroad company of its property without due

116. *Rees v. Watertown*, 19 Wall. 107 (U. S. 1873).

117. *Elmwood Twp. v. Marcy*, 92 U. S. 289 (1875); *South Ottawa v. Perkin*, 94 U. S. 260 (1876); *Scipio v. Wright*, 101 U. S. 665 (1879); *Northern Bk. v. Porter Twp.*, 110 U. S. 608 (1884); *Katzenberger v. Aberdeen*, 121 U. S. 172 (1887); *Hill v. Memphis*, 134 U. S. 198 (1890); *Rich v. Mentz Twp.*, 134 U. S. 632 (1890).

118. *Gelpcke v. Dubuque*, 1 Wall. 175, 206 (U. S. 1863).

119. 276 U. S. 518 (1928).

120. 276 U. S. 182 (1928).

121. *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15 (1892); *Palmer Transfer Co. v. Anderson*, 131 Ky. 217, 115 S. W. 182 (1909); *Commonwealth v. Louisville Transfer Co.*, 181 Ky. 305, 204 S. W. 92 (1918).

process of law. Both of these decisions were handed down in the same session of the Court and by the same justice.

The constitutional application of diversity decisions is further illustrated by the history of *Hitchman Coal & Coke Co. v. Mitchell*.¹²² In two New York labor injunction cases¹²³ concerning "yellow-dog" contracts the attorneys for the employers contended that the law as declared by the Supreme Court imposed constitutional restraints upon the state courts and required them to follow the *Hitchman* decision. While the New York court refused to accept the *Hitchman* case as one in constitutional law, the Massachusetts Supreme Court employed it as one of its principal arguments against the validity of a proposed anti-yellow-dog statute.¹²⁴

Independent federal interpretation of state law, coupled with a more conservative exposition of labor and business law by the federal courts than that expounded by the popularly elected state tribunals, has resulted, in the second place, in artificial creation of diversity of citizenship in order that litigants may get before the federal courts. This problem has become serious, since under well-established American law the citizenship of a corporation is the state of its incorporation, regardless of where it does business. Thus in the *Black & White Taxi* case a Kentucky family engaged in the cab business in Bowling Green incorporated in Tennessee in order to sue a Kentucky competitor in the federal rather than state court. While the rules as to diversity jurisdiction of the federal courts require that no two of the adverse parties be citizens of the same state,¹²⁵ there are various devices through which a domestic corporation can get into the federal courts. Thus in a labor controversy a citizen of a foreign state who has a contract with a domestic company, the performance of which is allegedly being imperilled by a strike, has been permitted to sue in the federal courts and align the company as a party defendant along with the union.¹²⁶ Or foreign bondholders of a corporation may sue on the ground that a strike, or the execution of a particular contract with another domestic corporation, or the enforcement of a state statute tends to impair their mortgage security.¹²⁷ Occasionally the courts have held that there must be no collusion between the nominal plaintiffs and

122. 245 U. S. 229 (1917).

123. *Interborough Rapid Transit Co. v. Lavin*, 247 N. Y. 65, 159 N. E. 863 (1928); *Interborough Rapid Transit Co. v. Green*, 131 Misc. 682, 227 N. Y. Supp. 258 (Sup. Ct. 1928).

124. Opinion of the Justices, 271 Mass. 598, 171 N. E. 234 (1930); Opinion of the Justices, 275 Mass. 580, 176 N. E. 649 (1931).

125. See DOBIE, *FEDERAL JURISDICTION* (1928) 210.

126. *Chesapeake & Ohio Coal Co. v. Fire Creek Coal & Coke Co.*, 119 Fed. 942 (C. C. S. D. W. Va. 1902), *aff'd*, 124 Fed. 305 (C. C. A. 4th, 1903); *Dail-Overland Co. v. Willys-Overland Co.*, 263 Fed. 171 (N. D. Ohio, 1919), *aff'd sub nom. Quinlivan v. Dail-Overland Co.*, 274 Fed. 56 (C. C. A. 6th, 1921).

127. *Ex parte Haggerty*, 124 Fed. 441 (C. C. N. D. W. Va. 1902); *United States Trust Co. v. Amalgamated Ass'n of St. & Elev. R. R. Employees*, Unreported (D. C. La. 1929).

the corporation joined as a party defendant;¹²⁸ however, they have not usually examined carefully into the facts of a created diversity of citizenship.

A third evil lies in the diversity of legal rules within a single geographical unit. Mr. Justice Story in *Swift v. Tyson* had argued that an independent federal interpretation of commercial law and general jurisprudence would produce a desirable uniformity in those fields of law that concern problems national in scope. And this contention has been re-echoed ever since.¹²⁹ However, judicial history indicates that this objective of uniformity has not been achieved.¹³⁰ In the railroad bond cases uniformity did not result from the federal adjudications; rather we discovered instances wherein the federal courts were granting bond interest and at the same time the state courts were enjoining the collection of taxes necessary to pay the bond interest or principal.¹³¹

The decisiveness with which the federal courts have asserted their rights of independent judgment and the disparagement of the state decisions that has openly or impliedly crept into the federal opinions have not only failed to achieve uniformity but have, rather, created animosity between the federal and state judges. After *Gelpcke v. Dubuque* the Iowa Supreme Court, instead of changing its rulings, resented Mr. Justice Swayne's remarks about immolating justice. In *Chamberlain v. Burlington*¹³² Judge Cole declared that, even if the case involved the identical questions adjudicated in *Gelpcke v. Dubuque*, that decision would have no binding force upon the Iowa court since it relates to that class of questions upon which the state courts have paramount authority to adjudicate and whose decisions are binding upon the federal tribunals. "Any attempt on the part of the Federal Court to invert this well recognized and settled order of superiority of judicial tribunals upon such questions, must tend, like any other disregard of law or rightful precedent, to confusion and anarchy."¹³³ In *McClure v. Owen*¹³⁴ Judge

128. See *Niles-Bement-Pond Co. v. Iron Molders' Union*, 254 U. S. 77 (1920); *Davis v. Henry*, 266 Fed. 261 (C. C. A. 6th, 1920); *Gable v. Vonnegut Mach. Co.*, 274 Fed. 66 (C. C. A. 6th, 1921); *Washington Cleaning Co. v. Cleaners' Union*, 34 F. (2d) 897 (C. C. A. 8th, 1929); *Detroit Tile & Mosaic Co. v. Mason Contractors' Ass'n*, 38 F. (2d) 284 (E. D. Mich. 1930).

129. See address by Judge Parker, *The Federal Jurisdiction and Recent Attacks Upon It* (1932) 18 A. B. A. J. 433, 438.

130. Professor Frankfurter listed a few cases in which state courts have refused to follow *Swift v. Tyson*, in *Distribution of Judicial Power between United States and State Courts* (1928) 13 CORN. L. Q. 499, 529n. These cases Professors Yntema and Jaffin have criticized on the ground that their facts are not on all fours with those of *Swift v. Tyson*, in *Preliminary Analysis of Concurrent Jurisdiction* (1931) 79 U. OF PA. L. REV. 869, 881, n. 23; however, what is of greater significance than the distinction of these state and federal cases is the fact that the state courts believed that the federal rule was applicable and refused to follow it.

131. *Chamberlain v. Burlington*, 19 Iowa 395 (1866); *McClure v. Owen*, 26 Iowa 243 (1868).

132. 19 Iowa 395 (1866).

133. *Id.* at 401.

134. 26 Iowa 243 (1868). "In questions of this kind it [the United States Supreme Court] is, in no sense, the final arbiter, but by a course of adjudications beginning at the foundation of the government and extending to the present time, it is required to look to the

Beck launched into an even more bitter attack upon the Supreme Court. And after the *Black & White Taxi* case, Judge Dawson, of the Kentucky Supreme Court, in a speech before a bar association, similarly leveled a severe criticism at the independent federal interpretation of state laws.¹³⁵

While independent federal interpretation of state laws in diversity of citizenship cases has produced uniformity of law within the federal judicial system, it has resulted in duplicity of law within political areas. The uncertainty as to whether a given issue is one of local law or of general jurisprudence, together with contrary conclusions of federal and state judges in the latter field, raises complicated problems for business organizations in their making of contracts, their floating of securities, or their labor relations. And in tort litigation lack of uniformity produces situations wherein liability depends, not upon the acts of the defendant, but upon the citizenship of the parties.

Unfortunately the doctrine of *Swift v. Tyson* has become too firmly embedded in the federal judiciary to expect the Supreme Court now on its own initiative to follow state interpretations of state law. If this phase of the problem of federal interpretation of state law is to be solved, congressional legislation is imperative. Several avenues of attack upon this problem are open. Congress, for example, may require federal courts to follow the decisions of the highest state tribunals in ascertaining the common law or gen-

courts of the States for the rules of construction of their respective laws and Constitutions. Upon such questions, then, it is, in law and in fact, inferior in authority to the courts of the States. . . . We cannot, therefore, be expected to conform our rulings to the opinion of that court upon questions of this character when they are in conflict with the adjudications of this court." *Id.* at 249-250. "It will be observed, that, while it is quite true several decisions of this court, which, by no means, as we have seen, settled the questions involved, are overruled by the series of adjudications declaring the county and city railroad bonds void, the Supreme Court of the United States in sustaining them have overruled many cases in that court of well-established authority, and disregarded principles at the very foundation of the federal judicial power, without the restraining influence of which, the country will be launched upon the stormy sea of judicial conflict between State and federal courts, or will avoid this by succumbing to the decrees of one great federal arbiter of judicial questions." *Id.* at 258. "Not only is the decision under consideration [*Gelpcke v. Dubuque*] remarkable for bold disregard of precedent, but it is distinguished from all other decisions of the august tribunal that rendered it, as well as from those of all other high courts, in the use of language extremely disrespectful toward the Supreme Court of a State. It is to be hoped that it will not be followed as a precedent for like offenses against judicial propriety." *Id.* at 258-259.

135. "Therefore, while the Federal Courts have always acknowledged the propriety of giving respectful consideration to the decisions of the highest court of the State on these questions, the rule announced has inevitably resulted in a constant and unseemly clash between the decisions of the State Courts and the Federal Courts on questions which so universally affect the business relations of men as to bring this conflict to the attention of all intelligent laymen. They have seen the State Courts deciding questions affecting the everyday relations between men one way, and the Federal Courts deciding exactly the same questions in a radically different way. They are not concerned with the reasons for this conflict. They only know it exists, and they cannot understand, if the law is the perfection of human reason and if the courts are instrumentalities of administering justice, why it should exist. They cannot understand why the law should be one thing in a State Court and something else in the Federal Court. In this day and time, when it is the fashion to belittle the law and its administration in the courts of justice, it should be a matter of vital concern to the members of the profession that the conflict to which I have referred exists, and it should be their task, as far as they can, to lessen the number of these conflicts." Dawson, *Conflict of Decisions between State and Federal Courts in Kentucky, and the Remedy* (1931) 20 Ky. L. J. 3, 4.

eral jurisprudence of each state. However, the history of Section 34 of the Judiciary Act of 1789 indicates that in the course of time the judicial interpretation of this proposal might well lead to a recurrence of the situation now existing. Thus the court may well hold that such a proposal is applicable only where there is a square holding by the state court on the point at issue; and through the gentle art of distinguishing cases it might carve out for itself a large portion of the common law for continued independent federal interpretation.

A second possible approach to this problem is federal legislation providing that where a corporation is organized under the laws of one state and carries on business in a second state, it shall for the purposes of federal jurisdiction be treated, in all suits brought within that state between itself and residents thereof and arising out of business carried on therein, as a citizen of the state in which it carries on business. Since the corporate device affords the most convenient method of escaping from state jurisdiction into the federal courts, this proposal would undoubtedly reduce some of the abuse arising under the diversity of citizenship clause. However, it would not solve the problem. In fact, difficult questions would arise as to the concrete meaning of the terms "doing business" within a state and "suits arising out of business carried on in such state." Thus, while a New York company selling insurance in North Dakota through a local agency would very likely be considered as doing business in the latter state, a second New York company selling insurance in North Dakota through the mails would not be considered as doing business in that state; and, consequently, the first insurance company would be limited in bringing suits on policies to the North Dakota courts, while the latter would be able to elect either the state or the federal courts. The present problem of federal interpretation of state law would thus still remain. It may also be questioned whether the resulting differentiation between corporations and individuals would constitute a valid classification under Article III, Section 2, of the Constitution.

A third possible means of solving the problem is by eliminating federal jurisdiction on the basis of diverse citizenship. While the fear of prejudice against foreign creditors was a proper motive for federal adjudication of such cases in 1789, the development of transportation and communications has broken down sectional barriers. Today an Elmira, New York, jury is probably no more unfriendly towards a Chicago plaintiff than towards a New York City plaintiff. Prejudice where it exists today is primarily economic in its nature, as agrarian prejudice against urban commercialism and industrialism, and is aimed primarily against powerful and wealthy corporations, regardless of the state of their incorporation. State boundaries are no longer conducive to such hostility. The prejudice argument on behalf of obtaining federal diversity jurisdiction is, in the last analysis, a demand

that the federal courts act as a bulwark for big business. Thus, while this third proposal has considerable merit and would eradicate entirely the problem arising under the diversity clause of the Constitution, it does not, however, solve the entire problem of federal interpretation of state law. As we have already noted and shall examine fully, this problem arises not merely in diversity cases, but also in cases where there is a mixture of federal and non-federal issues in the same action and in cases where the interpretation of state law is interwoven with federal constitutional problems. With the expansion of national authority, such as has taken place under the present administration, it is becoming easier to discover federal questions through which individuals or corporations can acquire federal, rather than state, jurisdiction over controversies which, in part, involve interpretation of state laws.

IV.

Although the problem of federal interpretation of state law arises most frequently in cases getting into the federal courts by virtue of the diverse citizenship of the parties, it also frequently occurs when a federal court is called upon to decide in a single suit both federal and non-federal legal issues. The proposal to eliminate federal jurisdiction based on diversity of citizenship would not at all effect this phase of the broader problem. And the current expansion of federal authority indicates that, should the diversity jurisdiction be abolished, skillful lawyers would undoubtedly devise new techniques for raising and blending federal with non-federal issues so as to deprive hostile state courts of their jurisdiction.

If the federal question is genuine, and not colorable, and one on which the decision in the case may reasonably turn, in whole or in part, federal jurisdiction results.¹³⁶ Having once assumed jurisdiction in the case, the federal court is competent to dispose of it effectively, and this involves the power to pass on all questions, non-federal as well as federal, upon which the adjudication of the litigation may depend.¹³⁷ Where a suit is brought to obtain relief against infringement of trade-mark and unfair competition,

136. See *Railroad Co. v. Mississippi*, 102 U. S. 135 (1880); *Siler v. Louisville & N. R. R.*, 213 U. S. 175 (1909); *Ohio R. & W. Ry. v. Dittey*, 232 U. S. 576 (1914); *Louisville & N. R. R. v. Finn*, 235 U. S. 601 (1915); *Greene v. Louisville & I. R. R.*, 244 U. S. 499 (1917); *St. Paul & M. Ry. v. St. Paul & N. P. R. R.*, 68 Fed. 2 (C. C. A. 8th, 1895); *Manigault v. S. M. Ward & Co.*, 123 Fed. 707 (C. C. D. S. C. 1903); *Portland Ry. L. & P. Co. v. Portland*, 210 Fed. 667 (D. Ore. 1914); *Kasch v. Cliett*, 297 Fed. 169 (C. C. A. 5th, 1924). "The jurisdictional requirement is that a federal question be present, not that the non-federal questions be absent; so that the jurisdiction conferred by the federal question is not divested merely because non-federal questions are also present." *Dobie, op. cit. supra* note 125, at 173.

137. See *Siler v. Louisville & N. R. R.*, 213 U. S. 175 (1909); *Greene v. Louisville & I. R. R.*, 244 U. S. 499 (1917); *Davis v. Wallace*, 257 U. S. 478 (1922); *Chicago G. W. Ry. v. Kendall*, 266 U. S. 94 (1924); *Bohler v. Callaway*, 267 U. S. 479 (1925); *St. Paul & M. Ry. v. St. Paul & N. P. R. R.*, 68 Fed. 2 (C. C. A. 8th, 1895); *Chicago, R. I. & P. Ry. v. Risty*, 282 Fed. 364 (D. S. D. 1922); *Georgia S. & F. Ry. v. Georgia Pub. Serv. Comm.*, 289 Fed. 878 (N. D. Ga. 1923).

arising from the same acts and framed as one cause of action, the federal ground carries the non-federal ground along with it and there is jurisdiction of the entire case.¹³⁸ The problem of federal interpretation of state law arises not only where the federal question is decided in favor of the plaintiff and then the court continues to examine the non-federal issues in order to determine whether the latter should defeat recovery, mitigate the damages, or aggravate them, but also where the federal question, although genuine, is decided against the plaintiff; here the court continues jurisdiction to decide the non-federal questions on the ground that, having once acquired jurisdiction, the court is competent to complete the litigation.¹³⁹

This aspect of federal interpretation of state law is especially dangerous because the Supreme Court has refused to enunciate any definite jurisdictional principles and has sought to side-step the issue. In *Hurn v. Oursler*¹⁴⁰ the plaintiff brought suit against the defendant's pirating of his play. He charged (1) copyright infringement, (2) unfair competition in an unauthorized use of his copyrighted play, and (3) unfair competition as to any uncopyrighted revision of the play. Only the first of these contentions raised any federal question. The district court found that the copyright had not been infringed and dismissed the other two claims for want of jurisdiction. The circuit court of appeals affirmed this decision, but the Supreme Court modified the affirmance to a dismissal of the second claim on its merits, making no mention of the third. Mr. Justice Sutherland, speaking for the majority, attempted to clarify the jurisdiction of the federal courts in dealing with a joinder of federal and local questions. He said:

"The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground*; in the latter it may not do so upon the non-federal *cause of action*."¹⁴¹

And in his attempt to differentiate between a cause of action and a ground for a cause of action, he follows the pragmatic definition of a cause

138. *Waterman Co. v. Gordon*, 8 F. Supp. 351 (S. D. N. Y. 1934).

139. "A jurisdiction assumed because of a substantial federal question may require the decision of other questions which control the controversy, regardless of what decision is given the federal question, or whether it is decided at all." *Kasch v. Cliett*, 297 Fed. 169, 171 (C. C. A. 5th, 1924).

140. 289 U. S. 238 (1933); cf. *Warner Publications v. Popular Publications*, 87 F. (2d) 913 (C. C. A. 2d, 1937); *Foster D. Snell, Inc. v. Potters*, 88 F. (2d) 611 (C. C. A. 2d, 1937); *Anderson v. Scandrett*, 19 F. Supp. 681 (D. Minn. 1937).

141. 289 U. S. at 246. The decision of the circuit court of appeals is reported in 61 F. (2d) 1031 (C. C. A. 2d, 1932).

of action stated in *United States v. Memphis Cotton Oil Co.* that a " 'cause of action' may mean one thing for one purpose and something different for another."¹⁴² The *Hurn* case thus left indefinite and undetermined the circumstances under which a federal district court may continue jurisdiction on non-federal questions after having decided the federal question against the plaintiff.

*Levering & Garrigues v. Morrin*¹⁴³ involved a labor injunction controversy. Some New York and Pennsylvania corporations in the building trades secured an injunction in the federal district court against a national labor union with headquarters in Indiana, several New York local unions, and their officers. In bringing the case to the federal court the complainants based their petition on diversity of citizenship and on the federal questions of interference with interstate commerce and conspiracy under the Sherman Act. The circuit court of appeals found¹⁴⁴ that there was no interference with interstate commerce and declared that the failure of the federal questions deprived the court of power to proceed to the merits unless another ground of federal jurisdiction appeared, and, since the bill did not show properly the existence of diverse citizenship, it remanded the case to the trial court for dismissal of the bill as to the domestic citizens or for amendment of the complaint concerning the citizenship of the defendants. The Supreme Court considered only the question whether interstate commerce was involved and, agreeing here with the circuit court of appeals, concluded that "the federal district court was without jurisdiction because the federal question presented was plainly unsubstantial. . . . The decree must be affirmed for this reason and it becomes unnecessary to consider the other ground discussed by the court below and upon which its decision primarily was predicated."¹⁴⁵ In the light of *Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n*¹⁴⁶ it is difficult to see wherein the federal question here raised was so unsubstantial as to be considered a colorable basis for acquiring federal jurisdiction. And if the federal question was genuine, and merely decided against the complainant, did not the lower court, under the *Hurn v. Oursler* doctrine, have the right to continue jurisdiction and to pass upon the non-federal question of state labor injunction grounds? This significant problem the Supreme Court deftly avoided.

If or where the federal courts followed the state precedents in adjudicating the non-federal questions in cases of a joinder of federal and non-federal issues, expediency, economy, and speed in litigation would demand that federal courts, having acquired jurisdiction, should proceed to settle the entire

142. 288 U. S. 62, 67 (1933).

143. 289 U. S. 103 (1933).

144. 61 F. (2d) 115 (C. C. A. 2d, 1932).

145. 289 U. S. at 108.

146. 274 U. S. 37 (1927).

controversy. Where, however, there is an independent federal judgment on state law, uniformity of interpretation within the same area may demand that the federal and non-federal questions constitute two distinct causes of action which cannot properly be joined; in that case the federal court could settle the federal cause of action and remand the non-federal one to the state court. A prompt judicial announcement of such a principle is imperative before this second aspect of federal interpretation of state law becomes too well embedded in our jurisprudence.

V.

Federal interpretation of state law arises, in the third place, in controversies where the determination of federal constitutional rights involves, in part, the ascertainment of state law. Although the Supreme Court has frequently said that it will accept that interpretation of a state's constitution or statute rendered by the highest tribunal of that commonwealth,¹⁴⁷ nevertheless, when the Court is hearing a review from a state court on the impairment of contracts or due process clauses, it exercises its own independent judgment as to the meaning and application of the state's constitutional, statutory, and common law.¹⁴⁸ And in respect to constitutional and statutory law, the Court here carries its independence of judgment far beyond that which it exercises in cases of original federal jurisdiction.

In the adjudication of controversies under the contract clause the courts must determine whether or not a contract actually existed, what were the exact obligations of the agreement, and whether the subsequent state statute impaired any of those obligations.¹⁴⁹ The answers to these queries are to be found generally in the state common law on contracts; and, in the case of public contracts or agreements made by public utilities franchised by the state or its political subdivision, the answers are to be discovered in the state statutes and constitution and in municipal ordinances. If then the Supreme Court attempts to determine for itself the existence of a contract, the nature of its obligations, and the fact of its impairment, it must necessarily independently interpret the state constitutional, statutory, and common law. And al-

147. See *Brown v. Van Bramm*, 3 Dall. 344 (U. S. 1797); *Elmendorf v. Taylor*, 10 Wheat. 152 (U. S. 1825); *Michigan Cent. R. R. v. Michigan R. R. Comm.*, 236 U. S. 615 (1915); *Palmer v. Ohio*, 248 U. S. 32 (1918); *Orr v. Allen*, 248 U. S. 35 (1918); *Hancock v. Muskogee*, 250 U. S. 454 (1919); *American Mfg. Co. v. St. Louis*, 250 U. S. 459 (1919); *Green v. Frazier*, 253 U. S. 233 (1920); *Thornton v. Duffy*, 254 U. S. 361 (1920); *Cudahy Packing Co. v. Parramore*, 263 U. S. 418 (1923); *Stebbins v. Riley*, 268 U. S. 137 (1925).

148. See *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532 (1904); *Appleby v. New York*, 271 U. S. 364 (1926); *Larson v. South Dakota*, 278 U. S. 429 (1929).

149. See *Houston & Tex. Cent. R. R. v. Texas*, 177 U. S. 66 (1900); *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142 (1901); *Terre Haute & I. R. R. v. Indiana ex rel. Ketcham*, 194 U. S. 579 (1904); *Milwaukee Elec. Ry. & Light Co. v. Railroad Comm.*, 238 U. S. 174 (1915); *Detroit United Ry. v. Michigan*, 242 U. S. 238 (1916); *Milwaukee Elec. Ry. & Light Co. v. Wisconsin ex rel. Milwaukee*, 252 U. S. 100 (1920); *Appleby v. New York*, 271 U. S. 364 (1926).

though the Supreme Court has declared that it will, so far as possible, lean towards the state courts' interpretations, nevertheless, clashes can and do exist. We thus experience the anomalous situation, jurisdictionally speaking, of a foreign tribunal superimposing upon a state its own conceptions of the law. Here, as in other phases of federal interpretation of state law, the federal judiciary dictates on those very legal subjects concerning which the Constitution forbids the Federal Congress to legislate. And while in diversity of citizenship cases it follows state decisions on local property law,¹⁵⁰ in adjudications under the impairment clause the Court employs a definition of contract sufficiently broad to enable it to encroach upon the property field especially reserved for local authority.

One of the most interesting and important examples of independent federal interpretation of state law is the case of *Appleby v. New York*.¹⁵¹ Back in 1852 and 1853 the city, with the approval of the state legislature, had conveyed by deed certain lots below the tidewater line in the Hudson river; the grantee of these lots, which extended out from the original high water mark to a line then established as the exterior line and ripa of the city, was given the right to fill in the lots and all the advantages and emoluments of wharfage on that line at the end of the lots. Subsequently, the state in 1857 and 1871 established a bulkhead line inshore from the exterior line bounding the grantee's lots; this legislation forbade solid filling but permitted the construction of piers beyond the new bulkhead line and limited the water spaces permissible between piers to one hundred feet. The city built piers out from the new bulkhead line at the end of streets crossing or adjacent to the granted premises, leased accommodations on the piers, constructed a platform or dumping board overhanging one of the grantee's waterlots, and dredged and appropriated the submerged lots, both inside and outside the new bulkhead line, with the result that the lots were converted into slips for the accommodation of the city's tenants and the slips were in constant use by vessels moored alongside the piers for loading or unloading. In a suit brought in the state court for an injunction against trespass by the city, the New York Court of Appeals held that no contract existed by the deeds of 1852 and 1853 and that the city at that time possessed no authority to alienate the rights to land under a navigable stream.¹⁵² On appeal to the United States Supreme Court, that tribunal revised the state decision on the ground that the state acts of 1857 and 1871 impaired the obligation of

150. *Jackson ex dem. St. John v. Chew*, 12 Wheat. 153 (U. S. 1827); *Green v. Neal's Lessee*, 6 Pet. 291 (U. S. 1832); *Suydam v. Williamson*, 24 How. 427 (U. S. 1860); *Walker v. State Harbor Comm'rs*, 17 Wall. 648 (U. S. 1873); *Barret v. Holmes*, 102 U. S. 651 (1880); *Edward Hines Yellow Pines Trustees v. Martin*, 268 U. S. 458 (1925). And this rule is applied even though the state decision is not approved. *Walker v. State Harbor Comm'rs*, *supra*; *Bucher v. Chesire Ry.*, 125 U. S. 555 (1888); *Balkham v. Woodstock Iron Co.*, 154 U. S. 177 (1894); *Edward Hines Yellow Pines Trustees v. Martin*, *supra*.

151. 271 U. S. 364 (1926).

152. 235 N. Y. 351, 139 N. E. 474 (1923).

the contract made by the deeds of 1852 and 1853. On the question of independent federal interpretation of state law, Mr. Chief Justice Taft, speaking for the Court, was most emphatic:

"The questions we have here to determine are, first, was there a contract, second, what was its proper construction and effect, and, third, was its obligation impaired by subsequent legislation as enforced by the state court? These questions we must answer independently of the conclusion of that court. Of course we should give all proper weight to its judgment, but we cannot perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration. It makes no difference what the answer to them involves, whether it turns on issues of general or purely local law, we cannot surrender the duty to exercise our own judgment. In the case before us, the construction and effect of the contract involved in the deeds and covenants depend chiefly upon the extent of the power of the State and city to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself. That is a state question, and we must determine it from the law of the State, as it was when the deeds were executed, to be derived from statutes then in force and from the decisions of the state courts then and since made; but we must give our own judgment derived from such sources and not accept the present conclusion of the state court without inquiry. Ordinarily this Court must receive from the court of last resort of a State its statement of state law as final and conclusive, but the rule is different in a case like this."¹⁵³

The rights here in dispute were real property rights rather than contract rights. And the Court here extended the contract clause to cover rights that properly came under the due process clause of the Fourteenth Amendment, which had not been adopted at the time the first state act involved in this controversy had been enacted.

A similar example of independent federal interpretation of local property law is to be found in *Muhlker v. New York & H. R. R.*¹⁵⁴ In the *New York Elevated Railroad* cases¹⁵⁵ the state court had held that an abutter upon a public street, under a municipal grant containing a covenant that the street should continue as other streets, had an easement of light, air, and access over the street which could not be impaired by legislation authorizing the construction of an elevated railroad in the street. In the *Muhlker* case the New York court held¹⁵⁶ the doctrine of the former cases inapplicable where a railroad, already in the occupation of a trench in a street, was com-

¹⁵³ 271 U. S. at 379.

¹⁵⁴ 197 U. S. 544 (1905).

¹⁵⁵ *Story v. New York Elev. R. R.*, 90 N. Y. 122 (1882); *Lahr v. Metropolitan Elev. R. R.*, 104 N. Y. 268, 10 N. E. 528 (1887).

¹⁵⁶ 173 N. Y. 549, 66 N. E. 558 (1903).

pelled by statute to elevate its tracks on a viaduct above the street. The plaintiff, who owned abutting property granted originally to prior grantees by the city with a covenant similar to that in the *Elevated Railroad* cases, appealed to the Supreme Court, and that tribunal, speaking through Mr. Justice McKenna, reversed the state decision. He declared that the Court was not called upon to discuss the power of the New York courts to declare rules of property or to change or modify their decisions; rather the question before the Court was whether such power can be exercised to take away rights which had been acquired by contract and had thus come under the protection of the Federal Constitution. Having so stated the issue, Mr. Justice McKenna naturally answered in the negative. He went on to announce that the Court must determine for itself the existence and extent of the contract and that "when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it."¹⁵⁷ He emphasized the point that the plaintiff had purchased his property under the assurance of the *Elevated Railroad* cases.

In both the *Muhlker* and *Appleby* cases the plaintiffs' rights, whether expressed in terms of contract or of property, arose from grants of property, the implied terms of which necessarily are subject to judicial construction. Certainly, in the *Muhlker* case the dedication of the land for the purpose of a public street did not explicitly set forth the easements of light, air, and access; nor is the common law of the several states in agreement as to the existence of such easements. Prior to these decisions it had not been believed that property owners have a vested right that no general proposition of law shall be reversed, changed, or modified by the courts to their detriment; rather it had been held that there is no constitutional right to have all general propositions of law remain unchanged once adopted.¹⁵⁸ The *Muhlker* case seems to go so far as to declare that not only shall the state courts not reverse their previous decisions concerning property rights, but also that they shall not distinguish them in a manner contrary to the Supreme Court's methods of differentiation. In these cases the rights in dispute arose from state judicial construction of legislative statutes, municipal ordinances, and deeds of conveyance; nevertheless, the Supreme Court undertook to explore for itself the intricacies of local property law, and its conclusions clashed sharply with those of the state courts.

In significant contrast to the *Muhlker* case is the doctrine that changes in state court decisions, though they adversely affect rights acquired in reliance on previous state decisions, do not raise such a federal question as to

¹⁵⁷. 197 U. S. at 570.

¹⁵⁸. *Patterson v. Colorado ex rel. Att'y Gen.*, 205 U. S. 454 (1907); *New York Cent. R. R. v. White*, 243 U. S. 188 (1917).

permit a review of the later state decision.¹⁵⁹ The case of *Central Land Co. v. Laidley*¹⁶⁰ involved a decision concerning the form of conveyance necessary to convey successfully the interests of a married woman in land. The Court, speaking through Mr. Justice Gray, said:

"In order to come within the provision of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the State, and not by a decision of its judicial department only.

The appellate jurisdiction of this court, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court."¹⁶¹

By placing emphasis on the phrase "no State shall pass any law," the Court has narrowed the scope of its appellate jurisdiction in a manner that has not characterized its interpretation of the Fourteenth Amendment. The literal definition of Article I, Section 10, of the Constitution has saved the Court the numerous and arduous tasks of reviewing and checking the fluctuations in state judicial and administrative decisions¹⁶² and to the extent of the doctrine enunciated in the *Laidley* case, has prevented federal conflict with state courts in the interpretation of state law.

The doctrine of independent federal determination of state law under the contract clause is further illustrated in the field of public utility regulation. In the early days of street railways and electric lighting, the units of operation were local; and the municipal governments granted franchises which, in some instances, specified the maximum rates. As the utilities expanded into larger units, in many cases state-wide or even regional in their scope, the state governments began to regulate their rates, services, and franchises. Where the state public service commissions were more friendly to the utilities than the city councils, the companies would attempt to break their local contracts, and if the state commission sanctioned such a move, the municipal authorities would argue the impairment of the obligation of

159. *Central Land Co. v. Laidley*, 159 U. S. 103 (1895); *Tidal Oil Co. v. Flanagan*, 263 U. S. 444 (1924); *Fleming v. Fleming*, 264 U. S. 29 (1924). See also *Morely v. Lake Shore & M. S. Ry.*, 146 U. S. 162, 171 (1892); *Patterson v. Colorado ex rel. Att'y Gen.*, 205 U. S. 454, 461 (1907); *Delmar Jockey Club v. Missouri*, 210 U. S. 324, 335 (1908); *Bonner v. Gorman*, 213 U. S. 86, 91 (1909); *Milwaukee Elec. Ry. & Light Co. v. Wisconsin ex rel. Milwaukee*, 252 U. S. 100, 106 (1920).

160. 159 U. S. 103 (1895).

161. *Id.* at 109.

162. On administrative impairment, see *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18 (1888).

their rate contract with the street railway or electric corporation. Where, on the other hand, the state commission was more rigid in its requirements than was the local government, the utilities would fight the state control as an impairment of the obligation of their municipal franchises. And even where the question of state versus local regulation did not enter into the problem of control, adverse local ordinances or state statutes were opposed generally by the utilities on the ground of the impairment clause.

Important instances of this last type of case are *Detroit United Ry. v. Michigan*¹⁶³ and *Georgia Ry. and Power Co. v. Decatur*.¹⁶⁴ In the *Detroit* case the railway company had purchased, under the existing state statutes, certain street railways and suburban lines, and had taken over the franchises from their owners. The suburban lines connected with the city lines at the city boundary, but lay wholly within adjacent village and township territory. The franchises for the city lines had arisen through city ordinances, one of which, passed in 1889, placed special restrictions on fares. The suburban line franchises had arisen through village and township ordinances which fixed the fares upon a basis more favorable to the grantees. In 1905 and 1907 the Michigan legislature extended the limits of the city with the result that portions of two suburban railways now fell within the city. These acts contained no reference to existing contracts nor specific mention of street railway rights; but each provided that the annexed territory should be subject to all the state laws applicable to the city of Detroit and, with certain exceptions not material to the case, to all the city ordinances and regulations. In a series of cases against the railway company the city and state contended and the Michigan court agreed¹⁶⁵ that insofar as they came within the new city boundaries the outlying lines also came within the fare restrictions of the Detroit ordinance of 1889. In the *Decatur* case the town had contracted with the railway company permitting it to tear up a portion of its track in return for a promise to maintain a five cent fare from Decatur to Atlanta. And here, too, the state legislature extended the limits of the town. The company proposed to raise the fare, and the town enjoined such action.¹⁶⁶ In both the *Detroit* and *Decatur* cases the Federal Supreme Court reversed the state decisions on the ground that the legislative changes in the local boundaries constituted an impairment of the obligation of contracts of the municipal government with the utilities. The Court expressed its duty to undertake an independent judgment upon the questions whether a contract existed, what obligation arose from it, and whether subsequent legislation had impaired that obligation.

¹⁶³. 242 U. S. 238 (1916).

¹⁶⁴. 262 U. S. 432 (1923).

¹⁶⁵. *Detroit v. Detroit United Ry.*, 173 Mich. 314, 139 N. W. 56 (1912).

¹⁶⁶. 153 Ga. 329, 111 S. E. 911 (1922).

While the Court has thus repeatedly enunciated the doctrine of its independent determination in impairment cases, it has also declared that it will lean to an agreement with the state court.¹⁶⁷ Frequently, however, the Court merely gives lip service to this latter principle and employs it as an introduction to a reversal of the state holding. In some instances, on the other hand, the Court has arrived, presumably through its independent judgment, at the same conclusions as did the state court.¹⁶⁸

So long as the scheme of federal supremacy exists, it is inevitable that, on appeals from state supreme courts involving the interpretation of the Federal Constitution, the Supreme Court should independently determine the meaning of the state legislation. Were any other rule adopted, the states,

167. "The general rule of this court is to accept the construction of a state constitution placed by the state Supreme Court as conclusive. One exception which has been constantly recognized is when the question of contract is presented. This court has always held that the competency of a State, through its legislation, to make an alleged contract, and the meaning and validity of such contract, were matters which in discharging its duty under the Federal Constitution it must determine for itself; and while the leaning is towards the interpretation placed by the state court, such leaning cannot relieve us from the duty of an independent judgment upon the question of contract or no contract." *Stearns v. Minnesota*, 179 U. S. 223, 232-233 (1900). See also *Freeport Water Co. v. Freeport*, 180 U. S. 587 (1901); *Vicksburg v. Vicksburg Water Co.*, 206 U. S. 496 (1907); *Milwaukee Elec. Ry. & Light Co. v. Railroad Comm.*, 238 U. S. 174 (1915); *Georgia Ry. & Power Co. v. Decatur*, 262 U. S. 432 (1923); *Fawcus Machine Co. v. United States*, 282 U. S. 375 (1931); *Fox v. Standard Oil Co. of N. J.*, 294 U. S. 87 (1935); *Duke Power Co. v. South Carolina Tax Comm.*, 81 F. (2d) 513 (C. C. A. 4th, 1936).

168. *Milwaukee Elec. Ry. & Light Co. v. Railroad Comm.*, 238 U. S. 174 (1915), involved the problem whether a state statute had granted to municipalities the power of rate-making to such an extent as to deprive the state legislature of future exercise of that function. The Wisconsin Supreme Court, 153 Wis. 502, 142 N. W. 491 (1913), held on behalf of state control, and this decision the federal bench sustained. Mr. Justice Day, speaking for the Court, stated: "It is true that this court has repeatedly held that the discharge of the duty imposed upon it by the Constitution to make effectual the provision that no State shall pass any law impairing the obligation of a contract, requires this court to determine for itself whether there is a contract, and the extent of its binding obligation, and parties are not concluded in these respects by the determination and decisions of the courts of the States. While this is so, it has been frequently held that where a statute of a State is alleged to create or authorize a contract inviolable by subsequent legislation of the State, in determining its meaning much consideration is given to the highest court of the State." 238 U. S. at 182. In *Milwaukee Elec. Ry. & Light Co. v. Wisconsin ex rel. Milwaukee*, 252 U. S. 100 (1920), the Supreme Court likewise accepted the Wisconsin court's construction of a contract where the matter was fairly in doubt. The railway franchise declared it the duty of the company to repair the roadway between its tracks with the same material as the city "shall have last used to pave or repave these spaces and the street previous to such repairs"; the city replaced macadam with asphalt on a concrete foundation, and a dispute arose as to the exact meaning of the franchise terms concerning the company's conformity with the municipality's paving plans. In *Freeport Water Co. v. Freeport*, 180 U. S. 587 (1901) (a five to four decision), the Court agreed with the state tribunal that a statute, which, it was contended, formed the basis of a local contract with a water company, permitted the city council to regulate rates by ordinance rather than to make binding contracts. In *Wilson v. Standefer*, 184 U. S. 399 (1902), the Supreme Court sustained the Texas court in its decision that the state was not precluded by contract from changing the mode of procedure in respect to defaulting purchases of land. Here the Court, speaking through Mr. Justice Shiras, held that, while it possesses paramount authority to determine for itself the existence or non-existence of an alleged contract and whether its obligation has been impaired by subsequent legislation, nevertheless it is the duty of the Court to follow the state decision when the question is one of doubt and uncertainty. Cf. *Fawcus Mach. Co. v. United States*, 282 U. S. 375 (1931); *Fox v. Standard Oil Co. of N. J.*, 294 U. S. 87 (1935); *Duke Power Co. v. South Carolina Tax Comm.*, 81 F. (2d) 513 (C. C. A. 4th, 1936).

through judicial misconstruction of their statutes, could violate the rights guaranteed by the Constitution and nullify the efforts of the Supreme Court in maintaining the paramountcy of that document. However, this consideration does not demand that in such appeals the Supreme Court ignore all state law, legislative or judicial, concerning property or contract rights. In this class of cases it is desirable that the Supreme Court limit its own rule of independent federal interpretation of state law and attempt to differentiate between instances where the state courts are honestly attempting to define property or contract law and cases in which they are obviously endeavoring to circumvent judicial annulment of local legislation.

A federal system of government with its frequent points of possible clash of authority demands constant readjustments. It cannot be expected that the set of arrangements provided in 1789—no matter how far-seeing its authors may have been—can endure unaltered throughout the rapidly changing decades. In the judicial aspects of American federalism, the national interpretation of state laws, as we have seen, has proven a clumsy, frictional, and confusing legal principle. The solution of this problem of accommodation offers a real challenge to legislators and to legal scholars.