



ERIE AT EIGHTY:
Choice of Law Across the Disciplines

September 14, 2018

The University of Akron School of Law

sponsored by
The Center for Constitutional Law, the Akron Law Review
and the *Federal Bar Association*

Continuing Legal Education Materials

Table of Contents

Erie Conference Program Schedule	2
Presenter Biographies	4
Erie R.R. Co. v. Tompkins, 58 S.Ct. 817 (April 25, 1938)	9
Brian Frye, <i>The Ballad of Harry James Tompkins</i>	19
Petition for Certiorari, <i>Aspen Insurance v. Black & Veatch Corp.</i> (June 6, 2018)	52



ERIE AT EIGHTY: *Choice of Law Across the Disciplines*

September 14, 2018

The University of Akron School of Law
sponsored by *The Center for Constitutional Law* & the *Akron Law Review*

The topic of the Sixth Annual Constitutional Law Conference at Akron is the eightieth anniversary of *Erie Railroad Co. v. Tompkins* (1938). In this iconic case, the U.S. Supreme Court cast significant doubt on the federal courts' authority to make law absent express authorization. This conference will bring together scholars from a range of legal disciplines in order to engage in a day of intensive scholarly discussion about the implications of *Erie* on choice of law issues that arise within specific fields including civil procedure, remedies, evidence, and intellectual property. The cross-disciplinary focus stems from a sense that *Erie's* impact on fields of law has been underexplored, and that *Erie* problems can be better understood and assessed with concrete examples in hand.

- | | |
|-----------------|---|
| 8:00am | Registration and Continental Breakfast (McDowell Commons)
Breakfast sponsored by the Federal Bar Association, Northern District of Ohio
Registration hosts: Student editors of <i>Akron Law Review</i> |
| 8:30am | Welcome, Dean C.J. Peters (Brennan Courtroom 180)
Introduction, Prof. Tracy Thomas, Director, Center for Constitutional Law |
| 8:45 – 10:00 am | Panel 1: <i>Understanding Erie</i> (Brennan Courtroom 180)
Moderator: Dean C.J. Peters (Akron)
Prof. Brian Frye (Kentucky), <i>The Ballad of Harry James Tompkins</i>
Prof. Michael Green (William & Mary), <i>The Erie Doctrine: A Flowchart</i>
Prof. Craig Green (Temple), <i>Erie and Constitutional Structure: An Intellectual History</i>
Prof. Megan LaBelle (Catholic), <i>An Erie Approach to Privilege Doctrine</i> |
| 10:00-10:15 am | Break |
| 10:15-12:00pm | Panel 2: <i>Erie and Federalism</i> (Brennan Courtroom 180)
Moderator: Prof. Bernadette Genetin (Akron)
Prof. Charlton Copeland (Miami), <i>Erie's Federalism and Ours</i>
Prof. Kermit Roosevelt (Penn), <i>Adrift on Erie: Characterizing Forum Selection Clauses</i>
Prof. Jeff Rensberger (South Texas), <i>At the Intersection of Erie and Administrative Law</i>
Prof. Laura Little (Temple), <i>Erie's Unintended Consequences on State Law</i>
Prof. Alex Reinert (Cardozo), <i>Erie Doctrine, State Law, and Civil Rights Litigation in Federal Court</i> |

12:15 – 1:15 pm	Lunch and Keynote (McDowell Commons) Prof. Ernie Young (Duke) , <i>Erie as a Way of Life</i> Introduction: Danielle Schantz, Editor in Chief, <i>Akron Law Review</i>
1:15 – 1:30 pm	Break
1:30 – 2:30 pm	Panel 3: <i>The Erie Effect in Remedies</i> (Brennan Courtroom 180) Moderator: Prof. Tracy Thomas (Akron) Prof. Caprice Roberts (Florida), <i>Remedies, Equity & Erie</i> Prof. Rachel Janutis (Capital) Prof. Michael Morley (Florida State), <i>Beyond the Elements: Erie and the Standards for Preliminary and Permanent Injunctions in Diversity Cases</i>
2:30 – 2:45pm	Break
2:45 – 3:45pm	Panel 4: <i>Erie in Intellectual Property</i> (Brennan Courtroom 180) Moderator: Camilla Hrdy (Akron) Prof. Joe Miller (Georgia), <i>Our IP Federalism: Thoughts on Erie at Eighty</i> Prof. Sharon Sandeen (Mitchell-Hamline), <i>The “Erie/Sears-Compco Squeeze” and Erie’s Other Effects on Trade Secret Law</i> Prof. Shubha Ghosh (Syracuse), <i>Jurisdiction Stripping and the Federal Circuit: A Path for Unlocking State Law Claims from Patent</i>
4:00 – 5:00pm	Coffee with the IP Faculty Host: Prof. Ryan Holte, Director of the Akron Center for IP Law & Technology

Follow the Erie Conference proceedings on **Twitter** @conlawcenter and post using hashtag #Erieat80

PRESENTER BIOGRAPHIES

CHARLTON COPELAND (Miami). Professor of Law & M. Minnette Massey Chair in Law. Professor Copeland teaches Civil Procedure I and II, Federal Courts, Administrative Law, and the Regulatory State, and Federal Policy Making: Legislation, Regulation and Litigation in the D.C. Externship program. He is a 2015 recipient of the Richard Hausler Golden Apple Award for the faculty member contributing the most to the student body both academically and through his or her extracurricular activities. Professor Copeland was an associate at Hogan & Hartson in Washington, DC, where he focused on litigation and regulatory matters. He served as a law clerk to Justices Richard J. Goldstone and Catherine O'Regan of the Constitutional Court of South Africa, and to Judge R. Guy Cole, Jr., of the United States Court of Appeals for the Sixth Circuit. He is a graduate of Amherst College, Yale Divinity School, and Yale Law School.

BRIAN FRYE (Kentucky). Spears-Gilbert Associate Professor of Law. Professor Frye teaches classes in civil procedure, intellectual property, copyright, and nonprofit organizations, as well as a seminar on law and popular culture. Previously, he was a Visiting Assistant Professor of Law at Hofstra University, and a litigation associate at Sullivan & Cromwell LLP. He clerked for Judge Andrew J. Kleinfeld of the United States Court of Appeals for the Ninth Circuit and Justice Richard B. Sanders of the Washington Supreme Court. He received a J.D. from the New York University School of Law in 2005, an M.F.A. from the San Francisco Art Institute in 1997, and a B.A. from the University of California at Berkeley in 1995. His research focuses on intellectual property and charity law, especially in relation to artists. Professor Frye is also a filmmaker and produced the documentary *Our Nixon* (2013), which was broadcast by CNN and opened theatrically nationwide.

BERNADETTE BOLLAS GENETIN (Akron). Professor of Law and Faculty Fellow at the Center for Constitutional Law. Professor Genetin teaches Civil Procedure, Federal Jurisdiction and Procedure, and Complex Litigation. A past Chair and current Executive Committee member of the AALS Section on Litigation, Professor Genetin writes in the area of federal rulemaking. Professor Genetin received her B.A. degree, with highest honors, from The University of Notre Dame, where she was also inducted into Phi Beta Kappa. Professor Genetin received her law degree, with highest honors, from The Ohio State University College of Law. Prior to joining the Akron Law faculty, Professor Genetin clerked in the United States Court of Appeals for the Second Circuit and worked in private practice as an associate attorney and as a partner for law firms in Columbus, Ohio and Canton, Ohio.

SHUBHA GHOSH (Syracuse). Crandall Melvin Professor of Law and Director of the Syracuse Intellectual Property Law Institute. Professor Ghosh earned his J.D. from Stanford University, with distinction, and Ph.D. from the University of Michigan. As Director and Founder of SIPLI, Ghosh works closely with College of Law's Innovation Law Center and the NYSTAR-funded New York State Science and Technology Law Center, an entity focused on mitigating intellectual property and commercialization challenges that affect entrepreneurs, start-ups, universities, and research centers in New York State and beyond. Ghosh was elected to the American Law Institute in 2012 and is a member of the advisory board on the Restatement of Copyright. He has been an IIP Research Fellow in Tokyo; a Fulbright Fellow to India; and a recipient of a National Endowment of the Humanities research grant.

CRAIG GREEN (Temple). James E. Beasley Professor of Law. Professor Green has taught and written in the fields of Administrative Law, American Legal History, Civil Procedure, Constitutional Law, and Federal Courts; he has also taught in the field of Reproductive Rights. In 2009 and 2015, Green received Temple Law's Award as "Outstanding Professor of the Year," and in 2010 he received Temple University's Lindback Award for Distinguished Teaching. Green's research has addressed the role of federal courts in overseeing the executive branch, and the significance of iconic cases like *Erie v. Tompkins* in legal discourse. In 2012, Green received Temple Law School's Friel-Scanlan Award for Outstanding Scholarship. In 2018, Green received a Ph.D from Princeton University's History Department for completing his dissertation, "Creating American Land: A Territorial History from the Albany Plan to the U.S. Constitution."

MICHAEL GREEN (William & Mary). Woodbridge Professor of Law. Professor Green teaches Civil Procedure, Conflicts of Law, and Philosophy of Law. He previously taught at George Mason Law School and clerked for Judge Richard A. Posner on the U.S. Court of Appeals for the Seventh Circuit. Professor Green practiced law at Paul, Weiss, Rifkind, Wharton & Garrison in New York City and was assistant professor of philosophy at Tufts University and visiting lecturer in philosophy at the University of Alabama (Huntsville), Wesleyan University and Yale University. He is the author of *The Oxford Introductions to U.S. Law: Civil Procedure* (forthcoming) and *Nietzsche and the Transcendental Tradition* (2002), as well as numerous articles and essays. He has a J.D. degree from Yale, Ph.D. from Yale and B.A. from University of California, Berkeley.

CAMILLA HRDY (Akron). Assistant Professor of Law. Professor Hrdy teaches Intellectual Property Law, Trade Secret Law, Trademark Law, Patent Law, and Civil Procedure. She was previously a resident fellow at the Yale Law School Information Society Project and a teaching fellow at the University of Pennsylvania Law School Center for Innovation, Technology & Competition. She received the Thomas G. Byers Memorial Award for Outstanding Faculty Scholarly Publication, and twice received a Thomas Edison Innovation fellowship and grant from George Mason University School of Law. She is a regular blogger on the popular IP scholarship blog, *Written Description*. Professor Hrdy holds a J.D. from Berkeley Law, a B.A. from Harvard University, and an M. Phil. from the University of Cambridge, Department of History. She clerked for Judge Janis Graham Jack in the Southern District of Texas.

RACHEL JANUTIS (Capital). Dean and Professor of Law. Dean Janutis teaches courses on Civil Procedure, Remedies, Complex Litigation and Conflict of Laws. She is a co-author of the casebook, *Cases and Problems on Remedies*. In fall 2007, she was named Director of Faculty Development. Dean Janutis served as Associate Dean of Academic Affairs from July 2010 to June 2014. She previously practiced as an associate with Winston & Strawn in Chicago where her practice focused on antitrust, contracts, business torts, and products liability. She served as law clerk to the Honorable Harlington Wood, Jr. Circuit Judge for the U.S. Court of Appeals for the Seventh Circuit. She earned her J.D., summa cum laude, at the University of Illinois College of Law and her B.S. from Northwestern University.

MEGAN LA BELLE (Catholic). Professor of Law, and Co-Director, Law and Technology Institute. Professor La Belle teaches and researches in the areas of intellectual property and procedure. She spent several years as a commercial litigator with the Los Angeles law firm of Munger, Tolles & Olson in the areas of intellectual property and complex civil litigation. Professor La Belle earned her B.A., summa cum laude, from the University of California, Los Angeles, and her J.D. from the University of California, Davis, School of Law. She served as a law clerk to Judge Stephen S. Trott on the U.S. Court of Appeals for the Ninth Circuit, and to Judge Margaret M. Morrow on the U.S. District Court for the Central District of California.

LAURA LITTLE (Temple). James G. Schmidt Professor of Law and Senior Advisor to the Dean. Professor Little teaches and consults in the areas of federal courts, conflict of laws, and constitutional law. She is the author of numerous books and articles, including a sole-authored casebook, *Conflict of Laws* (Aspen Wolters Kluwer 2013), a treatise, *Federal Courts*, and *Guilty Pleasures: Law and Comedy in America* (Oxford forthcoming 2018). She received the University-wide Lindback award for teaching and Temple's highest award for teaching, the University Great Teacher Award. The American Law Institute appointed Professor Little in 2014 to serve as Associate Reporter, *Restatement (Third) of Conflict of Laws*. Before entering academia, Professor Little practiced law in Philadelphia and served as a law clerk to Chief Justice William H. Rehnquist, Supreme Court of the United States (October Term 1986) and Judge James Hunter III of the United States Court of Appeals for the Third Circuit (1985-1986).

JOE MILLER (Georgia). Professor of Law. Professor Miller specializes in intellectual property law and competition law and teaches Patent Law, Intellectual Property Law Survey and Antitrust Law. From 2015 to 2017, he served as the faculty director of the Georgia Law at Oxford Program. He co-authored a casebook with Professor Lydia Loren, titled *Intellectual Property Law: Cases & Materials* (6th ed. 2018). He previously taught at Lewis & Clark Law School and as a visiting assistant professor at Northwestern. Before teaching, Miller worked as an attorney in the Antitrust Division of the U.S. Department of Justice, Sidley & Austin and as a judicial clerk for Judge Paul R. Michel of the U.S. Court of Appeals for the Federal Circuit. He was later appointed to the Federal Circuit Advisory Council, a post he held for five years. Miller earned his bachelor's degree from St. John's College, and his master's degree and law degree cum laude from Northwestern University.

MICHAEL MORLEY (Florida State). Assistant Professor of Law. Professor Morley teaches and writes in the areas of election law, constitutional law, remedies and the federal courts. He was previously an associate professor at Barry University School of Law. Prior to academia, he held numerous positions in both private practice and government, including as special assistant at the Office of the General Counsel, Department of the Army, at the Pentagon, clerk for Judge Gerald B. Tjoflat, of the U.S. Court of Appeals for the Eleventh Circuit, and as an associate at Winston & Strawn, LLP, in Washington, D.C. Professor Morley earned his J.D. from Yale Law School and his A.B. from Princeton University.

CHRISTOPHER JOHN ("CJ") PETERS (Akron). Dean and C. Blake McDowell Jr. Professor of Law, and Faculty Fellow of the Center for Constitutional Law. Dean Peters has been a legal educator for more than twenty years, having taught at the law schools of the University of Chicago, the University of Michigan, Wayne State University, Loyola Marymount University, the University of Toledo, and the University of Baltimore. He earned his bachelor's degree summa cum laude from Amherst College and his law degree cum laude from the University of Michigan. He practiced in civil litigation with the Chicago office of Latham & Watkins. Dean Peters teaches and writes in the areas of constitutional law, legal and constitutional theory, and civil procedure. He has published two books, *Precedent in the United States Supreme Court* (Springer 2013) and *A Matter of Dispute: Morality, Democracy, and Law* (Oxford University Press 2011).

ALEX REINERT (Cardozo). Professor of Law and Director, Center for Rights and Justice Prior to academia, Professor Reinert worked as an associate at Koob & Magoolahagan, where he focused on prisoners' rights, employment discrimination, and disability rights. He teaches and conducts research in the areas of constitutional law, civil procedure, and criminal law. Professor Reinert argued before the Supreme Court in *Ashcroft v. Iqbal*, and has appeared on behalf of parties and amicus curiae in many significant civil rights cases. Professor Reinert graduated magna cum laude from New York University School of Law and from Brown University. He held two clerkships, first with the Hon. Harry T. Edwards, D.C. Circuit Court of Appeals, and then with United States Supreme Court Justice Stephen G. Breyer.

JEFF RENSBERGER (South Texas). Professor of Law and Vice President for Strategic Planning, Institutional Research. Professor Rensberger teaches Civil Procedure, Conflict of Laws, Complex Litigation, and Property. He previously served as the Associate Dean for Academic Affairs (1999-2005). He has served on several committees of the Law School Admissions Council and on three ABA law school accreditation Site Inspection teams. He earned his undergraduate degree in English from Wabash College, graduating cum laude and with Distinction on his Senior Comprehensive Final Examination. He obtained his J.D., magna cum laude, from Indiana University (Bloomington). After law school, he served as a clerk for Judge Leroy Contie on U.S. Court of Appeals the Sixth Circuit and worked at Kirkland and Ellis in commercial litigation.

CAPRICE ROBERTS (Florida). Visiting Professor of Law. Professor Roberts teaches Federal Courts and Remedies. She is the editor of Dobbs & Roberts's *Law of Remedies*, and co-author of Remedies and Federal Courts casebooks. Professor Roberts is an elected member of the American Law Institute and served on the Consultative Group for the *Restatement (Third) of Restitution and Unjust Enrichment*. She has taught previously at West Virginia University, Florida State, Washington & Lee, University of North Carolina, Savannah Law School, and Catholic University. Professor Roberts clerked for Chief Judge Julia Smith Gibbons of the U.S. District Court for the Western District of Tennessee and Judge Ronald Lee Gilman of the U.S. Court of Appeals for the Sixth Circuit. She practiced complex civil and criminal litigation with Skadden Arps. She received her J.D. magna cum laude from Washington & Lee University and her B.A. from Rhodes College.

KERMIT ROOSEVELT, JR. (Penn). Professor of Law. Professor Roosevelt works in a diverse range of fields, focusing on constitutional law and conflict of laws. He is the author of *Conflict of Laws* (Foundation Press 2010) and *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (Yale, 2006). He was an associate with Mayer, Brown & Platt in Chicago and a Fellow with the Yale Information Society Project. Professor Roosevelt served as law clerk to the Honorable Stephen F. Williams, U.S. Court of Appeals for the District of Columbia and to U.S. Supreme Court Associate Justice David H. Souter. He earned a J.D. degree from Yale University and A.B. from Harvard University. He has represented a detainee in the detention center at Guantánamo Bay, Cuba. Professor Roosevelt is also the author of two novels, *Allegiance* and *In the Shadow of the Law*.

SHARON SANDEEN (Mitchell-Hamline). Professor of Law, Robins Kaplan Distinguished Professorship in IP Law and Director, Intellectual Property Institute. Professor Sandeen is an internationally recognized expert on trade secret law, having written three books and more than 25 articles and book chapters on trade secret law and other intellectual property topics, including the first casebook on trade secret law in the United States. She earned two degrees from the University of California Berkeley; a Bachelor of Arts degree in Political Science and a Masters of Law degree. She earned her J.D. from the University of the Pacific, McGeorge School of Law. She practiced law for more than 15 years in Sacramento, California, as an IP litigator and specialist. She was elected as a Fellow of the ABA Foundation and membership in the American Law Institute.

DANIELLE SCHANTZ (Akron). Editor in Chief, *Akron Law Review*. Ms. Schantz served as intern to U.S. District Court Judge Solomon Oliver, Jr.

TRACY THOMAS (Akron). Seiberling Chair of Constitutional Law, Director of the Center for Constitutional Law. Professor Thomas teaches Remedies, Alternative Dispute Resolution, and Family Law. She previously served as Associate Dean for Institutional Excellence. Professor Thomas received her B.A. degree from Miami University, a Master's of Public Administration, and a J.D. degree from Loyola Law School (L.A.). Prior to academia, she clerked for Judge Ferdinand F. Fernandez on the U.S. Court of Appeals for the Ninth Circuit, and was a litigation attorney for Covington & Burling and Neighborhood Legal Services in Washington D.C. She is the author of the books *Elizabeth Cady Stanton and the Feminist Foundations of Family Law* (NYU Press 2016), *Feminist Legal History* (2011), and West's annual volume, *Women and the Law*. She is lead editor on West's casebook, *Remedies: Public and Private*. Professor Thomas blogs as the sole editor of the *Gender & the Law Prof Blog*.

ERNEST YOUNG (Duke). Alston & Bird Professor of Law. Professor Young teaches Constitutional Law, Federal Courts, and Foreign Relations Law. He is one of the nation's leading authorities on the constitutional law of federalism, having written extensively on the Rehnquist Court's "Federalist Revival" and the difficulties confronting courts as they seek to draw lines between national and state authority. Professor Young previously taught at the University of Texas School of Law. He graduated from Dartmouth College in 1990 and Harvard Law School in 1993. After law school, he served as a law clerk to Judge Michael Boudin of the U.S. Circuit Court of Appeals for the First Circuit (1993-94) and to Justice David Souter of the U.S. Supreme Court (1995-96). Professor Young practiced law at Cohan, Simpson, Cowlshaw, & Wulff in Dallas, Texas (1994-95) and at Covington & Burling in Washington, D.C. (1996-98), where he specialized in appellate litigation. Elected to the American Law Institute in 2006, Professor Young is an active participant in both public and private litigation/// in his areas of interest.

58 S.Ct. 817
Supreme Court of the United States.
ERIE R. CO.
v.
TOMPKINS.*

* Mandate conformed to 98 F.2d 49.

No. 367.

Argued Jan. 31, 1938.

Decided April 25, 1938.

Synopsis

On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Action by Harry J. Tompkins against the Erie Railroad Company to recover for personal injuries allegedly sustained through negligent operation or maintenance of a train. To review a judgment of the Circuit Court of Appeals, 90 F.2d 603, affirming a judgment for plaintiff, the defendant brings certiorari.

Reversed and remanded, with directions.

Mr. Justice BUTLER, and Mr. Justice McREYNOLDS, dissenting.

Opinion

*69 Mr. Justice BRANDEIS delivered the opinion of the Court.

The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson*¹ shall now be disapproved.

¹ 1842, 16 Pet. 1, 10 L.Ed. 865. Leading cases applying the doctrine are collected in *Black & White Taxicab, etc., Co. v. Brown & Yellow Taxicab, etc., Co.*, 276 U.S. 518, 530, 531, 48 S.Ct. 404, 407, 408, 72 L.Ed. 681, 57 A.L.R. 426. Dissent from its application or extension was expressed as early as 1845 by Mr. Justice McKinley (and Mr. Chief Justice Taney) in *Lane v. Vick*, 3 How. 464, 477, 11 L.Ed. 681. Dissenting opinions were also written by Mr. Justice Daniel in *Rowan v. Runnels*, 5 How. 134, 140, 12 L.Ed. 85; by Mr. Justice Nelson in *Williamson v. Berry*, 8 How. 495, 550, 558, 12 L.Ed. 1170; by Mr. Justice Campbell in *Pease v. Peck*, 18 How. 595, 599, 600, 15 L.Ed. 518; and by Mr. Justice Miller in *Gelpcke v. City of Dubuque*, 1 Wall. 175, 207, 17 L.Ed. 520, and *U.S. ex rel. Butz v. City of Muscatine*, 8 Wall. 575, 585, 19 L.Ed. 490. Vigorous attack upon the entire doctrine was made by the Mr. Justice Field in *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 390, 13 S.Ct. 914, 37

L.Ed. 772, and by Mr. Justice Holmes in *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370, 30 S.Ct. 140, 54 L.Ed. 228, and in the *Taxicab Case*, 276 U.S. 518, at page 532, 48 S.Ct. 404, 408, 72 L.Ed. 681, 57 A.L.R. 426.

Tompkins, a citizen of Pennsylvania, was injured on a dark night by a passing freight train of the Erie Railroad Company while walking along its right of way at Hughestown in that state. He claimed that the accident occurred through negligence in the operation, or maintenance, of the train; that he was rightfully on the premises as licensee because on a commonly used beaten footpath which ran for a short distance alongside the tracks; and that he was struck by something which looked like a door projecting from one of the moving cars. To enforce that claim he brought an action in the federal court for Southern New York, which had jurisdiction because the company is a corporation of that state. It denied liability; and the case was tried by a jury.

*70 The Erie insisted that its duty to Tompkins was no greater than that owed to a trespasser. It contended, among other things, that its duty to Tompkins, and hence its liability, should be determined in accordance with the Pennsylvania law; that under the law of Pennsylvania, as declared by its highest court, persons who use pathways along the railroad right of way—that is, a longitudinal pathway as distinguished from a crossing—are to be deemed trespassers; and that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or willful. Tompkins denied that any such rule had been established by the decisions of the Pennsylvania courts; and contended that, since there was no statute of the state on the subject, the railroad's duty and liability is to be determined in federal courts as a matter of general law.

The trial judge refused to rule that the applicable law precluded recovery. The jury brought in a verdict of \$30,000; and the judgment entered thereon was affirmed by the Circuit Court of Appeals, which held (2 Cir., 90 F.2d 603, 604), that it was unnecessary to consider whether the law of Pennsylvania was as contended, because the question was one not of local, but of general, law, and that 'upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. * * * Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. * * * It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting

from the side of the train.’

*71 The Erie had contended that application of the Pennsylvania rule was required, among other things, by section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U.S.C. s 725, **819 28 U.S.C.A. s 725, which provides: ‘The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.’

Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari. 302 U.S. 671, 58 S.Ct. 50, 82 L.Ed. 518.

First. *Swift v. Tyson*, 16 Pet. 1, 18, 10 L.Ed. 865, held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the state is—or should be; and that, as there stated by Mr. Justice Story, ‘the true interpretation of the 34th section limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character. 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 *72 instrument, or what is the just rule furnished by the principles of commercial law to govern the case.’

The Court in applying the rule of section 34 to equity cases, in *Mason v. United States*, 260 U.S. 545, 559, 43 S.Ct. 200, 204, 67 L.Ed. 396, said: ‘The statute, however, is merely declarative of the rule which would exist in the absence of the statute.’² The federal courts assumed, in the broad field of ‘general law,’ the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given section 34,³ and as to the soundness of the rule which it introduced.⁴ But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, *73 the federal courts

exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written.⁵

² In *Hawkins v. Barney’s Lessee*, 5 Pet. 457, 464, 8 L.Ed. 190, it was stated that section 34 ‘has been uniformly held to be no more than a declaration of what the law would have been without it: to wit, that the *lex loci* must be the governing rule of private right, under whatever jurisdiction private right comes to be examined.’ See, also, *Bank of Hamilton v. Dudley’s Lessee*, 2 Pet. 492, 525, 7 L.Ed. 496. Compare *Jackson v. Chew*, 12 Wheat. 153, 162, 168, 6 L.Ed. 583; *Livingston v. Moore*, 7 Pet. 469, 542, 8 L.Ed. 751.

³ Pepper, *The Border Land of Federal and State Decisions* (1889) 57; Gray, *The Nature and Sources of Law* (1909 ed.) ss 533, 534; Trickett, *Non-Federal Law Administered in Federal Courts* (1906) 40 *Am.L.Rev.* 819, 821—824.

⁴ Street, *Is There a General Commercial Law of the United States* (1873) 21 *Am.L.Reg.* 473; Hornblower, *Conflict between State and Federal Decisions* (1880) 14 *Am.L.Rev.* 211; Meigs, *Decisions of the Federal Courts on Questions of State Law* (1882) 8 *So.L.Rev.* (n.s.) 452, (1911) 45 *Am.L.Rev.* 47; Heiskell, *Conflict between Federal and State Decisions* (1882) 16 *Am.L.Rev.* 743; Rand, *Swift v. Tyson versus Gelpcke v. Dubuque* (1895) 8 *Harv.L.Rev.* 328, 341—343; Mills, *Should Federal Courts Ignore State Laws* (1900) 34 *Am.L.Rev.* 51; Carpenter, *Court Decisions and the Common Law* (1917) 17 *Col.L.Rev.* 593, 602, 603.

⁵ Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 *Harv.L.Rev.* 49, 51—52, 81—88, 108.

Criticism of the doctrine became widespread after the decision of **820 *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 48 S.Ct. 404, 72 L.Ed. 681, 57 A.L.R. 426.⁶ There, *Brown & Yellow*, a Kentucky corporation owned by Kentuckians, and the *Louisville & Nashville Railroad*, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at the Bowling Green, Ky., Railroad station; and that the *Black & White*, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a contract would be void under the common law of Kentucky, it was arranged that the *Brown & Yellow* reincorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the

federal court for Western Kentucky to enjoin competition by the Black & White; an injunction issued by the District Court *74 was sustained by the Court of Appeals; and this Court, citing many decisions in which the doctrine of Swift & Tyson had been applied, affirmed the decree.

⁶ Shelton, Concurrent Jurisdiction—Its Necessity and its Dangers (1928) 15 Va.L.Rev. 137; Frankfurter, Distribution of Judicial Power Between Federal and State Courts (1928) 13 Corn.L.Q. 499, 524—530; Johnson, State Law and the Federal Courts (1929) 17 Ky.L.J. 355; Fordham, The Federal Courts and the Construction of Uniform State Laws (1929) 7 N.C.L.Rev. 423; Dobie, Seven Implications of Swift v. Tyson (1930) 16 Va.L.Rev. 225; Dawson, Conflict of Decisions between State and Federal Courts in Kentucky, and the Remedy (1931) 20 Ky.L.J. 1; Campbell, Is Swift v. Tyson an Argument for or against Abolishing Diversity of Citizenship Jurisdiction (1932) 18 A.B.A.J. 809; Ball, Revision of Federal Diversity Jurisdiction (1933) 28 Ill.L.Rev. 356, 362—364; Fordham, Swift v. Tyson and the Construction of State Statutes (1935) 41 W.Va.L.Q. 131.

Second. Experience in applying the doctrine of Swift v. Tyson, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity;⁷ and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.⁸

⁷ Compare Mr. Justice Miller in *Gelpcke v. City of Dubuque*, 1 Wall. 175, 209, 17 L.Ed. 520. The conflicts listed in Holt, *The Concurrent Jurisdiction of the Federal and State Courts* (1888) 160 et seq. cover twenty-eight pages. See, also, Frankfurter, *supra* note 6, at 524—530; Dawson, *supra* note 6; Note, *Aftermath of the Supreme Court's Stop, Look and Listen Rule* (1930) 43 Harv.L.Rev. 926; cf. Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction* (1931) 79 U. of Pa.L.Rev. 869, 881—886. Moreover, as pointed out by judge Augustus N. Hand in *Cole v. Pennsylvania R. Co.*, D.C., 43 F.2d 953, 956, 957, 71 A.L.R. 1096, decisions of this Court on common-law questions are less likely than formerly to promote uniformity.

⁸ Compare 2 Warren, *The Supreme Court in United States History*, Rev.Ed. 1935, 89: 'Probably no decision of the Court has ever given rise to more uncertainty as to legal rights; and though doubtless intended to promote uniformity in the operation of business transactions, its chief effect has been to render it difficult for business men to know in advance to what particular topic the Court would apply the doctrine. * * *' The Federal Digest through the 1937 volume, lists nearly 1,000 decisions involving the distinction between questions of general and of local law.

On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. Swift v. Tyson introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state *75 or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen.⁹ Thus, the doctrine rendered **821 impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.

⁹ It was even possible for a nonresident plaintiff defeated on a point of law in the highest court of a State nevertheless to win out by taking a nonsuit and renewing the controversy in the federal court. Compare *Gardner v. Michigan Cent. R.R. Co.*, 150 U.S. 349, 14 S.Ct. 140, 37 L.Ed. 1107; *Harrison v. Foley*, 8 Cir., 206 F. 57; *Interstate Realty & Inv. Co. v. Bibb County*, 5 Cir., 293 F. 721; see Mills, *supra* note 4, at 52.

The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called 'general law' as to which federal courts exercised an independent judgment.¹⁰ In addition to questions of purely commercial law, 'general law' was held to include the obligations under contracts entered into and to be performed within the state,¹¹ the extent to which a carrier operating within a state may stipulate for exemption from liability for his own negligence or that of his employee;¹² the liability for torts committed within the state upon persons resident or property located there, even where the question of liability *76 depended upon the scope of a property right conferred by the state;¹³ and the right to exemplary or punitive damages.¹⁴ Furthermore, state decisions construing local deeds,¹⁵ mineral conveyances,¹⁶ and even devises of real estate,¹⁷ were disregarded.¹⁸

¹⁰ For a recent survey of the scope of the doctrine, see Sharp & Brennan, *The Application of the Doctrine of Swift v. Tyson since 1900* (1929) 4 Ind.L.J. 367.

¹¹ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 48 S.Ct. 404, 72 L.Ed. 681, 57 A.L.R. 426; *Rowan v. Runnels*, 5 How. 134, 139, 12 L.Ed. 85; *Boyce v. Tabb*, 18 Wall. 546, 548, 21 L.Ed. 757; *Johnson v. Chas. D. Norton Co.*, 6 Cir., 159 F. 361; *Keene Five Cent Sav. Bank v. Reid*, 8 Cir., 123 F. 221.

- ¹² New York Railroad Co. v. Lockwood, 17 Wall. 357, 367, 368, 21 L.Ed. 627; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 443, 9 S.Ct. 469, 32 L.Ed. 788; Eells v. St. Louis, K. & N.W. Ry. Co., C.C.S.D.Iowa, 52 F. 903; Fowler v. Pennsylvania R.R. Co., 2 Cir., 229 F. 373.
- ¹³ Chicago v. Robbins, 2 Black 418, 428, 17 L.Ed. 298. Compare Yates v. Milwaukee, 10 Wall. 497, 506, 507, 19 L.Ed. 984; Yeates v. Illinois Cent. Ry. Co., C.C.N.D.Ill., 137 F. 943; Curtis v. Cleveland, C.C. & St. L. Ry. Co., C.C.E.D.Ill., 140 F. 777. See, also, Hough v. Texas Railway Co., 100 U.S. 213, 226, 25 L.Ed. 612; Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 13 S.Ct. 914, 37 L.Ed. 772; Gardner v. Michigan Cent. R.R. Co., 150 U.S. 349, 358, 14 S.Ct. 140, 37 L.Ed. 1107; Beutler v. Grand Trunk Junction Ry. Co., 224 U.S. 85, 32 S.Ct. 402, 56 L.Ed. 679; Baltimore & Ohio R.R. Co. v. Goodman, 275 U.S. 66, 48 S.Ct. 24, 72 L.Ed. 167, 56 A.L.R. 645; Pokora v. Wabash Ry. Co., 292 U.S. 98, 54 S.Ct. 580, 78 L.Ed. 1149, 91 A.L.R. 1049; Cole v. Pennsylvania R.R. Co., D.C., 43 F.2d 953, 71 A.L.R. 1096.
- ¹⁴ Lake Shore & M.S. Ry. Co. v. Prentice, 147 U.S. 101, 106, 13 S.Ct. 261, 37 L.Ed. 97; Norfolk & P. Traction Co. v. Miller, 4 Cir., 174 F. 607; Greene v. Keithley, 8 Cir., 86 F.2d 238, 239.
- ¹⁵ Foxcroft v. Mallet, 4 How. 353, 379, 11 L.Ed. 1008; Midland Valley Ry. Co. v. Sutter, 8 Cir., 28 F.2d 163; Midland Valley Ry. Co. v. Jarvis, 8 Cir., 29 F.2d 539, 61 A.L.R. 1064.
- ¹⁶ Kuhn v. Fairmont Coal Co., 215 U.S. 349, 30 S.Ct. 140, 54 L.Ed. 228; Mid-Continent Petroleum Corporation v. Sauder, 10 Cir., 67 F.2d 9, 12, reversed on other grounds 292 U.S. 272, 54 S.Ct. 671, 78 L.Ed. 1255, 93 A.L.R. 454.
- ¹⁷ Lane v. Vick, 3 How. 464, 476, 11 L.Ed. 681; Barber v. Pittsburg, F.W. & C. Ry. Co., 166 U.S. 83, 99, 100, 17 S.Ct. 488, 41 L.Ed. 925; Messinger v. Anderson, 6 Cir., 171 F. 785, 791, 792, reversed on other grounds 225 U.S. 436, 32 S.Ct. 739, 56 L.Ed. 1152; Knox & Lewis & Alwood, D.C.S.D.Ga., 228 F. 753.
- ¹⁸ Compare, also, Williamson v. Berry, 8 How. 495, 12 L.Ed. 1170; Watson v. Tarpley, 18 How. 517, 15 L.Ed. 509; Gelpcke v. City of Dubuque, 1 Wall. 175, 17 L.Ed. 520.

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own state and become citizens of another might avail themselves of the federal rule.¹⁹ ****822** And, without even change of residence, a corporate citizen of ***77** the state could avail itself of the federal rule by reincorporating under the laws of another state, as was done in the Taxicab Case.

- ¹⁹ See Cheever v. Wilson, 9 Wall. 108, 123, 19 L.Ed. 604; Robertson v. Carson, 19 Wall. 94, 106, 107, 22 L.Ed. 178; Morris v. Gilmer, 129 U.S. 315, 328, 9 S.Ct. 289, 32 L.Ed. 690; Dickerman v. Northern Trust Co., 176 U.S. 181, 192, 20 S.Ct. 311, 44 L.Ed. 423; Williamson v. Osenton, 232 U.S. 619, 625, 34 S.Ct. 442, 58 L.Ed. 758.

^[1] The injustice and confusion incident to the doctrine of Swift v. Tyson have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction.²⁰ Other legislative relief has been proposed.²¹ If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.²² But the unconstitutionality ***78** of the course pursued has now been made clear, and compels us to do so.

- ²⁰ See, e.g., Hearings Before a Subcommittee of the Senate Committee on the Judiciary on S. 937, S. 939, and S. 3243, 72d Cong., 1st Sess. (1932) 6—8; Hearing Before the House Committee on the Judiciary on H.R. 10594, H.R. 4526, and H.R. 11508, 72d Cong., 1st Sess., ser. 12 (1932) 97-104; Sen.Rep.No. 530, 72d Cong., 1st Sess. (1932) 4—6; Collier, A Plea Against Jurisdiction Because of Diversity (1913) 76 Cent.L.J. 263, 264, 266; Frankfurter, *supra* note 6; Ball, *supra*, note 6; Warren, Corporations and Diversity of Citizenship (1933) 19 Va.L.Rev. 661, 686.

- ²¹ Thus, bills which would abrogate the doctrine of Swift v. Tyson have been introduced. S. 4333, 70th Cong., 1st Sess.; S. 96, 71st Cong., 1st Sess.; H.R. 8094, 72d Cong., 1st Sess. See, also, Mills, *supra*, note 4, at 68, 69; Dobie, *supra*, note 6, at 241; Frankfurter, *supra*, note 6, at 530; Campbell, *supra*, note 6, at 811. State statutes on conflicting questions of 'general law' have also been suggested. See Heiskell, *supra*, note 4, at 760; Dawson, *supra*, note 6; Dobie, *supra*, note 6, at 241.

- ²² The doctrine has not been without defenders. See Eliot, The Common Law of the Federal Courts (1902) 36 Am.L.Rev. 498, 523—525; A. B. Parker, The Common Law Jurisdiction of the United States Courts (1907) 17 Yale L.J. 1; Schofield, Swift v. Tyson: Uniformity of

Judge-Made State Law in State and Federal Courts (1910) 4 Ill.L.Rev. 533; Brown, The Jurisdiction of the Federal Courts Based on Diversity of Citizenship (1929) 78 U. of Pa.L.Rev. 179, 189—191; J. J. Parker, The Federal Jurisdiction and Recent Attacks Upon It (1932) 18 A.B.A.J. 433, 438; Yntema, The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States (1933) 19 A.B.A.J. 71, 74, 75; Beutel, Common Law Judicial Technique and the Law of Negotiable Instruments—Two Unfortunate Decisions (1934) 9 Tulane L.Rev. 64.

[2] [3] [4] Third. Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401, 13 S.Ct. 914, 927, 37 L.Ed. 772, against ignoring the Ohio common law of fellow-servant liability: I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence *79 in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as **823 to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.’

The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes.²³ The doctrine rests upon the assumption that there is ‘a transcendental body

of law outside of any particular State but obligatory within it unless and until changed by statute,’ that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts ‘the parties are entitled to an independent judgment on matters of general law’:

²³ *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370—372, 30 S.Ct. 140, 54 L.Ed. 228; *Black & White Taxicab, etc., Co. v. Brown & Yellow Taxicab, etc., Co.*, 276 U.S. 518, 532—536, 48 S.Ct. 404, 408, 409, 72 L.Ed. 681, 57 A.L.R. 426.

But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. * * *

‘The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.’

Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, ‘an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.’ In disapproving that doctrine we do not hold *80 unconstitutional section 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.

[5] Fourth. The defendant contended that by the common law of Pennsylvania as declared by its highest court in *Falchetti v. Pennsylvania R. Co.*, 307 Pa. 203, 160 A. 859, the only duty owed to the plaintiff was to refrain from willful or wanton injury. The plaintiff denied that such is the Pennsylvania law.²⁴ In support of their respective contentions the parties discussed and cited many decisions of the Supreme Court of the state. The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion.

²⁴ *Tompkins* also contended that the alleged rule of the *Falchetti* Case is not in any event applicable here because he was struck at the intersection of the longitudinal pathway and a transverse crossing. The court below found it unnecessary to consider this contention, and we leave the question open.

Reversed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

Mr. Justice BUTLER (dissenting).

The case presented by the evidence is a simple one. Plaintiff was severely injured in Pennsylvania. While walking on defendant's right of way along a much-used path at the end of the cross-ties of its main track, he came into collision with an open door swinging from the side of a car in a train going in the opposite direction. Having been warned by whistle and headlight, he saw the locomotive *81 approaching and had time and space enough to step aside and so avoid danger. To justify his failure to get out of the way, he says that upon many other occasions he had safely walked there while trains passed.

Invoking jurisdiction on the ground of diversity of citizenship, plaintiff, a citizen and resident of Pennsylvania, brought this suit to recover damages against defendant, a New York corporation, in the federal court for the Southern District of that state. The issues were whether negligence of defendant was a proximate cause of his injuries, and whether negligence of plaintiff contributed. He claimed that, by hauling the car with the open door, defendant violated a duty to him. The defendant insisted that it violated no duty, and that plaintiff's injuries were caused by his own **824 negligence. The jury gave him a verdict on which the trial court entered judgment; the Circuit Court of Appeals affirmed. 2 Cir., 90 F.2d 603.

Defendant maintained, citing *Falchetti v. Pennsylvania R. Co.*, 307 Pa. 203, 160 A. 859, and *Koontz v. Baltimore & O.R. Co.*, 309 Pa. 122, 163 A. 212, that the only duty owed plaintiff was to refrain from willfully or wantonly injuring him; it argued that the courts of Pennsylvania had so ruled with respect to persons using a customary longitudinal path, as distinguished from one crossing the track. The plaintiff insisted that the Pennsylvania decisions did not establish the rule for which the defendant contended. Upon that issue the Circuit Court of Appeals said (90 F.2d 603, et page 604): 'We need not go into this matter since the defendant concedes that the great weight of authority in other states is to the contrary. This concession is fatal to its contention, for upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law.' *82 Upon that basis the court held the evidence sufficient to sustain a finding that plaintiff's injuries were caused by the negligence of defendant. It also held the question of contributory negligence one for the jury.

Defendant's petition for writ of certiorari presented two

questions: Whether its duty toward plaintiff should have been determined in accordance with the law as found by the highest court of Pennsylvania, and whether the evidence conclusively showed plaintiff guilty of contributory negligence. Plaintiff contends that, as always heretofore held by this Court, the issues of negligence and contributory negligence are to be determined by general law against which local decisions may not be held conclusive; that defendant relies on a solitary Pennsylvania case of doubtful applicability, and that, even if the decisions of the courts of that state were deemed controlling, the same result would have to be reached.

No constitutional question was suggested or argued below or here. And as a general rule, this Court will not consider any question not raised below and presented by the petition. *Olson v. United States*, 292 U.S. 246, 262, 54 S.Ct. 704, 711, 78 L.Ed. 1236; *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 494, 53 S.Ct. 721, 726, 77 L.Ed. 1331; *Gunning v. Cooley*, 281 U.S. 90, 98, 50 S.Ct. 231, 234, 74 L.Ed. 720. Here it does not decide either of the questions presented, but, changing the rule of decision in force since the foundation of the government, remands the case to be adjudged according to a standard never before deemed permissible.

The opinion just announced states that: 'The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* (1842, 16 Pet. 1, 10 L.Ed. 865) shall now be disapproved.'

That case involved the construction of the Judiciary Act of 1789, s 34, 28 U.S.C.A. s 725: 'The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of *83 the United States, in cases where they apply.' Expressing the view of all the members of the Court, Mr. Justice Story said (16 Pet. 1, at page 18, 10 L.Ed. 865): 'In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often reexamined, reversed, and qualified by courts themselves, whenever they are found to be either defective, or illfounded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed, that the true interpretation of the 34th section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. 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 ****825** 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 ***84** 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. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules or conclusive authority, by which our own judgments are to be bound up and governed.' (Italics added.)

The doctrine of that case has been followed by this Court in an unbroken line of decisions. So far as appears, it was not questioned until more than 50 years later, and then by a single judge.¹ *Baltimore & O. Railroad Co. v. Baugh*, 149 U.S. 368, 390, 13 S.Ct. 914, 37 L.Ed. 772. In that case, Mr. Justice Brewer, speaking for the Court, truly said (149 U.S. 368, at page 373, 13 S.Ct. 914, 916, 37 L.Ed. 772): 'Whatever differences of opinion may have been expressed have not been on the question whether a matter of general law should be settled by the independent judgment of this court, rather than through an adherence to the decisions of the state courts, but upon the other question, whether a given matter is one of local or of general law.'

¹ Mr. Justice Field Filed a dissenting opinion, several sentences of which are quoted in the decision just announced. The dissent failed to impress any of his associates. It assumes that adherence to section 34 as construed involves a supervision over legislative or judicial action of the states. There is no foundation for that suggestion. Clearly, the dissent of the learned Justice rests upon misapprehension of the rule. He joined in applying the doctrine for more than a quarter of a century before his dissent. The reports do not disclose that he objected to it in any later case. Cf. *Oakes v. Mase*, 165 U.S. 363, 17 S.Ct. 345, 41 L.Ed. 746.

And since that decision, the division of opinion in this Court has been of the same character as it was before. In 1910, Mr. Justice Holmes, speaking for himself and two

other Justices, dissented from the holding that a ***85** court of the United States was bound to exercise its own independent judgment in the construction of a conveyance made before the state courts had rendered an authoritative decision as to its meaning and effect. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 30 S.Ct. 140, 54 L.Ed. 228. But that dissent accepted (215 U.S. 349, at page 371, 30 S.Ct. 140, 54 L.Ed. 228) as 'settled' the doctrine of *Swift v. Tyson*, and insisted (215 U.S. 349, at page 372, 30 S.Ct. 140, 54 L.Ed. 228) merely that the case under consideration was by nature and necessity peculiarly local.

Thereafter, as before, the doctrine was constantly applied.² In *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 48 S.Ct. 404, 72 L.Ed. 681, 57 A.L.R. 426, three judges dissented. The writer of the dissent, Mr. Justice Holmes said, however (276 U.S. 518, at page 535, 48 S.Ct. 404, 409, 72 L.Ed. 681, 57 A.L.R. 426): 'I should leave *Swift v. Tyson* undisturbed, as I indicated in *Kuhn v. Fairmont Coal Co.*, but I would not allow it to spread the assumed dominion into new fields.'

² In *Salem Co. v. Manufacturers' Co.*, 264 U.S. 182, at page 200, 44 S.Ct. 266, 271, 68 L.Ed. 628, 31 A.L.R. 867, Mr. Justice Holmes and Mr. Justice Brandeis concurred in the judgment of the Court upon a question of general law on the ground that the rights of the parties were governed by state law.

No more unqualified application of the doctrine can be found than in decisions of this Court speaking through Mr. Justice Holmes. *United Zinc Co. v. Britt*, 258 U.S. 268, 42 S.Ct. 299, 66 L.Ed. 615, 36 A.L.R. 28; *Baltimore & O.R.R. Co. v. Goodman*, 275 U.S. 66, 70, 48 S.Ct. 24, 25, 72 L.Ed. 167, 56 A.L.R. 645. Without in the slightest departing from that doctrine, but implicitly applying it, the strictness of the rule laid down in the *Goodman Case* was somewhat ameliorated by ****826** *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 54 S.Ct. 580, 78 L.Ed. 1149, 91 A.L.R. 1049.

Whenever possible, consistently with standards sustained by reason and authority constituting the general law, this Court has followed applicable decisions of state courts. *Mutual Life Co. v. Johnson*, 293 U.S. 335, 339, 55 S.Ct. 154, 156, 79 L.Ed. 398. See *Burgess v. Seligman*, 107 U.S. 20, 34 2 S.Ct. 10, 27 L.Ed. 359; *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, supra, 276 U.S. 518, at page 530, 48 S.Ct. 404, 407, 72 L.Ed. 681, 57 A.L.R. 426. Unquestionably, the determination of the issues of negligence and contributory negligence upon which decision of this case ***86** depends are questions of general law. *Hough v. Texas Railway Co.*, 100 U.S. 213, 226, 25 L.Ed. 612; *Lake Shore Railway Co. v. Prentice*, 147 U.S. 101, 13 S.Ct. 261, 37 L.Ed. 97; *Baltimore & O. Railroad Co. v. Baugh*, supra;

Central Railroad Co., 150 U.S. 349, 358, 14 S.Ct. 140, 37 L.Ed. 1107; Central Vermont Ry. Co. v. White, 238 U.S. 507, 512, 35 S.Ct. 865, 59 L.Ed. 1433, Ann.Cas.1916B, 252; Baltimore & O.R.R. Co. v. Goodman, supra; Pokora v. Wabash Ry. Co., supra.

While amendments to section 34 have from time to time been suggested, the section stands as originally enacted. Evidently Congress has intended throughout the years that the rule of decision as construed should continue to govern federal courts in trials at common law. The opinion just announced suggests that Mr. Warren's research has established that from the beginning this Court has erroneously construed section 34. But that author's 'New Light on the History of the Federal Judiciary Act of 1789' does not purport to be authoritative, and was intended to be no more than suggestive. The weight to be given to his discovery has never been discussed at this bar. Nor does the opinion indicate the ground disclosed by the research. In his dissenting opinion in the Taxicab Case, Mr. Justice Holmes referred to Mr. Warren's work, but failed to persuade the Court that 'laws' as used in section 34 included varying and possibly ill-considered rulings by the courts of a state on questions of common law. See, e.g., *Swift v. Tyson*, supra, 16 Pet. 1, 16, 17, 10 L.Ed. 865. It well may be that, if the Court should now call for argument of counsel on the basis of Mr. Warren's research, it would adhere to the construction it has always put upon section 34. Indeed, the opinion in this case so indicates. For it declares: 'If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.' This means that, so far as concerns the rule of decision now condemned, the Judiciary Act of 1789, passed to establish judicial *87 courts to exert the judicial power of the United States, and especially section 34 of that act as construed, is unconstitutional; that federal courts are now bound to follow decisions of the courts of the state in which the controversies arise; and that Congress is powerless otherwise to ordain. It is hard to foresee the consequences of the radical change so made. Our opinion in the Taxicab Case cites numerous decisions of this Court which serve in part to indicate the field from which it is now intended forever to bar the federal courts. It extends to all matters of contracts and torts not positively governed by state enactments. Counsel searching for precedent and reasoning to disclose common-law principles on which to guide clients and conduct litigation are by this decision told that as to all of these questions the decisions of this Court and other federal courts are no longer anywhere authoritative.

This Court has often emphasized its reluctance to consider constitutional questions and that legislation will not be held invalid as repugnant to the fundamental law if the case may be decided upon any other ground. In view of

grave consequences liable to result from erroneous exertion of its power to set aside legislation, the Court should move cautiously, seek assistance of counsel, act only after ample deliberation, show that the question is before the Court, that its decision cannot be avoided by construction of the statute assailed or otherwise, indicate precisely the principle or provision of the Constitutional held to have been transgressed, and fully disclose the reasons and authorities found to warrant the conclusion of invalidity. These safeguards against the improvident use of the great power to invalidate legislation are so well-grounded and familiar that statement of reasons or citation of authority to support them is no longer necessary. But see, e.g., **827 *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 553, 9 L.Ed. 773; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 673, 22 L.Ed. 227; *Chicago, etc., Railway Co. v. Wellman*, 143 U.S. 339, 345, 12 S.Ct. 400, 36 L.Ed. 176; *88 *Baker v. Grice*, 169 U.S. 284, 292, 18 S.Ct. 323, 42 L.Ed. 748; *Martin v. District of Columbia*, 205 U.S. 135, 140, 27 S.Ct. 440, 51 L.Ed. 743.

So far as appears, no litigant has ever challenged the power of Congress to establish the rule as construed. It has so long endured that its destruction now without appropriate deliberation cannot be justified. There is nothing in the opinion to suggest that consideration of any constitutional question is necessary to a decision of the case. By way of reasoning, it contains nothing that requires the conclusion reached. Admittedly, there is no authority to support that conclusion. Against the protest of those joining in this opinion, the Court declines to assign the case for reargument. It may not justly be assumed that the labor and argument of counsel for the parties would not disclose the right conclusion and aid the Court in the statement of reasons to support it. Indeed, it would have been appropriate to give Congress opportunity to be heard before divesting it of power to prescribe rules of decision to be followed in the courts of the United States. See *Myers v. United States*, 272 U.S. 52, 176, 47 S.Ct. 21, 45, 71 L.Ed. 160.

The course pursued by the Court in this case is repugnant to the Act of Congress of August 24, 1937, 50 Stat. 751, 28 U.S.C.A. ss 17 and note, 349a, 380a and note, 401. It declares that: 'Whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General. In any such case the court shall permit the United States to intervene and become a party for presentation of evidence (if evidence is otherwise receivable in such suit or proceeding) and argument upon the question of the constitutionality of such Act. In any such suit or proceeding the United States shall, subject to the applicable provisions of law, have all

the rights of a *89 party and the liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of such Act.' Section 1, 28 U.S.C.A. s 401. That provision extends to this Court. Section 5, 28 U.S.C.A. s 380a note. If defendant had applied for and obtained the writ of certiorari upon the claim that, as now held, Congress has no power to prescribe the rule of decision, section 34 as construed, it would have been the duty of this Court to issue the prescribed certificate to the Attorney General in order that the United States might intervene and be heard on the constitutional question. Within the purpose of the statute and its true intent and meaning, the constitutionality of that measure has been 'drawn in question.' Congress intended to give the United States the right to be heard in every case involving constitutionality of an act affecting the public interest. In view of the rule that, in the absence of challenge of constitutionality, statutes will not here be invalidated on that ground, the Act of August 24, 1937 extends to cases where constitutionality is first 'drawn in question' by the Court. No extraordinary or unusual action by the Court after submission of the cause should be permitted to frustrate the wholesome purpose of that act. The duty it imposes ought here to be willingly assumed. If it were doubtful whether this case is within the scope of the act, the Court should give the United States opportunity to intervene and, if so advised, to present argument on the constitutional question, for undoubtedly it is one of great public importance. That would be to construe the act according to its meaning.

The Court's opinion in its first sentence defines the question to be whether the doctrine of *Swift v. Tyson* shall now be disapproved; it recites (third page, 58 S.Ct. 819) that Congress is without power to prescribe rules of decision that have been followed by federal courts as a result of the construction of section 34 in *Swift v. Tyson* and since; after discussion, it declares (seventh page, 58 S.Ct. 822) that 'the unconstitutionality of the course pursued (meaning the rule of decision *90 resulting from that construction) * * * compels' abandonment of the doctrine so long applied; and then near the end of the last page, 58 S.Ct. 823, the Court states that it does not hold section 34 unconstitutional, but merely that, in applying the doctrine of *Swift v. Tyson* construing it, this Court and the lower courts have invaded rights which are reserved **828 by the Constitution to the several states. But, plainly through the form of words employed, the substance of the decision appears; it strikes down as unconstitutional section 34 as construed by our decisions; it divests the Congress of power to prescribe rules to be followed by federal courts when deciding questions of general law. In that broad field it compels this and the lower federal courts to follow decisions of the courts of a particular state.

I am of opinion that the constitutional validity of the rule need not be considered, because under the law, as found

by the courts of Pennsylvania and generally throughout the country, it is plain that the evidence required a finding that plaintiff was guilty of negligence that contributed to cause his injuries, and that the judgment below should be reversed upon that ground.

Mr. Justice McREYNOLDS, concurs in this opinion.

Mr. Justice REED (concurring in part).

I concur in the conclusion reached in this case, in the disapproval of the doctrine of *Swift v. Tyson*, and in the reasoning of the majority opinion, except in so far as it relies upon the unconstitutionality of the 'course pursued' by the federal courts.

The 'doctrine of *Swift v. Tyson*,' as I understand it, is that the words 'the laws,' as used in section 34, line 1, of the Federal Judiciary Act of September 24, 1789, 28 U.S.C.A. s 725, do not included in their meaning 'the decisions of the local tribunals.' Mr. Justice Story, in deciding that point, said, 16 Pet. 1, 19, 10 L.Ed. 865: *91 'Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed.'

To decide the case now before us and to 'disapprove' the doctrine of *Swift v. Tyson* requires only that we say that the words 'the laws' include in their meaning the decisions of the local tribunals. As the majority opinion shows, by its reference to Mr. Warren's researches and the first quotation from Mr. Justice Holmes, that this Court is now of the view that 'laws' includes 'decisions,' it is unnecessary to go further and declare that the 'course pursued' was 'unconstitutional,' instead of merely erroneous.

The 'unconstitutional' course referred to in the majority opinion is apparently the ruling in *Swift v. Tyson* that the supposed omission of Congress to legislate as to the effect of decisions leaves federal courts free to interpret general law for themselves. I am not at all sure whether, in the absence of federal statutory direction, federal courts would be compelled to follow state decisions. There was sufficient doubt about the matter in 1789 to induce the first Congress to legislate. No former opinions of this Court have passed upon it. Mr. Justice Holmes evidently saw nothing 'unconstitutional' which required the overruling of *Swift v. Tyson*, for he said in the very opinion quoted by the majority, 'I should leave *Swift v. Tyson* undisturbed, as I indicated in *Kuhn v. Fairmont*

Coal Co., but I would not allow it to spread the assumed dominion into new fields.’ *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 535, 48 S.Ct. 404, 409, 72 L.Ed. 681, 57 A.L.R. 426. If the opinion commits this Court to the position that the Congress is without power to declare what rules of substantive law shall govern the federal courts, *92 that conclusion also seems questionable. The line between procedural and substantive law is hazy, but no one doubts federal power over procedure. *Wayman v. Southard*, 10 Wheat. 1, 6 L.Ed. 253. The Judiciary Article, 3, and the ‘necessary and proper’ clause of article 1, s 8, may fully authorize legislation, such as this section of the Judiciary Act.

In this Court, stare decisis, in statutory construction, is a useful rule, not an inexorable command. *Burnet v.*

Coronado Oil & Gas Co., 285 U.S. 393, dissent, page 406, note 1, 52 S.Ct. 443, 446, 76 L.Ed. 815. Compare *Read v. Bishop of Lincoln*, (1892) A.C. 644, 655; *London Street Tramways v. London County Council*, (1898) A.C. 375, 379. It seems preferable to overturn an established construction of an act of Congress, rather than, in the circumstances of this case, to interpret the Constitution. Cf. *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 29 S.Ct. 527, 53 L.Ed. 836.

There is no occasion to discuss further the range or soundness of these few phrases of the opinion. It is sufficient now to call attention to them and express my own non-acquiescence.

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

The Ballad of Harry James Tompkins

Brian L. Frye¹

*Freight Train, Freight Train,
Run so fast.
Please don't tell what train I'm on.
They won't know what route I'm going.*²

At about 2:30 a.m. on Friday, July 27, 1934, William Colwell of Hughestown, Pennsylvania was awakened by two young men banging on his front door. When he went downstairs, they told him that someone had been run over by a train. Colwell looked out his side window. In the moonlight, he saw someone near the railroad tracks.³ He went back upstairs and told his wife that there had been an accident. She told him “not to go out, that them fellows was crazy,” but he put on his clothes and went out to help anyway.

Colwell found his neighbor Harry James Tompkins lying next to the railroad tracks, about 6 or 10 feet from Hughes Street. Tompkins had a deep gash on his right temple, and his severed right arm was in between the tracks. Colwell told the young men to go to Mrs. Rentford's house down the street and call an ambulance. After calling the ambulance, they disappeared. Colwell yelled to his neighbor, Aloysius Thomas McHale, who got dressed and came out.⁴ Colwell and McHale stayed with Tompkins until the ambulance arrived at about 2:45 a.m. and took him to Pittston Hospital.⁵

The train that injured Tompkins was the Ashley Special No. 2499, a freight train operated by the Erie Railroad Company. Tompkins filed a diversity action against Erie in federal court, because the relevant federal common law rule was more favorable to him than the Pennsylvania rule. While Tompkins won at trial and on appeal, the Supreme Court reversed in *Erie Railroad Company v. Tompkins*, holding that federal courts sitting in diversity must apply state substantive law.⁶

¹ Spears-Gilbert Associate Professor of Law, University of Kentucky School of Law. J.D., New York University School of Law, 2005; M.F.A., San Francisco Art Institute, 1997; B.A., University of California, Berkeley, 1995. Thanks to Roger P. Nober and Adam Charnes for their helpful suggestions. Thanks to Amelia Landenberger, Michel Yang, Franklin Runge, and especially Lexington Sauers for their invaluable research assistance.

² Elizabeth Cotten, *Freight Train* (c. 1906-12).

³ On July 27, 1934 at 2:30 a.m., the moon was 99.5% full.

⁴ Record 115.

⁵ Record 86-87. See also *Tompkins Loses Arm*, *Wilkes-Barre Times Leader*, *The Evening News* (Wilkes-Barre, Pennsylvania), July 27, 1934, at 25.

⁶ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

The Supreme Court's decision in *Erie Railroad Company v. Tompkins* "was completely unheralded and unexpected."⁷ For almost a century, the Court had followed its opinion in *Swift v. Tyson*, holding that federal courts sitting in diversity should apply "general" common law, which gradually became "federal" common law.⁸ But after *Erie*, "federal general common law" was no more.⁹

Initially, lawyers were unsure what to make of *Erie*. But legal scholars immediately recognized its significance, which has only become more pronounced over time. Today, it is universally considered both one of the most important Supreme Court decisions, and one of the most enigmatic. It implicates philosophical questions about the nature of law, constitutional questions about federalism and the separation of powers, normative questions about access to justice, and practical questions about litigation strategy, but answers none of them. For law professors, *Erie* is the gift that keeps on giving, and for law students it is the bane of their existence.

And yet, like every other Supreme Court case, *Erie* was also an actual dispute between actual parties. In the judicial and scholarly retelling, the facts of the case become almost irrelevant. *Erie* was a case about what law to apply, not what happened in Hughestown on July 27, 1934. But for Tompkins and Erie, it was a case about what actually happened, who was at fault, and why.

Over the years, a smattering of journalists, lawyers, and legal scholars have told the story of *Erie*.¹⁰ Most relied on the record. A few relied on interviews and personal experience. But all accepted Tompkins's account at face value: An unsecured refrigerator car door hit him while he was walking on the path next to the railroad track. Apparently, the jury believed him, or at least voted in his favor. But was he telling the truth?

Ultimately, it's impossible to know for sure. No one asked, and everyone involved is long dead. But there are reasons to be suspicious. The defense strategy was to question the credibility of Tompkins and his witnesses. It failed, but they scored some points.

According to Tompkins, he was walking home from his mother-in-law's house at 2 a.m., when friends driving home from a lake 20 miles away happened to pass by and give him a ride to the railroad crossing a block away from his house. While he walked the rest of the way home on a path next to the railroad track, an oncoming train passed at about 30 miles per hour. Something projecting from the train, probably an unsecured refrigerator car door, struck him in the head and knocked him unconscious. When he fell to the ground, his right arm fell under the wheels of

⁷ Robert L. Stearns, *Erie Railroad Versus Tompkins: One Year After*, 12 Rocky Mtn. L. Rev. 1 (1939).

⁸ *Swift v. Tyson*, 41 U.S. 1 (1842).

⁹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

¹⁰ See, e.g., Bob Rizzi, *Erie Memoirs Reveal Drama, Tragedy*, 63 Harv. L. Rec. 2 (Sept. 24, 1976); Irving Younger, *What Happened in Erie*, 56 Tex. L. Rev. 1011 (1978); *Erie Railroad Company v. Tompkins* Project, *Luzerne Legal Register Report* (Jan. 2007); Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in *Civil Procedure Stories* (Kevin M. Clermont, ed. 2008).

the train, and was severed just below his shoulder. Luckily, minutes after he was injured, two unidentified young men just happened to stumble upon him, alert Colwell, and then disappear without a trace.

Bluntly, I find Tompkins's story implausible. And so did Erie's lawyer, who repeatedly asked Tompkins and his witnesses if they were serious. Of course, it's impossible to know for sure what really happened. But I am confident that Tompkins and his witnesses were not entirely candid with the court. I suspect that Tompkins was actually trying to board the Ashley Special and ride it to Wilkes-Barre, presumably to look for work, when he slipped and fell. The two young men who found him were probably also trying to catch the train, or perhaps were already riding it, and jumped off when they saw Tompkins fall. And Tompkins's friends simply concocted a cover story about dropping him off at the railroad crossing, in order to substantiate his claim.

Does it matter? After all, *Erie* was ultimately a case about the authority of the federal courts, not what happened to Tompkins.

I think it does. For one thing, the truth is valuable for its own sake.¹¹ But for another, it may also help explain why Tompkins filed his action in New York rather than Pennsylvania. The decision is typically attributed entirely to choice of law, which surely played an important role. But maybe Tompkins's lawyers also figured that a New York jury would be more likely to buy his story? And maybe the progressive Supreme Court justices were willing to sacrifice Tompkins in part because they knew he was lying? In any case, I offer the following revisionist history of *Erie v. Tompkins* for your consideration.

Harry James Tompkins

Hughestown is a borough in the Greater Pittston area of Luzerne County in northeastern Pennsylvania, about halfway between Scranton and Wilkes-Barre, where the Lackawanna River joins the Susquehanna River. In 1934, it had about 2,300 residents, many of them coal miners.¹²

Harry James Tompkins was born in Hughestown on July 31, 1907, to Emanuel Tompkins and Sarah Bowkley Tompkins. Tompkins dropped out of school at 15, but started working as soon as possible, first in a knitting mill, and then at a coal breaker.¹³ In 1920, he got a job at the

¹¹ As a great philosopher once said, "Now you know, and knowing is half the battle." G.I. Joe: A Real American Hero (September 12, 1983).

¹² In the 1930 Census the population of Hughestown was 2,252 and in the 1940 Census its population was 2,340. Edward M. Harrington's estimate of a population of about 2,800 seems improbably high. Record 107. In the 2010 Census the population Hughestown was 1,392, and it appears to be shrinking.

¹³ Record 18. A "knitting mill" was a factory that produced knitted goods. A "coal breaker" was a factory that processed anthracite coal by breaking it into pieces of various useful sizes, sorting the pieces by size, and removing impurities.

Pittston Stove Works, where he eventually learned the trade of iron moulding, and joined the Iron Moulders' Union of North America, Local No. 133.¹⁴



Pittston Stove Works (c. 1907)¹⁵

On May 10, 1930, Tompkins married Edith Newhart of Exeter, at the Methodist Episcopal Church in West Pittston.¹⁶ They moved to 7 Hughes Street in Hughestown, an “unpretentious white framehouse.”¹⁷ And their daughter Naomi Tompkins was born on May 14, 1931.¹⁸ One of his lawyers described him as, “Mild mannered, slight of build, soft spoken, you would say of him that his whole life would be spent in the backwaters of the commonplace.”¹⁹

¹⁴ Record 18. See generally Margaret Loomis Stecker, *The Founders, the Molders, and the Molding Machine*, 32 *The Quarterly Journal of Economics* 278 (1918) (describing the iron moulding trade). The Iron Moulders' Union of North America was founded on July 5, 1859. Richard T. Ely, *The Labor Movement in America* (1886). Local No. 133 represented the moulders at the Pittston Stove Works. It later became the International Molders and Foundry Workers Union of North America. In 1988, it merged with the Glass, Pottery, Plastics and Allied Workers International Union to form the Glass, Molders, Pottery, Plastics and Allied Workers International Union, which is now part of United Steelworkers.

¹⁵ <https://www.loc.gov/pictures/resource/cph.3b25344/>

¹⁶ Tompkins-Newhart, *The Evening News* (Wilkes-Barre, PA), May 13, 1930, at 6.

¹⁷ Aaron L. Danzig, *Erie v. Tompkins at 50: Due a Respectful Burial?*, N.Y.L.J., Feb. 26, 1988, at 6.

¹⁸ Pittston Briefs, *The Wilkes-Barre Record* (Wilkes-Barre, Pennsylvania), May 20, 1931, at 18.

¹⁹ Aaron L. Danzig, *Erie v. Tompkins at 50: Due a Respectful Burial?*, N.Y.L.J., Feb. 26, 1988, at 6.

When the Depression hit in 1929, work at the Pittston Stove Works gradually began to dry up. By 1934, Tompkins was working only 3 or 4 days a week for about 6 months of the year, earning \$7 to \$7.50 per day.²⁰ In late June 1934, the Pittston Stove Works finally closed, and Tompkins was unemployed. He looked for odd jobs repairing stoves, with limited success.²¹ And then he had his fateful encounter with the Ashley Special.²²



Harry James Tompkins (c. 1930)

²⁰ Record 175-77.

²¹ Record 19.

²² Hughestown Man Sues Erie for Damages, *The Evening News* (Wilkes-Barre, Pennsylvania) (Oct. 9, 1936) at 3.



Harry James Tompkins & Naomi Tompkins (c. 1960).

The Scene of the Accident

Tompkins's accident occurred about 5 or 10 feet south of where Hughes Street, near the Rock Street crossing. Rock Street ran roughly east-west through Hughestown. It crossed Searle Street to the west and the railroad track to the east. Hughes Street ran parallel to Rock Street, one block to the north. It dead-ended into Searle Street in the west, and the railroad right of way in the east. The railroad track ran roughly north-south, curving east to the north of Hughes Street. There was a spur just south of the Rock Street crossing.

Colwell's house was on the southwest corner of the intersection of Hughes Street and the railroad track. McHale's house was next to Colwell's, at the northwest corner of Rock Street and the railroad track. Tompkins's house was on the northern side of Hughes Street, two houses to the west of the railroad track.

The railroad right of way on the west side of the track between Rock Street and Hughes Street was about 29 feet wide, and ended at Colwell's picket fence. The right of way sloped up to the track, and the ground was rough and rutted. A footpath on the west side of the railroad track ran from Rock Street to Hughes Street, about 115 feet. The path was about two feet from the ends of the railroad ties and about two feet wide. Another footpath ran east from the end of Hughes Street, crossed the railroad track, and led to Center Street.



Plaintiff's Exhibit 2: Photograph taken with camera 50 feet west of crossing and 150 feet from point of accident, looking east.



Defendant's Exhibit C.1: Photograph taken with camera over center of Rock Street, 5 feet north from near rail, looking east.



Plaintiff's Exhibit 3: Photograph taken with camera 100 feet east from point of accident, looking west.

The Trial

After the accident, Tompkins regained consciousness in the hospital receiving room. The doctors sedated him, stitched up the wound on his face, and amputated the remainder of his right arm. He spent about three weeks in the hospital, during which time he developed an infection in his shoulder, which became an abscess. The doctors drained the abscess, and the wound eventually healed, but Tompkins experienced persistent phantom limb pain in his missing fingers.²³ His surgery cost about \$350, and his hospital stay cost about \$89.²⁴

²³ Record 31-32. Tompkins testified that the doctors amputated the socket. "A. They took my arm right out of the socket. Q. You have no stub or anything? A. Or no socket; they took the socket too." *Id.* However, the doctors actually performed a "shoulder disarticulation," removing the entire humerus at the socket.

²⁴ Transcript of Record, *Erie v. Tompkins*, 304 U.S. 64 (1938) at 16.

Nathan Nemeroff owned several shirt factories, including one in Berwick, Pennsylvania, about 40 miles southwest of Hughestown.²⁵ Somehow, Nemeroff heard about the accident and referred Tompkins to his son Bernard, a young New York lawyer.²⁶

Bernard G. “Bernie” Nemeroff and Bernard Kaufman were young lawyers running a struggling partnership out of a rented office at 11 Broadway in Manhattan.²⁷ Desperate for clients, and willing to gamble on a big payout, they took Tompkins’s case on contingency. And Nemeroff hired Aaron L. Danzig, a Columbia law student, to help with research.²⁸ Danzig described Nemeroff as “a sharp dresser, keenly intelligent, with piercing blue eyes that frequently darted about as he spoke to you. Bernie had a practice of sorts, but was definitely not a legal scholar.”

29

Nemeroff and Danzig soon realized that choice of law - or rather “choice of court” - was critical to Tompkins’s claim.³⁰ Under Pennsylvania common law, a person using a path parallel to a railroad track was a trespasser, so the railroad’s duty of care was “wanton negligence.”³¹ But the Supreme Court had long held that federal courts sitting in diversity should apply federal “general common law,” rather than state common law.³² And under federal “general common law,” the railroad’s duty of care was regular negligence.³³

Luckily for Tompkins, diversity jurisdiction existed, so he could file his action in federal court. Tompkins was a citizen of Pennsylvania, where he lived, and Erie was a citizen of New York,

²⁵ Nathan Nemeroff was born in Kiev and emigrated to the United States in 1898. He began working in the textile industry as soon as he was able, and opened his own business in 1915. Radio Singer, Bride of Reading Resident, Reading Times (Reading, Pennsylvania), Jan. 17, 1936, at 10. Obituaries: Nathan Nemeroff, The Journal News (White Plains, New York), Mar. 12, 1965, at 2.

²⁶ Aaron L. Danzig, *Erie v. Tompkins* at 50: Due a Respectful Burial?, N.Y.L.J., Feb. 26, 1988, at 6 (“Bernie got the case through his father who was in the shirt business and dealt with Pennsylvania contractors in the area.”).

²⁷ In 1934, Nemeroff and Kaufman were both 27. Nemeroff graduated from the New York University School of Law in 1929. Irving Younger, What Happened in Erie, 56 Tex. L. Rev. 1011 (1978). See also Aaron L. Danzig, *Erie v. Tompkins* at 50: Due a Respectful Burial?, N.Y.L.J., Feb. 26, 1988, at 6.

²⁸ Aaron Leon Danzig was 21, and was clerking for another lawyer at 11 Broadway when Nemeroff and Kaufman hired him. Aaron L. Danzig, *Erie v. Tompkins* at 50: Due a Respectful Burial?, N.Y.L.J., Feb. 26, 1988, at 6. See also Irving Younger, What Happened in Erie, 56 Tex. L. Rev. 1011 (1978). Danzig graduated from law school in 1935, and later earned an LLM from the New York University School of Law. Notably, Danzig had contracted polio as a child, and lost the use of one of his arms. Stuart Lavietes, Aaron Danzig, 89, Who Argued Landmark Case on Court Power, New York Times, Sept. 17, 2002.

²⁹ Aaron L. Danzig, *Erie v. Tompkins* at 50: Due a Respectful Burial?, N.Y.L.J., Feb. 26, 1988, at 6.

³⁰ Professor Younger interviewed Nemeroff, who described his research process and litigation strategy. Irving Younger, What Happened in Erie, 56 Tex. L. Rev. 1011, 1014 (1978). See also Aaron L. Danzig, *Erie v. Tompkins* at 50: Due a Respectful Burial?, N.Y.L.J., Feb. 26, 1988, at 6.

³¹ *Falchetti v. Penn. R.R.*, 160 A. 859 (Pa. 1932).

³² *Swift v. Tyson*, 41 U.S. 1 (1842).

³³ Compare *Falchetti v. Penn. R.R.*, 160 A. 859 (Pa. 1932) with *Adams v. Southern R.R.*, 84, f. 596, 600 (5th Cir. 1898). By contrast, a person using a path crossing a railroad track was a licensee, so the railroad’s duty of care was regular negligence. See, e.g., *Falchetti v. Penn. R.R.*, 160 A. 859 (Pa. 1932).

where it was incorporated and headquartered, so complete diversity existed. And Tompkins's damages far exceeded the \$3,000 amount in controversy requirement.

But which federal court should Tompkins choose? Personal jurisdiction over Erie existed in both Pennsylvania, where the accident occurred, and in New York, where Erie was incorporated and headquartered. Neither Nemeroff nor Kaufman was licensed to practice in Pennsylvania, so New York was the only realistic option. And in any case, while all federal courts were theoretically supposed to apply federal "general common law," the Third Circuit tended to defer to local law, while the Second Circuit did not, making New York a more attractive venue for Tompkins's action.³⁴

On August 29, 1934, Nemeroff served the Erie Railroad Company with a summons and complaint, initiating Tompkins's action in the United States District Court for the Southern District of New York, a few blocks up Broadway in the City Hall Post Office and Courthouse. The complaint alleged that Tompkins was on an established footpath when Erie negligently injured him by running its train at a dangerous speed, failing to ring the bell or blow the whistle, and allowing an object to project from the train, which struck Tompkins, and demanded \$100,000 in damages.³⁵

Erie retained the venerable white shoe law firm Davis, Polk, Wardwell, Gardiner & Reed, which answered Tompkins's complaint on September 28, 1934 by denying his substantive allegations, asserting contributory negligence, and asking the court to dismiss the complaint.³⁶ The court ignored Erie's motion to dismiss, and the action proceeded to discovery. Tompkins and Erie exchanged interrogatories and responses.³⁷ And on February 14, 1935, the parties deposed 17 witnesses in Pittstown.³⁸

³⁴ Compare *Perucca v. Baltimore & Ohio R.R. Co.*, 35 F. 2d 113 (3rd Cir. 1929) ("The duty of one about to cross the tracks of a railroad in the state of Pennsylvania has been frequently declared by the courts of that state. That law governs here.") with *Tompkins v. Erie R. Co.*, 90 F.2d 603, 604 (2d Cir. 1937) ("The defendant contends that the only duty owed to the plaintiff was to refrain from willful or wanton injury because the courts of Pennsylvania have so ruled with respect to persons using a customary longitudinal path, as distinguished from a path crossing the track. The plaintiff denies that such is the local law, but we need not go into this matter since the defendant concedes that the great weight of authority in other states is to the contrary. This concession is fatal to its contention, for upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law.") (cleaned up).

³⁵ Record 2-4. By that time, Tompkins and his family had moved into his mother-in-law's house at 1125 Wyoming Avenue in Exeter.

³⁶ Record 5-6. At the time, Davis, Polk's offices were at 15 Broad Street.

³⁷ Record 7-16.

³⁸ Record 91. The witnesses deposed were Henry Brodbeck, Jr.; Walter Perschau; Samuel Carr; Joseph Guerin; Thomas Hefferon; Albert Dotter; John J. Reilly; George Trewein; Frank T. Keller; Benjamin Renfer; Ernest Cook; Charles Fritz; Elmer Smith; Louis Weitz; William Colwell; and Fred Jennings. To Take Depositions in Big Damage Suit, *Pittston Gazette*, Jan. 24, 1935, at 5. Some of these witnesses testified at trial, but most did not.

Judge Mandelbaum

When *Tompkins*'s action was ready for trial, it was assigned to Judge Samuel Mandelbaum, who had just been appointed. Mandelbaum was born in Russia, on September 20, 1884. His family soon emigrated to New York City, and he grew up in a tenement on the Lower East Side. As a child, he contracted polio, which crippled his legs. Nevertheless, he graduated from the New York University School of Law, successfully practiced law, and then ran for public office.³⁹ He served as a member of the New York State Assembly from 1923 to 1932, where he became an advisor to Governor Franklin D. Roosevelt, and as a member of the New York State Senate from 1933 to 1936.⁴⁰

On June 15, 1936, President Roosevelt nominated Mandelbaum to a new seat on the United States District Court for the Southern District of New York.⁴¹ The American Bar Association, the New York County Lawyers' Association, and the Association of the Bar of the City of New York all opposed the nomination, arguing that Mandelbaum was unqualified, because he had never even tried a case in federal court.

But Mandelbaum had overwhelming political and popular support, and was confirmed on June 20, 1936.⁴² As Roosevelt observed: "There was one other man I considered for the job. He was equally qualified, but unlike Mandelbaum, he had never lived in a tenement. All other things being equal, I think the man who had lived in a tenement is better suited for a judgeship for he will have a better understanding of human problems."⁴³

Mandelbaum was sworn in on July 10, and presided over criminal cases for ten weeks, before moving to the civil docket. *Tompkins v. Erie Railroad Company* was his first civil case.

The trial began on October 5, 1936. *Tompkins* was represented by Everett G. "Stubby" Hunt, who Nemeroff hired as trial counsel.⁴⁴ *Erie* was represented by Theodore Kiendl, a Davis, Polk partner with extensive trial experience.⁴⁵

Tompkins's Story

³⁹ Mandelbaum earned an LL.B. in 1912 and an LL.M. in 1913.

⁴⁰ Mandelbaum was a member of Roosevelt's "Turkey Cabinet," which convened most Mondays at the Executive Mansion for a turkey lunch. He became close friends with Eleanor Roosevelt, who ensured that he received kosher turkey on kosher dishes, and accompanied him on tours of the Lower East Side slums.

⁴¹ Congress had recently created three new seats on the court. 49 Stat. 1491.

⁴² Milton S. Gould, *The Alien Corn in the Southern District: A Memory of Judge Sam Mandelbaum, Legend of Foley Square* (Parts 1 and 2), N.Y.L.J., Aug. 1, 1977, at 1, and Aug. 2, 1977, at 1.

⁴³ *The Montgomery Advertiser* (Montgomery, Alabama), Nov. 29, 1946, at 4.

⁴⁴ Hunt was assisted by his associate, William G. Walsh.

⁴⁵ Kiendl graduated from Columbia College and Columbia Law School, and became a partner in 1923. He was assisted by Harold W. Bissell, L. Ray Glass, and S. Hazard Gillespie.

According to Tompkins, on Thursday, July 26, 1934, he ate supper at home in Hughestown with his wife and three-year-old daughter at about 5:00 p.m. At about 6:00 p.m., he walked to visit his sick mother-in-law Alice Newhart at her home in Exeter, about 5 or 6 miles away, across the Susquehanna River.⁴⁶ At about 8:00 p.m., he walked down to the river to watch people fish, then returned to Newhart's home. And at about 12:30 or 1:00 a.m. he began walking home to Hughestown.⁴⁷

Tompkins took the "main road" through Exeter, and used the Fort Jenkins Bridge to cross the river.⁴⁸ At about 1:30 a.m., while Tompkins was crossing the bridge, a car passed him, then stopped, and his friend Wilbert Schultz called out to him, "Come on, Harry, we will give you a ride up."⁴⁹ The driver of the car was Edward M. Harrington, Jr., the former Chief of Police of Hughestown.⁵⁰ Schultz was a member of the Iron Moulders' Union who had worked with Tompkins at the Pittston Stove Works.⁵¹ Harrington and Schultz were driving home from Harvey's Lake, which is about 20 miles east of Hughestown.⁵² They both lived near Tompkins, and offered to give him a ride home.⁵³

At about 2:00 a.m., Harrington and Schultz dropped Tompkins on the east side of the Rock Street crossing. Tompkins crossed back over the railroad track, and began walking north on the footpath toward Hughes Street. When he got about halfway to Hughes Street, he heard the whistle of a southbound train, and then saw the train's headlight approaching, but he continued walking north on the path.⁵⁴ He was "about four or five steps" away from Hughes Street when the engine passed him on his right at about 30 or 35 miles per hour.⁵⁵

The accident occurred a moment later. "When I got right on the path there was something came up in front of me, a black object that looked like a door to me, and I went to put my hands up and I guess before I got them up I was hit."⁵⁶ The object projecting from the side of the train was

⁴⁶ Record 57. Tompkins lived at 7 Hughes Street in Hughestown and Alice Newhart lived at 31 Memorial Street in Exeter. The walking distance between the two is actually about 2.5 miles.

⁴⁷ Record 27-29, 57-59. Alice Newhart lived at 31 Memorial Street in Exeter, which is actually about 2.5 miles from 7 Hughes Street. Mrs. Alice Newhart Dies in Exeter, Pittston Gazette, Dec. 1, 1938, at 7.

⁴⁸ Presumably Wyoming Avenue, which leads directly to the Fort Jenkins Bridge.

⁴⁹ Record 29.

⁵⁰ Harrington was appointed Chief of Police on January 4, 1932. Hughestown Council Makes Clean Sweep, The Wilkes-Barre Record, January 5, 1932, at 17. He lost the position on March 28, 1933. Changes Made in Personnel in Hughestown, The Evening News (Wilkes-Barre, Pa.), March 29, 1933, at 7. He was reappointed on April 15, 1933. Eight Borough Employees Lose Their Positions, Wilkes-Barre Times Leader, April 17, 1933, at 18. But he lost the job to Steve Moss sometime in early 1934.

"Round-Up" Nets Fifty, Wilkes-Barre Record, Feb. 17, 1934, at 12.

⁵¹ Wilkes-Barre Times Leader, August 12, 1946, at 13.

⁵² Record 71.

⁵³ Harrington lived at 1 Kenley Street (?), and Schultz lived at 235 Rock Street. Miss Ann Mattison and Wilbert Schultz Were Wedded Today, Pittston Gazette, Aug. 29, 1936, at 1. Local Gleanings, Pittston Gazette, June 6, 1938, at 3. Record 152.

⁵⁴ Record 47-48.

⁵⁵ Record 71.

⁵⁶ Record 65.

about 2 or 2½ feet wide, and it hit Tompkins on his right temple, knocking him unconscious.⁵⁷ He fell to the ground, and the wheels of the train severed his right arm.

Erie's Response

Unsurprisingly, Kiendl's strategy was to discredit Tompkins's story. He focused on three issues: 1) the use of the footpath; 2) the speed of the train; and 3) the inspection of the doors. His goal was to show that people did leave the footpath, especially when a train was passing, that the Ashley Special was moving relatively slowly, and that there was no evidence of an unsecured refrigerator car door.

The Footpath

Tompkins claimed that he continued walking on the footpath next to the railroad track while the train was passing. Kiendl questioned the credibility of that claim:

Q. Well then, if I get your testimony correctly, Mr. Tompkins, you were walking along within two feet of the side of this moving train that was going past you at the rate of 30 miles per hour, and you kept right on walking alongside of it?

A. Yes, sir.

Q. Without any fear that anything was going to hit you?

A. Yes, sir.

Q. Without any fear that any coal or something else might have fallen from that train and hit you; that is right?

A. I do not think there was any coal on that train.

Q. Well, you did not know when you saw the train coming what it had on, did you?

A. No, sir.

Q. And did it occur to you that there might have been coal on that train?

A. No, sir.

Q. That might fall off and hit you?

A. No, sir.

Q. Did it occur to you that there might be anything else on the train that might fall off and hit you?

A. No, sir.

Q. You felt perfectly safe in your own mind as you walked along there within a foot or two of a 30 mile moving train, to continue along, and it never occurred to you at any time to get further away to a place of safety?

A. No, sir.⁵⁸

⁵⁷ Record 65.

⁵⁸ Record 45-46.

Tompkins's witnesses made the same claim, eliciting the same reaction from Kiendl. For example, McHale insisted that people walked on the footpath while trains were passing a foot or two away, day and night, and that it was perfectly safe to do so.

Q. Have you ever seen anybody walking along that path at night in the pitch dark when a train was going by?

A. Yes, sir.

Q. How many times have you seen people doing that, Mr. McHale?

A. I have seen them hundreds of times.

Q. Hundreds of times at night?

A. Yes, sir.

Q. In the pitch dark?

A. Yes, sir.

Q. Walking along that path?

A. Yes, sir.

Q. And you have walked along it yourself at night?

A. Yes, sir.

Q. And when you were walking along it, when you got to the point that we are interested in -

A. Yes, sir.

Q. (Continuing.) - where these two paths converge -

A. Yes, sir.

Q. - alongside of the ties; you have done that often, haven't you?

A. I have walked it; yes, sir.

Q. How close was your body to the moving side of the train when you did that?

A. Oh, I would say a foot or two feet away.

Q. A foot or two feet away?

A. Yes, sir.

Q. And you tell this Court and Jury that you have walked alongside of a moving train?

A. Yes, sir.

Q. At night?

A. Yes, sir.

Q. With the side of that moving train within a foot of your body?

A. Yes, sir.

Q. And you have seen other people do that?

A. Yes, sir.

Q. And the trains go by there pretty fast, wouldn't they?

A. Yes, sir.

Q. Sometimes, twenty miles an hour, thirty miles an hour, forty miles an hour?

A. Yes, sir.

Q. And you have done that frequently?

A. Yes, sir.

Q. Did you think that was dangerous?

A. No, sir.⁵⁹

. . .

Q. Do you tell this Court and jury that you feel perfectly safe walking at night on this path with a train moving up to forty miles an hour?

A. Yes, sir.

Q. Passing you within one foot of the side of your body?

A. Yes, sir.⁶⁰

Schultz made the same claim, albeit somewhat more reluctantly, as if he recognized the absurdity of what he was saying:

Q. Now, when you used the path on the twenty times when you used it, if it were twenty times, did you did you walk along that path along the edge of these railroad ties when trains were coming?

A. Yes.

Q. You have?

A. Yes.

Q. When trains were coming from either direction?

A. Yes, sir.

Q. And you had been in this stove company business all of your life; you had never been in the railroad business, had you?

A. No, sir.

Q. And the trains come awfully close to you when you were walking along that path?

A. Oh, maybe a foot and a half away.

Q. Maybe a foot and a half?

A. Yes, sir.

Q. And the trains would move at a fairly rapid rate of speed?

A. Fairly good rate of speed.

Q. And they would come from behind you and in front of you?

A. Yes, sir.

Q. You did not consider that dangerous at all, did you?

A. Not if the train was in good condition and nothing sticking out from it, no.

Q. Well did you expect things might be sticking out from trains sometimes?

A. No.

Q. It never occurred to you that things might be sticking out from trains, such as machinery or something of that kind?

A. Sir?

Q. It never occurred to you, did it?

⁵⁹ Record 127-28.

⁶⁰ Record 142.

A. Never could, did you say?

Q. You never thought about anything projecting from the side of the train?

A. No.

Q. You never thought about any wide cars containing automobiles or furniture?

A. No, sir.

Q. Or anything of that kind?

A. No, sir.

Q. You considered it perfectly safe in the daytime to walk along that path with trains moving at a rapid rate of speed within a foot and a half of you?

A. Yes, sir.

Q. Did you consider it safe for you to do that at nighttime?

A. I didn't do it at nighttime.

Q. In complete darkness?

A. I did not do it at nighttime.

Q. Would you consider it safe to do it at nighttime in complete darkness?

Mr. Hunt: Objected to.

The Court: Overruled.

Mr. Hunt: Exception.

Q. Would you?

A. No, sir.

Q. In your experience in using that path, as one of the citizens of that borough for thirty-nine years, I understand you to tell this Court and Jury that, having seen the path and having seen people walking on it, you would consider it dangerous to walk on that path in pitch darkness?

A. I would not.

Q. When trains were coming toward you?

A. I would not consider it dangerous.

Q. You would consider it perfectly safe?

A. Yes.⁶¹

Additionally, Tompkins and his witnesses claimed that people walked on the footpath and only on the footpath. Indeed, they insisted that no one ever walked anywhere in the right of way, except on the footpath. Tompkins stated that he had never seen anyone set foot in the right of way, outside of a footpath:

Q. 12 or 14 years you lived in that neighborhood?

A. Yes, sir.

Q. And during all that time you were within two blocks of the Rock Street Crossing of the railroad company, weren't you?

A. Yes, sir.

⁶¹ Record 147-49.

Q. And during those 12 or 14 years that you have seen anybody walking in that territory they were walking on the path that goes up to Hughes Street or they were walking on the Hughes Street path that came up to the track, is that right?

A. Yes, sir.

Q. Now I will ask you again, Mr. Tompkins, do you mean that seriously?

A. Yes, sir.

Q. What?

A. Yes, sir.⁶²

Likewise, Colwell stated that he had never seen anyone set foot in the right of way, outside of a footpath:

Q. Now, take that piece of land, Mr. Colwell, it is about 115 feet long and about 35 feet wide between Hughes Street, Rock Street, the railroad ties and the fence. In the two years that you have lived at the house that you have indicated on the map had you ever seen anybody at any time walk in any part of that territory except on the two paths that you have told us about?

A. No, sir.

Q. Never once?

A. No, sir. That is too rough walking.

Q. Let us see Mr. Colwell; see that I get this straight. You have never seen a soul -

A. No, sir.

Q. (Continuing.) - walking over any other part of that whole territory?

A. No, sir.

Q. Except the path along the ties and the path to Hughes Street?

A. Yes, sir.

Q. Do you mean that?

A. I sure do.

Q. You understand that you have told Mr. Hunt here - I thought you did - that you walked out of your gate across part of that territory?

A. Well, that path I do.⁶³

Indeed, Colwell even claimed that it would have been impossible for anyone to walk in the right of way, except on the path:

Q. Did you ever see anybody walk alongside of your fence?

A. No, sir.

Q. Is there any reason why you could not walk alongside of your fence if you wanted to?

A. Well, you could walk alongside of it, but you would roll down and under.

Q. You would roll in under the fence?

⁶² Record 36.

⁶³ Record 92-93.

A. Exactly.

Q. You don't mean that, do you?

A. I sure do. Here is the ditch right here (indicating), see, and down here there is a bank goes right under the fence.

Q. Now, you asked me if I saw the ditch?

A. Yes.

Q. There are some rocks right up against the fence, aren't there?

A. Yes.

Q. And a drain that runs in there?

A. Yes, sir.

Q. But come out two feet from the fence. There is no reason why you couldn't walk in there, is there?

A. It is pretty rough there.

Q. It is like it is shown in this picture?

A. No, sir; it is rougher than that.

Q. Do you mean that the territory we are talking about is not correctly shown in this picture, Mr. Colwell?

A. It is not, no, sir.⁶⁴

In all of these exchanges, Kiendl's incredulity is palpable. And for good reason, because the claims are ridiculous. It is simply not credible that people walked on the path while trains were passing a foot or two away. Surely, people stepped off the path when trains were passing. Indeed, it is more likely that people simply did not use the path at all when trains were passing. The railroad track in question was only rarely used, primarily late at night by the Ashley Special. Most of the time, the path was perfectly safe, simply because no trains were present.

Unsurprisingly, William H. Henning, the engineer who was operating the Ashley Special when it hit Tompkins, testified that he had seen people walking on the footpath next to the railroad track between Rock Street and Hughes Street, and that when a train passed them, they always stepped out of the way.⁶⁵ Notably, Henning also testified that he did not see anyone on the path on July 27, 1934, when Tompkins was injured.⁶⁶

The Speed of the Train

Tompkins claimed that the Ashley Special was going about 30 or 35 miles per hour when it hit him.⁶⁷ And Tompkins's witnesses claimed that it regularly went 30 to 40 miles per hour at the Rock Street crossing. Specifically, Colwell insisted that the Ashley Special often went through

⁶⁴ Kiendl and Colwell are referring to Plaintiff's Exhibit 3.

⁶⁵ Transcript of Record, *Erie v. Tompkins*, 304 U.S. 64 (1938) at 325-26.

⁶⁶ Transcript of Record, *Erie v. Tompkins*, 304 U.S. 64 (1938) at 325-26.

⁶⁷ Record 45.

the Rock Street crossing at 30 or 40 miles per hour, and that he had complained about it to Gannon.⁶⁸

Q. You have told us that you have told Mr. Gannon that the trains were going too fast because of the rails?

A. Yes, sir.

Q. Is that right?

A. Yes, sir. And that is right on a curve and our house is right there at that curve, and I would hate to have them come through that at night.

Q. You would hate to have them go through your house at night?

A. Yes, sir.

Q. Are you being serious, sir?

A. Well, no -

Q. Are you being serious?

A. Well, certainly I would hate to have that engine jump the road and go through our house.

Q. Has the engine ever jumped the road down there?

A. No, but there is always a first time.⁶⁹

Kiendl effectively discredited those claims, by showing that the Ashley Special was actually going about 8 to 10 miles per hour, and that it would have been impossible for it to go any faster. When the Ashley Special left Avoca and approached the Rock Street crossing, it was going uphill and around a curve. As the Ashley Special's flagman James A. Dooner observed, "The pull was too great for the size engine we had. That engine couldn't make over eight to ten miles an hour with the train."⁷⁰ Likewise, Henning testified that the Ashley Special was going about 8 or 10 miles per hour when it approached the Rock Street crossing on July 27, 1934.⁷¹ This is consistent with the fact that it took about an hour and a half for the Ashley Special to go about 16 miles from Avoca to Ashley.⁷²

⁶⁸ Record 102-03

⁶⁹ Record 104.

⁷⁰ Transcript of Record, *Erie v. Tompkins*, 304 U.S. 64 (1938) at 315.

⁷¹ Transcript of Record, *Erie v. Tompkins*, 304 U.S. 64 (1938) at 288, 325-26.

⁷² Transcript of Record, *Erie v. Tompkins*, 304 U.S. 64 (1938) at 288.



Swift Refrigerator Car, East Orange, New Jersey (1937).

The Refrigerator Car Door

According to Tompkins, the object that hit him was probably an unsecured refrigerator car door. Trains pulled many different kinds of cars, including boxcars and refrigerator cars. The doors on a boxcar slide on a rail, but the doors of a refrigerator car swing open and closed. Tompkins claimed that Erie had failed to secure the doors of a refrigerator car, and that an unsecured door hit him in the head as the Ashley Special passed him

Hunt focused on showing that it was possible a refrigerator car door had been open. Of course, it is always hard to prove a negative, but the evidence suggests otherwise.

On July 27, 1934, the Ashley Special was pulling three refrigerator cars.⁷³ Albert Howell inspected the Ashley Special before it left Avoca and found no defects.⁷⁴ Michael Bernard McGrath inspected the Ashley Special when it arrived at Ashley Station at 4:50 a.m. and

⁷³ Record 187-88. Specifically, the 8th, 17th, and 24th cars from the caboose were refrigerator cars, or the 14th, 21st, and 30th trains from the engine.

⁷⁴ Transcript of Record, *Erie v. Tompkins*, 304 U.S. 64 (1938) at 257.

marked all of its refrigerator car doors closed and sealed. But he acknowledged that his testimony was based entirely on his seal record book, and that he had no direct recollection of checking the train that night.⁷⁵ Alfred Alworth and Steve Prabola, car inspectors for the Central Railroad Company of New Jersey, inspected the Ashley Special shortly after its arrival in the Ashley yard on the morning of the accident, and found nothing significant out of the ordinary.⁷⁶ And when Victor H. Deppi, the car inspector foreman for the Central Railroad Company of New Jersey in Penobscot, Pennsylvania, was informed that there had been an injury and was asked to inspect the cars arriving from Ashley at about 11 a.m., he found bloodstains on the flanges of the wheels of seven cars, but did not find any open doors.⁷⁷

The Verdict

When Hunt finished presenting Tompkins's case, Kiendl made a motion to dismiss the action, on the ground that Tompkins had failed to prove negligence, and had in fact shown contributory negligence. Mandelbaum denied the motion.⁷⁸ And when Kiendl finished presenting Erie's case, he made another motion to dismiss, which Mandelbaum also denied.⁷⁹

On October 13, 1936, Kiendl and Hunt gave closing arguments, and the court charged the jury. Essentially, the court told the jury that its job was to determine whether Erie had failed to secure a refrigerator car door.⁸⁰

The jury retired at 12:40 p.m., and returned at 4:45 p.m. with a verdict for Tompkins, awarding him \$30,000, plus interest and costs.⁸¹ According to Danzig, "Mr. Tompkins had been put up at a cheap hotel, and at the celebration that evening in his room, I remember thinking: 'the practice of law is really simple as long as you're well prepared.'"⁸² Kiendl moved to set aside the verdict, but on November 9, 1936, Mandelbaum denied the motion, and the clerk entered judgment for Tompkins in the amount of \$30,260.⁸³

The Second Circuit

On November 16, 1936, Erie appealed to the United States Court of Appeals for the Second Circuit. A panel consisting of Learned Hand, Martin Manton, and Thomas Swan heard oral argument. And on June 7, 1937, they unanimously affirmed, essentially because there was no basis on which to review the verdict. Notably, they observed, "To us it would seem imprudent to walk, or even to stand, in the dark within a foot of a train moving at the rate of 10 miles an hour;

⁷⁵ Record 179-90.

⁷⁶ Transcript of Record, *Erie v. Tompkins*, 304 U.S. 64 (1938) at 241.

⁷⁷ Transcript of Record, *Erie v. Tompkins*, 304 U.S. 64 (1938) at 249-55.

⁷⁸ Record 178.

⁷⁹ Record 339-40.

⁸⁰ Record 343-49.

⁸¹ Record 351.

⁸² Aaron L. Danzig, *Erie v. Tompkins* at 50: Due a Respectful Burial?, N.Y.L.J., Feb. 26, 1988, at 6.

⁸³ The judgment included \$165 in interest and \$95 in costs.

but the fact that recoveries have been allowed under closely similar circumstances in the cases above cited indicates that fair-minded men may hold a different view. This is enough to preclude taking the issue from the jury.”⁸⁴

When the Second Circuit denied Erie’s appeal, Nemeroff was sure that Tompkins had won. As Danzig observed:

Now we really celebrated, this time in Bernie’s office - champagne, smoked salmon, corned beef sandwiches, the works. The case was over. There wasn’t a chance in the world that the Supreme Court would grant *certiorari* in a case involving an accident in a small hamlet in Pennsylvania.

So we laughed when we got the petition for *certiorari*. Even if they won, they would lose. Mr. Tompkins could take his money, go to Tahiti, and how would the railroad ever get it back? They realized that, too, and made an application for a stay.⁸⁵

It was June, and the Supreme Court was in summer recess, so a stay would issue only if personally issued by one of the justices. Kiendl arranged for an appointment with Justice Cardozo, at his summer home in upstate New York. As Danzig recalled:

The Court was in summer vacation, so it was to be heard by Justice Cardozo in his home in Mamaroneck, N.Y. Since I had written both briefs, Bernie asked me to argue it.

Justice Cardozo lived in a lovely old Victorian house. A summer wind gently swayed the curtains as we waited downstairs. He entered the room in a black velvet jacket, white handkerchief in hand, wispy grey hair, the satiny skin on his long face bespeaking his age and ill health.

Mr. Kiendl began. His argument was the same he had used in the two courts below. Acknowledging that *Swift v. Tyson* was good law, he argued that it didn’t apply here because a local custom (a recognized exception to *Swift*), applied, and then he said, “Your Honor, I must be honest and say that if a stay is not granted, we will carry the case no further.” Now I *knew* we had won. I had lined up cases in 24 states in our favor, and I sent out this imposing legal infantry in my short statement. The judge paused for a moment. Then he turned to me and said, “Mr. Danzig, the law may well be what you say it is, and I don’t doubt it, but if I don’t grant the stay it will end the case, and I think the Court as a whole ought to have the opportunity to rule on the petition.

Despair. Compounded with astonishment, when a few months later the High Court granted *certiorari*.⁸⁶

⁸⁴ Tompkins v. Erie R. Co., 90 F.2d 603, 605 (2d Cir. 1937).

⁸⁵ Aaron L. Danzig, *Erie v. Tompkins at 50: Due a Respectful Burial?*, N.Y.L.J., Feb. 26, 1988, at 6.

⁸⁶ Aaron L. Danzig, *Erie v. Tompkins at 50: Due a Respectful Burial?*, N.Y.L.J., Feb. 26, 1988, at 6.

Settlement Attempts

Apparently, after the judgment, Erie attempted to settle the case, possibly on more than one occasion.

According to Danzig, “A gas station attendant had Harry Tompkins and told him he could get him several thousand dollars to settle. Bernie hid Harry for weeks in an old hotel in Freeport, L.I., to prevent them from getting to him.”⁸⁷

The Supreme Court

The Supreme Court heard oral argument in *Erie v. Tompkins* on January 31, 1938.⁸⁸ Kiendl argued that the court should have applied well-established Pennsylvania law. Nemeroff responded that the court properly applied federal general common law.

But the Supreme Court didn’t care. A majority of the justices were intent on reversing *Swift v. Tyson*, and *Erie v. Tompkins* was the perfect foil. Kiendl faced a Hobson’s choice. He could win, but only by enabling the Court to reverse *Swift v. Tyson*, a precedent his clients loved. He did his best to thread the needle, to no avail.

Ultimately, on April 25, 1938, the Supreme Court voted 6-2 to reverse *Swift v. Tyson* and hold that federal courts sitting in diversity must apply state substantive law.⁸⁹ Brandeis wrote the opinion for the majority, Reed concurred on statutory grounds, and Butler and McReynolds dissented. Ironically, Justice Cardozo recused, even though he surely would have joined the majority. He was just too sick to participate, and died on June 9, 1938. And yet, *Erie* was still his legacy, as the Supreme Court would never have heard the case if he hadn’t granted a stay.

While the Supreme Court’s opinion in *Erie v. Tompkins* largely ignored the facts of the case, Tompkins’s fate clearly worried some of the justices. Brandeis wrote at least 13 drafts of his majority opinion, and asked his clerk William Claytor to determine what would happen to Tompkins if the Court reversed *Swift v. Tyson*.⁹⁰ And Justice Black also asked Brandeis what would happen to Tompkins.⁹¹

And yet, the Supreme Court still threw Tompkins under the bus. Why? Maybe it was just opportunistic. The Supreme Court can afford to sacrifice the interests of particular parties on the altar of general principles. But maybe some of the justices were also mollified by the realization that Tompkins was probably lying about what happened?

⁸⁷ Aaron L. Danzig, *Erie v. Tompkins* at 50: Due a Respectful Burial?, N.Y.L.J., Feb. 26, 1988, at 6.

⁸⁸ *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁸⁹ *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁹⁰ Tony A. Freyer, *Harmony & Dissonance: The Swift & Erie Cases in American Federalism* (1981).

⁹¹ Letter from Black to Brandeis, March 22, 1938.

On April 25, 1938, the Supreme Court remanded *Erie v. Tompkins* to the Second Circuit. And on July 12, 1938, the Second Circuit dismissed the action. Under *Erie*, it had to apply Pennsylvania law, so Tompkins had to prove wanton recklessness.⁹² Given the facts pleaded by Tompkins, that was impossible, so the court had to reverse. Tompkins filed a petition for certiorari, but it was summarily denied, and the case ended on October 24, 1938.⁹³

A Critical Analysis of Tompkins's Story

Countless scholars have studied the impact of *Erie v. Tompkins* on United States law.⁹⁴ But relatively few have studied the facts of the actual case itself. And they uniformly accepted Tompkins's account as true.⁹⁵ Was that a mistake?

Of course, as a legal matter, the jury ruled for Tompkins, implicitly endorsing his story. If a jury verdict is perlocutionary, then Tompkins's account became "true" when the jury returned a verdict in his favor. And it remains "true" today, as the Second Circuit did not reverse the jury's findings of fact, only the legal conclusions that followed from those facts.

But legally "true" and factually true are not the same thing. What actually happened in Hughestown, Pennsylvania at the corner of Hughes Street and the railroad track at 2:30 a.m. on Friday, July 27, 1934? Did Harry James Tompkins get hit in the head by the door of a refrigerator car? Or did he slip and fall while trying to beat the Ashley Special?

A Social Visit

According to Tompkins, he walked from his house at 7 Hughes Street in Hughestown to Alice Newhart's house at 31 Memorial Street in Exeter at about 6 p.m., and then began walking home at about 12:30 or 1 a.m. While Tompkins estimated the distance as about 5 or 6 miles, it is actually about 2.5 miles.

It is perfectly plausible that Tompkins would visit his sick mother-in-law in the early evening, especially given that it was only a 2.5 mile walk. However, it seems a little unusual for him to stay until 12:30 or 1 a.m., and then walk home. Perhaps he waited until she retired to her bedroom or fell asleep. In any case, neither Alice Newhart nor Edith Tompkins were deposed or testified to corroborate Tompkins's account.

⁹² Tompkins v. Erie R. Co., 98 F.2d 49 (2d Cir. 1938).

⁹³ Tompkins v. Erie R. Co., 305 U.S. 637 (1938); Tompkins v. Erie R. Co., 305 U.S. 673 (1938).

⁹⁴ As of July 16, 2018, the Westlaw "law reviews" database includes 6,176 citations to *Erie v. Tompkins*.

⁹⁵ See, e.g., Bob Rizzi, *Erie Memoirs Reveal Drama, Tragedy*, 63 Harv. L. Rec. 2 (Sept. 24, 1976); Irving Younger, *What Happened in Erie*, 56 Tex. L. Rev. 1011 (1978); Erie Railroad Company v. Tompkins Project, Luzerne Legal Register Report (Jan. 2007); Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in *Civil Procedure Stories* (Kevin M. Clermont, ed. 2008).

A Chance Encounter

According to Harrington and Schultz, they left Harvey's Lake and began driving to Hughestown sometime after midnight on July 27, 1934. At about 1:30 a.m., while crossing the Fort Jenkins Bridge, they saw Tompkins, and stopped to give him a ride home.

It is perfectly plausible that if Harrington and Schultz saw Tompkins, they would give him a ride. After all, Tompkins was a friend, and his house was on their way home. But it is also a remarkable coincidence. Why were Harrington and Schultz driving home from a lake 20 miles away at 2 a.m.?

Harrington and Schultz testified primarily to corroborate Tompkins's claim that he was walking home from Exeter at 2 a.m., and to explain why Tompkins used the path next to the railroad track, rather than Searle Street. Interestingly, Harrington refused to talk to Erie's investigators, and refused to be deposed.

Q. Did the railroad come to see you about the case, Mr. Harrington?

A. Why yes, they did, I believe, the two gentlemen in the house there.

Q. You refused to tell them anything?

A. I told them that if my testimony was wanted I would give it.

Q. They asked you to give it and you refused to give it to them, didn't you?

A. I believe I did. I don't believe I even asked them to sit down.

Q. You know you refused to give them any information when they called and asked you what you knew about this accident?

A. I told -

Q. Listen to me. You refused to give them any information when they asked you what if anything you knew about this accident; isn't that so?

A. I am answering it the best way I can. I told you that I told them that if my testimony was wanted I would give it in court when the time came.

Q. They said to you in substance, "So you refuse to tell us anything about it" and you said "I do"? Isn't that what occurred?

A. Well, am I being tried? I don't understand.

Q. Are you being tried? I am trying to get some information from you as to what you said and did. Did the railroad come to you and ask you for some information and did you point blank refuse to give them any?

A. Just as I told you. I told them I would give it if I were called as a witness.

Q. Didn't they ask you to give it to them?

A. In other words, I refused, if that is what you mean, yes, sir.⁹⁶

Harrington's refusal to cooperate with Erie's investigation is suspicious. Was he simply hostile to Erie? Or was he trying to protect Tompkins's story by hampering Erie's investigation?

⁹⁶ Record 110-11.

A Short Walk

Supposedly, Harrington and Schultz dropped Tompkins on the east side of the Rock Street crossing at about 2 a.m. Tompkins crossed back over to the west side of the railroad track, and began walking north on the footpath from Rock Street to Hughes Street. Soon, he heard the whistle and bell of the southbound Ashley Special, then saw its oncoming headlight. As he approached Hughes Street, the engine passed him. The train was going about 30 miles per hour, about a foot away from his body. But he did not step off the footpath, because the ground in the railroad right of way was rough, and he was afraid of turning his ankle.

It is utterly implausible that Tompkins - or anyone else for that matter - would not have stepped off the footpath when a train passed. When Tompkins and his witnesses insisted that people routinely walked on the footpath while trains were passing, they were lying. And everyone knew it. Kiendl's incredulity at their testimony was neither masked nor feigned. Erie's witnesses were obviously telling the truth when they stated that pedestrians stepped off the path when trains were passing. As Kiendl observed and the photographs introduced into evidence reflect, the railroad right of way was reasonably smooth and perfectly walkable.

An Accident

According to Tompkins, when he was only about 5 or 10 feet away from Hughes Street, a dark object protruding from the Ashley Special - probably an unsecured refrigerator car door - struck him in the head and knocked him unconscious. When he fell to the ground, his right arm fell under the wheels of the train, and was severed just below the shoulder.

Nothing about this story adds up. Tompkins's injuries consisted primarily of a cut on his right temple and a severed right arm. If the Ashley Special had been traveling at 30 miles per hour, the putative refrigerator car door would have caused massive head trauma, that Tompkins almost certainly could not have survived. Of course, the Ashley Special was actually traveling at about 8 or 10 miles per hour. But even at that speed, the refrigerator car door would have caused a very serious head injury, including skull fractures. Tompkins had no such injury. In addition, impact with a refrigerator car door would have propelled Tompkins away from the train, not under it.

A Rescue

Almost immediately after Tompkins was injured, two "boys" - presumably young men - found the him. Who were they? How did they find him so quickly? Why were they at the corner of Hughes Street and the railroad track at 2 a.m.? If they lived in the neighborhood, why couldn't Colwell identify them? Why would he have to tell them who owned a telephone? And what did Colwell's wife mean when she said they were "crazy"?

A Revisionist Account

What really happened in Hughestown, Pennsylvania at the corner of Hughes Street and the railroad track at 2:30 a.m. on Friday, July 27, 1934? I suspect that Tompkins was trying to beat the Ashley Special and ride it into Wilkes-Barre to look for work, when he slipped and fell. He hit his head on the ground, and his right arm fell under the wheels of the train.

The Rock Street crossing, and the end of Hughes Street in particular, were a perfect place to hop aboard the Ashley Special. The train was traveling slowly as it labored uphill and around a curve. There were no streetlights, and little traffic. And there was a convenient path running alongside the railroad track, perfect for anyone running next to the train.

Notably, the engineer operating the Ashley Special did not see Tompkins walking on the footpath next to the railroad track. And curiously, Tompkins was injured right at the intersection of Hughes Street and the railroad tracks. If he had been walking home, it would have been particularly easy to step aside for the train. But if he were trying to board the train, better to hide behind the picket fence.

The young men who found Tompkins were probably hoboes, which would explain why Colwell didn't know them, and why they disappeared. Presumably, they were either trying to board the train themselves, or hopped off when they saw Tompkins slip and fall.

In the early 20th century, it was common for people to hitchhike on trains, especially freight trains. And the number of people riding the rails spiked in the 1930s, as unemployment spiked during the Depression, and made it increasingly necessary for people to travel to look for work. But it was also extremely dangerous, and produced many casualties:

It is quite astonishing to realize that trespasser fatalities per head of population were ten times higher than current levels in the 1920s and 1930s. In part this is explained by the large numbers of hoboes who rode the trains during the depression years. It is also true that more people were exposed to trespassing risks earlier this century because the railroads served a mass market, and provided extensive freight and passenger service to small communities.⁹⁷

In the 1930s, thousands of people were killed or injured every year while riding trains:

H.L. Denton, general superintendent of police of the Baltimore & Ohio, read a paper on 'The Railroad Trespass Evil.' He said that during the past two years there has been a very large increase in the number of adult trespassers, due to general business conditions, many good citizens going from one community to another seeking employment. Due to the inadequacy of laws covering trespassing in many communities,

⁹⁷ Ian Savage, *The Economics of Railroad Safety* 15-16.

railroad are in a position where they can do little other than eject trespassers from the property. He felt that a great deal of good work can be accomplished if employees could be educated to understand that in the interest of safety it is as much their job to warn the trespasser as it is that of the police officer. Very little result has been obtained in reducing accidents to trespassers in the past ten years. In 1921 the number killed was 2,481 and 3,071 were injured, and in 1931 there were 2,401 killed and 3,321 injured. In the last year and a half the police departments of 90 railroads made 213,353 arrests, a large portion of which were for trespassing.⁹⁸

While casualty rates fell dramatically in the 1920, from about 100 per 10 million miles traveled to about 40 per million miles traveled, they spiked to 80 per million miles traveled in the 1930s.⁹⁹

The most plausible explanation for Tompkins's accident is that he was trying to climb aboard the Ashley Special when he slipped and fell. Notably, Hunt alluded to hoboes on a couple of occasions. For example, he referred to refrigerator cars as "reefers," a hobo term also used by railroad employees, and referred to a boxcar as a "side door palace car," a term used primarily by hoboes.¹⁰⁰ Notably, Kiendl also asked Tompkins whether he was attracted to trains, which Tompkins denied:

Q. You have seen railroad trains going through time and time again?

A. Yes, sir.

Q. And I suppose like most young men, they attracted your attention?

A. No, sir, they never attracted my attention. I have seen too many of them.¹⁰¹

The Aftermath of *Erie v. Tompkins*

Despite getting reversed, Judge Mandelbaum was immensely proud of his role in *Erie v. Tompkins*:

The late John Cahill once told this writer that in arguing before Mandelbaum he once questioned whether the judge correctly understood a principle of law in question. Cahill said Mandelbaum smiled at him indulgently and asked: "Mr. Cahill, did you ever hear of a case, *Erie v. Tompkins*."

"Of course, your honor," said Cahill.

"Do you know, Mr. Cahill, who was the trial judge in that case?"

"I'm not sure, your Honor," said Cahill.

⁹⁸ Annual Meeting A.R.A. Safety Section, 93 Railway Age 505 (Oct. 8, 1932).

⁹⁹ Ian Savage, Trespassing on the Railroad Figure 2.

¹⁰⁰ Transcript of Record, *Erie v. Tompkins*, 304 U.S. 64 (1938) at 263.

¹⁰¹ Record 44.

“I was,” said Mandelbaum “and Learned Hand and Judge Swan agreed with me, even though the Supreme Court later on got a little confused and reversed us. So don’t tell me I don’t understand the law!”¹⁰²

In his copy of Volume 304 of the United States Reports, Mandelbaum wrote in the margin of *Erie v. Tompkins*, “Because the Swift Tyson case although before this case I never knew of its existence to be truthful and for the confusion this decision brought about, it might have been better to leave it alone and stand by good old Swiftly.”¹⁰³

When the United States entered the Second World War, the Army classified Tompkins 4-F, unfit for service for medical reasons. During the war, Tompkins had a job, but he lost it when the war ended. He eventually learned to compensate for his missing arm, and enjoyed fishing in the Susquehanna River. “It was said that he would tie the line using his teeth and he would ready his bait with his hand, while he carefully tucked the hook in his shoe. Harry is also remembered in Hughestown for his great soul and the passion that he had for music. He loved to sing.”¹⁰⁴

Tompkins died on August 27, 1961.¹⁰⁵ While none of his obituaries mentioned his accident or his role in *Erie v. Tompkins*, they followed a standard form that included few personal details.

In 1960, the Erie Railroad Company merged with the Delaware, Lackawanna & Western Railroad and became the Erie-Lackawanna Railroad. In 1972, the Erie-Lackawanna filed for bankruptcy, from which it never recovered. In 1976, the United States purchased most of the Erie-Lackawanna’s remaining assets, which became part of the Consolidated Rail Corporation, also known as Conrail.

¹⁰² Milton S. Gould, The Alien Corn in the Southern District: A Memory of Judge Sam Mandelbaum, Legend of Foley Square (Parts 1 and 2), N.Y.L.J., Aug. 1, 1977, at 1, and Aug. 2, 1977, at 1.

¹⁰³ Milton S. Gould, The Alien Corn in the Southern District: A Memory of Judge Sam Mandelbaum, Legend of Foley Square (Parts 1 and 2), N.Y.L.J., Aug. 1, 1977, at 1, and Aug. 2, 1977, at 1.

¹⁰⁴ Luzerne Project 9 & n. 23 (recollections of Michael I. Butera).

¹⁰⁵ Harry Tompkins Dies in Hospital, Wilkes-Barre Times Leader, August 28, 1961, at 1. Harry Tompkins, Pittston Gazette, August 31, 1961, at 12.

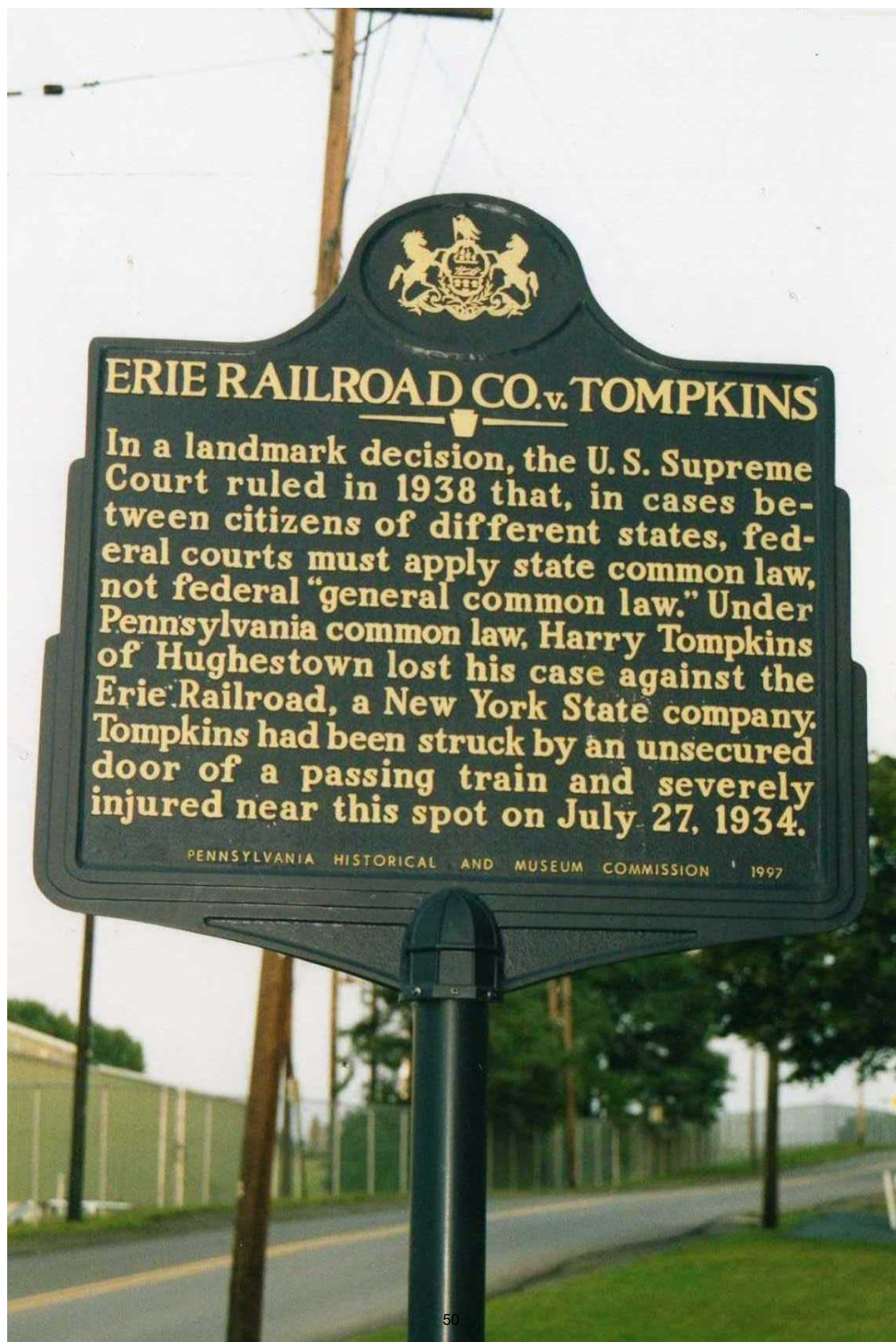


Hughes Street facing north, remaining railroad track on the right.



Hughes Street facing north, from Rock Street.

At some point, the railroad track running through Hughestown was decommissioned. While much of the track remains in place, the track running from the Rock Street crossing to Hughes Street was removed, and Hughes Street was extended along the former right of way and connected to Rock Street.



ERIE RAILROAD CO. v. TOMPKINS

In a landmark decision, the U. S. Supreme Court ruled in 1938 that, in cases between citizens of different states, federal courts must apply state common law, not federal "general common law." Under Pennsylvania common law, Harry Tompkins of Hughestown lost his case against the Erie Railroad, a New York State company. Tompkins had been struck by an unsecured door of a passing train and severely injured near this spot on July 27, 1934.

PENNSYLVANIA HISTORICAL AND MUSEUM COMMISSION 1997

On October 13, 1997, the Pennsylvania Historical and Museum Commission installed a historical marker commemorating *Erie Railroad Company v. Tompkins* and Tompkins's accident on Rock Street in Hughestown, Pennsylvania, near the former Rock Street crossing.¹⁰⁶ It reads as follows:

In a landmark decision, the U.S. Supreme Court ruled in 1938 that, in cases between citizens of different states, federal courts must apply state common law, not federal “general common law.” Harry Tompkins of Hughestown lost his case against the Erie Railroad, a New York State company. Tompkins had been struck by an unsecured door of a passing train and severely injured near this spot on July 27, 1934.

Maybe so. But maybe not.

¹⁰⁶ Christopher Romanelli, Historical marker honors court battle, *The Times Leader* (Wilkes-Barre, Pennsylvania), October 14, 1997, at 6.

No. 17-

IN THE
Supreme Court of the United States

ASPEN INSURANCE (UK) LTD
AND LLOYD'S SYNDICATE 2003,

Petitioners,

v.

BLACK & VEATCH CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT J. FRANCO
Counsel of Record
ANDREW C. PATTON
SCOTT O. REED
FRANCO MORONEY BUENIK LLC
500 West Madison Street, Suite 2440
Chicago, IL 60661
(312) 466-7240
robert.franco@francomoroney.com

Counsel for Petitioners

281240



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The United States Court of Appeals for the Tenth Circuit, sitting in diversity, made a prediction of state law under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), finding that New York's highest court would decline to follow New York intermediate appellate court precedent on an issue of coverage under a general liability insurance policy. The Tenth Circuit looked to a variety of sources, including commentary and authority from courts applying the law of other states, to make its prediction that New York's highest court would not follow those intermediate appellate court decisions.

The question presented is:

1. Whether a federal court sitting in diversity must give deference to state intermediate appellate court decisions on a question of state law, absent state highest court precedent, or whether those intermediate court decisions are merely one factor among many to be considered in predicting the highest court's likely ruling on that question.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE

Petitioners, Aspen Insurance (UK) Ltd. and Lloyd’s Syndicate 2003, were the appellees in the court below. Respondent Black & Veatch Corporation was the appellant in the court below.

Aspen Insurance (UK), Ltd. and Lloyd’s Syndicate 2003 are non-governmental corporate parties.

Aspen Insurance (UK) Ltd.’s parent company is Aspen Insurance (UK) Holdings Limited. Aspen Insurance (UK) Holdings Limited is a wholly-owned subsidiary of Aspen Insurance Holdings Limited, a Bermuda corporation traded on the New York Stock Exchange under the ticker “AHL.” Aspen Insurance (UK) Ltd. and Aspen Insurance (UK) Holdings Limited are not publicly traded companies. No one person or entity owns 10% or more of Aspen Insurance Holdings Limited, which is a publicly traded company.

Lloyd’s Syndicate 2003 is a Lloyd’s of London insurance syndicate managed by Catlin Underwriting Agencies Limited (“CUAL”). CUAL is a wholly-owned subsidiary of XL Group Ltd., a Bermuda corporation traded on the New York Stock Exchange under the ticker “XL.” No one person or entity owns 10% or more of XL Group Ltd., which is a publicly traded company.

TABLE OF CONTENTS

	<i>Page</i>
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE	ii
TABLE OF CONTENTS.....	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION.....	2
STATEMENT OF THE CASE	3
REASONS FRO GRANTING THE PETITION.....	5
A. The Tenth Circuit’s Approach To State Intermediate Appellate Court Precedent Conflicts With That Taken By Other Circuit Courts.....	6

Table of Contents

	<i>Page</i>
B. The Tenth Circuit's Refusal To Give Deference To The Decisions Of The State Intermediate Appellate Courts Cannot Be Reconciled With This Court's Precedent Or The Principles Of Federalism Underlying <i>Erie</i>	10
CONCLUSION	16

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED FEBRUARY 13, 2018.....	1a
APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, FILED NOVEMBER 17, 2016	49a
APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED MARCH 9, 2018	116a
APPENDIX D — CORRECTED DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED MARCH 12, 2018 ..	118a

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES	
<i>Assicurazioni Generali, S.p.A. v. Neil</i> , 160 F.3d 997 (4th Cir. 1998).....	7, 12
<i>Community Bank of Trenton v. Schnuck Markets, Inc.</i> , 887 F.3d 803 (7th Cir. 2018).....	7
<i>Dufel v. Green</i> , 198 App. Div. 2d 640, 603 N.Y.S.2d 624 (1993)	10
<i>Erie R.R. Co. v. Tompkins</i> , 304 U.S. 64 (1938).....	<i>passim</i>
<i>George A. Fuller Co. v. United States Fid. & Guar. Co.</i> , 200 App. Div. 2d 255, 613 N.Y.S.2d 152 (1994), <i>leave to appeal denied</i> , 84 N.Y.2d 806, 645 N.E.2d 1215, 621 N.Y.S.2d 515 (1994).....	14
<i>Glendale Assocs., Ltd. v. N.L.R.B.</i> , 347 F.3d 1145 (9th Cir. 2003).....	8
<i>Guilbeau v. Hess Corp.</i> , 854 F.3d 310 (5th Cir. 2017).....	7
<i>Hanna v. Plumer</i> , 380 U.S. 460 (1965).....	9

Cited Authorities

	<i>Page</i>
<i>Hicks v. Feiock</i> , 485 U.S. 624 (1988)	11
<i>Illinois Nat’l. Ins. Co. v.</i> <i>Wyndham Worldwide Operations, Inc.</i> , 653 F.3d 225 (3d Cir. 2003)	8
<i>In re Emerald Casino, Inc.</i> , 867 F.3d 743 (7th Cir. 2017)	9
<i>In re Montreal, Maine & Atlantic Ry. Co.</i> , 888 F.3d 1 (1st Cir. 2018)	8
<i>Lehman Bros. v. Schein</i> , 416 U.S. 386 (1974)	11
<i>Mayes v. Summit Entertainment Corp.</i> , 287 F. Supp. 3d 200 (E.D.N.Y. 2018)	7
<i>National Union Fire Ins. Co. of Pittsburgh, PA</i> <i>v. Turner Constr. Co.</i> , 119 App. Div. 3d 103, 986 N.Y.S.2d 74 (2014)	13
<i>Pavarini Constr. Co. v. Continental Ins. Co.</i> , 304 App. Div. 2d 501, 759 N.Y.S.2d 56 (2003)	13
<i>People v. Bing</i> , 76 N.Y.2d 331, 559 N.Y.S.2d 474, 558 N.E.2d 1011 (1990)	10

Cited Authorities

	<i>Page</i>
<i>Salve Regina College v. Russell</i> , 499 U.S. 225 (1991)	5
<i>State of California v. Taylor</i> , 353 U.S. 553 (1957)	11
<i>Travelers Ins. Co. v. Carpenter</i> , 411 F.3d 323 (2d Cir. 2005)	11
<i>West v. American Tel. & Tel. Co.</i> , 311 U.S. 223 (1940)	11, 12
<i>Winn-Dixie Stores, Inc. v. Dolgencorp, LLC</i> , 881 F.3d 835 (11th Cir. 2018)	6
<i>Yates v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.</i> , 808 F.3d 281 (6th Cir. 2015)	7

STATUTES AND OTHER AUTHORITIES

U.S. Const., amend. X	1, 3
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1332	2
28 U.S.C. § 1652	2

Cited Authorities

	<i>Page</i>
17A MOORE’S FEDERAL PRACTICE, 3d Ed., § 124.20(2).....	12, 14
36 C.J.S., FEDERAL COURTS, § 201, <i>State Intermediate Appellate Court</i>	6, 8
B. Glassman, “Making State Law in Federal Court,” 41 GONZAGA L. REV. 237 (2005)	9
McKINNEY’S N.Y. INS. LAW, §1101(a)(2)	14

Petitioners, Aspen Insurance (UK) Ltd. and Lloyd’s Syndicate 2003, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 882 F.3d 952, and is reproduced in the appendix hereto (“App.”) at 1a. The opinion of the District Court for the District of Kansas is not reported in F. Supp., but is available at 2016 WL 6804894, and is reproduced at App. 49a.

JURISDICTION

The judgment of the Tenth Circuit was entered on February 13, 2018. Petitioners timely filed a petition for panel rehearing and rehearing *en banc*. On March 9, 2018, the Tenth Circuit denied Petitioners’ petition for panel rehearing and rehearing *en banc*, a copy of which is reproduced at App. 116a. On March 19, 2018, the Tenth Circuit denied Petitioners’ motion to stay issuance of the mandate. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the Constitution provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.”

The Rules of Decision Act, 28 U.S.C. § 1652, provides that “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”

INTRODUCTION

Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), a federal court sitting in diversity must strive to give the litigants the same result they would receive had they proceeded in state court. Otherwise, the principles of federalism are lost.

Where a state’s highest court has not addressed the state law issue in question, but the state’s intermediate appellate courts have done so, the federal courts have taken different paths. Some have deferred to those intermediate decisions, while others have treated those decisions as merely “some evidence” of what the state’s highest court might do if faced with the issue. The Tenth Circuit took the latter approach and adopted a rule of decision inconsistent with numerous New York intermediate appellate court decisions rendered over the course of at least three decades.

Commentators have observed that the federal courts have reached widely differing results when attempting to predict a state supreme court decision based on existing intermediate appellate court decisions due to the divergent approaches identified above.

Making an *Erie* prediction of state law is a frequent task of the federal courts. Petitioners assert that giving

deference to intermediate appellate state court decisions in the absence of controlling state highest court authority is consistent with this Court's decisions, and more accurately implements the goals of federalism as reflected in the Tenth Amendment to the United States Constitution and the Rules of Decision Act. Clarifying the scope of such deference is a matter of nationwide importance, warranting this Court's review and pronouncement. This fundamental question of the law to be applied in cases involving the interpretation of state law has not received a significant recent treatment from this Court.

STATEMENT OF THE CASE

Black & Veatch Corporation ("Black & Veatch") sued Petitioners Aspen Insurance (UK) Ltd. and Lloyd's Syndicate 2003 ("the Insurers") in the district court for the District of Kansas, alleging the Insurers were required to reimburse Black & Veatch more than \$70 million under a commercial general liability (CGL) insurance policy. Black & Veatch claimed that it was entitled to coverage for damage caused by its subcontractors to a project on which it was the general contractor. The district court exercised diversity jurisdiction under 28 U.S.C. § 1332, as the parties are diverse¹ and the amount in controversy was more than \$75,000.

The district court granted the Insurers' motion for partial summary judgment, holding that the policy did not provide coverage. New York law governs the policy, and the court adhered to a long line of New York state cases holding that construction defects which only damage the

1. Black & Veatch is a citizen of Kansas and the Insurers are citizens of the United Kingdom.

construction project itself are not covered “occurrences” under a commercial general liability policy.

The Tenth Circuit reversed. Relying on a purported “trend” of construction defect cases in *other* states (App. 29a-31a), it held that where defective construction work performed by the subcontractor of an insured results in damage to non-defective parts of the construction project, that damage presents a covered “occurrence.” It ruled that New York’s highest court would decide that a “subcontractor exception” to a general contractor’s liability insurance policy would be interpreted to provide coverage where the acts of a subcontractor damaged the contractor’s work, and that a construction defect stands as an “occurrence” as that term is defined by a general liability insurance policy. The court remanded for further proceedings on the Insurers’ other coverage defenses.

Judge Briscoe dissented. She noted that “[t]he rule among intermediate appellate courts in New York has been that” the standard definition of “occurrence” in commercial general liability policies does not provide coverage for faulty workmanship in the work product itself, but only covers faulty workmanship where it causes bodily injury or property damage to something other than the work product itself. App. 43a-44a, Briscoe, J., dissenting. Judge Briscoe explained that New York intermediate appellate courts have “developed the rule that a CGL policy using the standard definition of ‘occurrence’ cannot cover damage to the insured’s own work product, even when errors by the insured or its subcontractors cause the damage.” App. 44a.

Addressing the majority’s contrary conclusion, Judge Briscoe noted that “in declining to apply the rule that New York’s intermediate appellate courts have applied we exceed our proper role as a court of review in a diversity action.” App. 46a, Briscoe, J., dissenting. She pointed out that the majority reached its result, “[a]rmed with ... extrinsic evidence about how CGL policies are generally drafted, scholarly sources, and persuasive authority from courts applying the law of other jurisdictions.” App. 46a. Judge Briscoe called this reasoning “a bridge too far,” in turning to the law of other jurisdictions to determine what New York’s highest court would decide. App. 47a. She stated that looking at the law of other jurisdictions to accomplish that task may be appropriate if New York law were unclear, but “[i]t is not difficult to ascertain how New York courts would decide the issue here – nor does the majority say it would be difficult.” App. 47a.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit made an *Erie* prediction that New York’s highest court, the Court of Appeals, would interpret a commercial liability insurance policy to provide coverage where the acts of a subcontractor damage the contractor’s work.² The New York Court of Appeals has never decided that question. Instead, decades of consistent New York intermediate appellate court precedent holds that construction defects are not “occurrences” under general liability policies. As Judge Briscoe pointed

2. As a lower court’s determination of state law, the Circuit Court’s ruling would be subject to *de novo* review by this Court, to ensure the policy of consistent application of state law in the federal courts under *Erie*. See *Salve Regina College v. Russell*, 499 U.S. 225 (1991).

out, “in declining to apply the rule that New York’s intermediate appellate courts have applied,” the Tenth Circuit “exceed[ed] [its] proper role as a court of review in a diversity action.” App. 46a, Briscoe, J., dissenting.

A. The Tenth Circuit’s Approach To State Intermediate Appellate Court Precedent Conflicts With That Taken By Other Circuit Courts.

When faced with a state law question addressed by intermediate state courts but not decided by a state’s highest court, federal courts have taken divergent approaches:

According to one view, where state law is to be applied in actions in federal court, in the absence of a decision by the highest court, the federal court must follow the decisions of the intermediate state courts, if they are not in conflict, even though the rule announced by such decisions may appear to be unsound or undesirable, unless it is convinced by other persuasive data that the highest court of the state would do otherwise or unless there is a compelling reason to doubt that the intermediate appellate courts have got the law right.

36 C.J.S., FEDERAL COURTS, § 201, *State Intermediate Appellate Court*, at 228-29. *E.g.*, *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 881 F.3d 835, 848 (11th Cir. 2018) (“State law is what the state appellate courts say it is, and we are bound to apply a decision of a state appellate court about state law even if we think the decision is wrong.”);

Community Bank of Trenton v. Schnuck Markets, Inc., 887 F.3d 803, 816 (7th Cir. 2018) (“we consider decisions of intermediate appellate courts unless there is good reason to doubt the state’s highest court would agree with them”) (citations omitted); *Mayes v. Summit Entertainment Corp.*, 287 F. Supp. 3d 200, 207 (E.D.N.Y. 2018) (“A federal court may not choose to ignore substantive state law if there is no indication that state courts have abandoned their precedent on the matter.”); *Guilbeau v. Hess Corp.*, 854 F.3d 310, 312 (5th Cir. 2017) (federal court should “defer to intermediate state appellate court decisions, unless convinced by other persuasive data that the highest court of the state would decide otherwise.”) (citations omitted); *Yates v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 808 F.3d 281, 289 (6th Cir. 2015) (same); *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1003 (4th Cir. 1998) (“only if the decision of a state’s intermediate court cannot be reconciled with state statutes, or decisions of the state’s highest court, or both, may a federal court sitting in diversity refuse to follow it.”).

Alternatively, “[a]ccording to another view,

an intermediate appellate court’s reading of state law is usually trustworthy data but is not binding on a federal court. ... Under this view, where state law applies and the highest state court has not spoken, a federal court takes a predictive approach and seeks guidance from other persuasive case law, learned treatises, pertinent public policy considerations, and the general weight and trend of authority.”

36 C.J.S., FEDERAL COURTS, § 201, *State Intermediate Appellate Court*, at 229. *E.g.*, *Glendale Assocs., Ltd. v. N.L.R.B.*, 347 F.3d 1145, 1154 (9th Cir. 2003) (absent decision from the state’s highest court, federal court “must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treaties and restatements as guidance.”) (citations omitted); *In re Montreal, Maine & Atlantic Ry. Co.*, 888 F.3d 1, 8 (1st Cir. 2018) (where state’s highest court has not addressed the issue, federal court must attempt to predict its ruling “by relying on the ‘types of sources that the state’s highest court would be apt to consult,’ such as persuasive out-of-state precedents, learned treatises, and public policy considerations.” (citations omitted); *Illinois Nat’l. Ins. Co. v. Wyndham Worldwide Operations, Inc.*, 653 F.3d 225, 231 (3d Cir. 2003) (“we must take into consideration: (1) what [the state’s highest] court has said in related areas; (2) the decisional law of the state intermediate courts; (3) federal cases interpreting state law; and (4) decisions from other jurisdictions that have discussed the issue.”) (citations omitted). The Tenth Circuit took this latter approach in predicting New York law, affording no special deference to the intermediate New York appellate court decisions and instead treating them, at best, as one of many sources of guidance.

This case warrants review to resolve how lower courts should treat intermediate state appellate court decisions in the absence of a decision from the state’s highest court. This issue goes to the heart of the nature of federalism. *Erie* is “one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems.”

Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). And as one commentator noted, the proper use of sources of state law in federal courts is especially appropriate for this Court’s review in light of the failure of lower courts to agree upon a consistent approach, and the length of time since a definitive pronouncement from this Court on the issue. *See, e.g.*, B. Glassman, “Making State Law in Federal Court,” 41 GONZAGA L. REV. 237, 263 (2005) (“Despite the long amount of time since the Supreme Court last spoke on ascertaining state law, the federal circuit courts of appeals have not developed a consensus approach to the sources of state law, nor have they truly demonstrated a consistent command of the principles involved.”).

The presence of two different lines of authority in the lower courts – the “deference” standard and the “one item of evidence among many” standard – has created confusion in deciding whether to follow state intermediate court rulings in the absence of a pronouncement from the state’s highest court. For example, in *In re Emerald Casino, Inc.*, 867 F.3d 743, 765 (7th Cir. 2017), the Seventh Circuit reviewed a district court’s decision not to apply a state intermediate appellate court ruling “because it wasn’t convinced that the Illinois Supreme Court would apply” it. The Seventh Circuit reversed the district court, stating, “[t]hat has the analysis exactly backwards.” *Id.*

The Tenth Circuit’s analysis is equally “backwards.” The court equated itself with New York’s highest court, unbound by the decisions of the intermediate New York reviewing court, stating that, “as the New York Court of Appeals has said, Appellate Division decisions ‘are certainly not binding upon this court.’” App. 33a, n.18.

³ This is a truism – a state’s highest court is not bound by lower state court decisions. But this principle does not apply to a federal court and free the Tenth Circuit from applying those intermediate appellate court cases, particularly since those decisions are binding precedent under the law of New York. *See, Dufel v. Green*, 198 App. Div. 2d 640, 640, 603 N.Y.S.2d 624, 624-25 (1993) (“Once this court [the Supreme Court, Appellate Division] has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision under the doctrine of stare decisis, which recognizes that legal questions, once resolved, should not be reexamined every time they are presented.” *Citing, People v. Bing*, 76 N.Y.2d 331, 338, 559 N.Y.S.2d 474, 558 N.E.2d 1011 (1990)). Not giving those decisions their due deference results in litigants receiving a different result in the Tenth Circuit than they would in any New York state court at the Appellate Division or below, which is contrary to *Erie* and the goals of federalism.

B. The Tenth Circuit’s Refusal To Give Deference To The Decisions Of The State Intermediate Appellate Courts Cannot Be Reconciled With This Court’s Precedent Or The Principles Of Federalism Underlying *Erie*.

This Court’s precedents confirm that giving deference to the rulings of intermediate appellate courts, rather than merely treating them as one factor among many, is more consistent with the goals of *Erie* and federalism.

3. This led the majority wrongly to treat the “occurrence” issue as if it “apparently raise[d] an issue of first impression,” rather than one well-settled among the intermediate courts. App. 47a, Briscoe, J., dissenting.

See *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) (“Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is *not to be disregarded* by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.”) (emphasis added); *State of California v. Taylor*, 353 U.S. 553, 556 n. 2 (1957) (court was “constrained to accept the ruling of” state intermediate appellate court, where the position of that court on that issue was not rejected by the state’s highest court); *Hicks v. Feiock*, 485 U.S. 624, 630 n. 3 (1988), *quoting*, *West*, *supra*.

Further, treating intermediate appellate court decisions as just one factor among many – on par with, *e.g.*, cases decided under the laws of other states and without any particular deference – is inimical to the principles of federalism, and threatens to revive the very drive for a uniform “general law” that *Erie* rejected. See *Erie*, 304 U.S. at 78-79.

The Tenth Circuit’s ruling ignored decades of state intermediate appellate court rulings, predicting that New York’s highest court would rule differently, in part, because the Tenth Circuit viewed that result as a product of the “better law,” in light of the views of some commentators and the asserted trend in other jurisdictions. Yet it is not the role of a federal court to fashion “better law” for a state, particularly one not located within its own jurisdiction. See, *e.g.*, *Travelers Ins. Co. v. Carpenter*, 411 F.3d 323, 329 (2d Cir. 2005) (“[o]ur role as a federal court sitting in diversity is not to adopt innovative theories that may distort established state law.”) (citation omitted); *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (“When

federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as ‘outsiders’ lacking the common exposure to local law which comes from sitting in the local jurisdiction.”).

As the Fourth Circuit has stated, “a federal court cannot refuse to follow an intermediate appellate court’s decision simply because it believes the intermediate court’s decision was wrong, bad policy, or contrary to the majority rule in other jurisdictions.” *Assicurazioni Generali*, 160 F.3d at 1003 (*citing West*, 311 U.S. at 237). *See also, e.g.*, 17A MOORE’S FEDERAL PRACTICE, 3d Ed., § 124.20[2] (federal court cannot disregard state caselaw based upon its view the rulings were “wrong, bad policy, contrary to the majority rule in other jurisdictions, lacking common sense, or not what ‘ought to be’”). Yet that is precisely what the Tenth Circuit did, engaging in a “better law” approach and purporting to align New York law with results reached by other states and favored by certain commentators. This is not a basis for refusing to defer to intermediate court rulings.

The Insurers cited 15 intermediate state court decisions, including many from the New York Supreme Court, Appellate Division, to support the District Court’s ruling. App. 37a-38a. There were so many of these decisions that the Opinion did not distinguish them individually, but distinguished them in bulk. App. 32a-33a, 38a. As the dissent correctly points out, this approach led the majority to overlook that several intermediate appellate court decisions actually decided that a contractor could not receive coverage for property damage caused by a subcontractor, as it was not an “occurrence.” App. 44a-45a,

Briscoe, J., dissenting, *citing*, *Pavarini Constr. Co. v. Continental Ins. Co.*, 304 App. Div. 2d 501, 759 N.Y.S.2d 56 (2003); *National Union Fire Ins. Co. of Pittsburgh, PA v. Turner Constr. Co.*, 119 App. Div. 3d 103, 106-108, 986 N.Y.S.2d 74 (2014).

The Tenth Circuit’s refusal to apply these consistent state intermediate court decisions departed from accepted principles of federalism. A leading treatise has noted that “[a] federal court may refuse to follow an intermediate state appellate court decision if the following grounds exist:

- Subsequent statutory enactments or amendments that change state law.
- Decisions of the state’s highest court in analogous or related areas that suggest that the highest court would decide the issue differently.
- A statute or statutory scheme with which the decision conflicts.
- Considered dicta of the state’s highest court that contradicts lower court decisions.
- Differences between state circuit or district courts. However, a federal court may not ignore an intermediate court decision because it believes that the decision is wrong, bad policy, contrary to the majority rule in other jurisdictions, lacking common sense, or not what ‘ought to be.’”

17A MOORE'S FEDERAL PRACTICE, 3d Ed., § 124.20[2], *Decisions of Intermediate State Appellate Courts Usually Must Be Followed*. None of these circumstances were present here.

The court cited no statutes or amendments that are inconsistent with the Appellate Division rulings.⁴ It quoted no decisions, dicta, or other comments from the New York Court of Appeals that suggest any criticism of the rule long followed by the Appellate Division on the issue. Indeed, the Court of Appeals denied discretionary review of the leading *George A. Fuller Co.* case, where the Appellate Division stated the rule that a commercial general liability policy “does not insure against faulty workmanship in the work product itself but rather faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to something other than the work product.” *George A. Fuller Co. v. United States Fid. & Guar. Co.*, 200 App. Div. 2d 255, 613 N.Y.S.2d 152, 155 (1994), *leave to appeal denied*, 84 N.Y.2d 806, 645 N.E.2d 1215, 621 N.Y.S.2d 515 (1994). Nor was there a conflict among the Appellate Division rulings, which the district court described as showing “an established consistency up through the most recent decisions.” App. 87a.

But instead of giving deference to these numerous lower state court cases, including many published

4. By statute in New York, a “fortuitous event” is defined as “any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial event *beyond the control of either party*.” MCKINNEY'S N.Y. INS. LAW, §1101(a)(2) (emphasis added). This statute, cited by the Insurers but not cited by the court, supports the Appellate Division decisions the court chose not to follow.

intermediate appellate decisions, the Tenth Circuit relied on out-of-state law and commentary, and without any ruling or dicta from the state's highest court indicating any inclination to change the law. In doing so, as the dissent put it, the Circuit Court "exceed[ed] our proper role as a court of review in a diversity action." App. 46a, Briscoe, J., dissenting.

On many questions of state law faced by federal courts sitting in diversity, the state appellate courts provide the best evidence of the state's law, because many state highest courts are of discretionary jurisdiction and accept only a small fraction of the petitions for leave to appeal presented to them. The question of whether to defer to existing state intermediate appellate court decisions is one upon which the lower federal courts are entitled to clarity and consistency. Current caselaw does not provide either, as evidenced by the Tenth Circuit's decision. As such, this case merits this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. FRANCO

Counsel of Record

ANDREW C. PATTON

SCOTT O. REED

FRANCO MORONEY BUENIK LLC

500 West Madison Street, Suite 2440

Chicago, IL 60661

(312) 466-7240

robert.franco@francomoroney.com

Counsel for Petitioners

June 6, 2018