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Eugene N. Zeigler

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EUGENE N. ZEIGLER*

Facing, as I do, this audience of learned judges, advocates, and scholars, all of whom know more about the subject of my address than I, and feeling ill prepared for the task before me, I am reminded of a scene from Oscar Wilde's play *The Importance of Being Earnest.* You will recall that Mr. John Worthing, a foundling who could only trace his ancestry back to a suitcase in Victoria Station, has had the temerity to ask that veritable dragon of Victorian snobbery, Lady Bracknell, for her daughter's hand in marriage, to which she replies, "I have always been of the opinion that a man who desires to get married should know either everything or nothing. Which do you know?" Mr. Worthing answers after some hesitation, "I know nothing, Lady Bracknell." "I am pleased to hear it," Lady Bracknell replies, "I do not approve of anything that tampers with natural ignorance. Ignorance is like a delicate exotic fruit; touch it and the bloom is gone.—Fortunately in England at any rate, education produces no effect whatsoever."

Anyone who has the temerity to address this audience on *Erie R.R. v. Tompkins*[1] should know either everything or nothing. Like Mr. Worthing, I plead to knowing nothing and only hope that the preparation I have made has not destroyed the natural bloom of ignorance.

I am reassured by the thought that my function on this panel is to serve as prologue—to set the stage for the real show which follows. Indeed, if I may paraphrase one of Shakespeare's famous prologues,[2] I long "for a muse of fire, that would ascend the highest heaven of invention"—for within the small span of twenty minutes I must conjure up in your imagination the very constitutional debate which more than once shook the foundations of this nation, and with the aid of your imaginary forces delineate those "two high upreared and abutting fronts," *Swift v. Tyson*[3] and *Erie v. Tompkins.*

The decision in *Erie v. Tompkins* written by Mr. Justice Brandeis begins with startling abruptness. "The question for decision

* McEachin, Townsend & Zeigler, Florence, South Carolina.

1. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
2. SHAKESPEARE, HENRY THE FIFTH (prologue).
3. 41 U.S. (16 Pet.) 1 (1842).

is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved"—a question he emphatically answered in the affirmative. Then comes what must have been a real shocker to the litigants back in 1938. "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied through nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so. 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."[4]

Taking our cue from the opinion itself, let us consider the background of *Erie* in the framework of three topics: The delegation of powers, the separation of powers, and the nature of common law in our federal system. Let us begin with a consideration of the question of separation of powers and its history as a constitutional issue.

From a strong sentiment of national unity which prevailed during the early part of the Revolutionary War, through a spirit of particularism which led to the Articles of Confederation of 1781, down through the reaction toward national unity which lead to the ratification of the Constitution in 1788, the political thought of the time associated liberty with self government and feared centralization as tending toward tyranny. The Constitution and the theories that were put forward in its support did not clearly define the nature of the new American state. Ultimate authority was believed to reside in the people, but whether of the states separately or of the states collectively was not answered. It was a "compound republic" with sovereignty divided between the states and the union. The term "sovereignty" was carefully omitted from the Constitution, and the real issue was deliberately avoided.[5]

4. Erie R.R. v. Tompkins, 304 U.S. 64, 77 (1938).
5. GETTELL, HISTORY OF POLITICAL THOUGHT 415 (1925).

Initially the founding fathers probably thought that the states would retain most legislative authority and the Congress of the United States would be exercising limited legislative power in rather severely restricted subject matter areas.

History has not supported their view and we have witnessed the rapid expansion of federal powers particularly in the area of war power and commerce power. To this might be added the indicated expansion in the *Clearfield Trust*[6] type situation and in the *Lincoln Mills*[7] type situation.

There are limits within the federal system which have been referred to as delegation of powers. Listed in the first seventeen clauses of article I, section 8 of the Constitution are certain specific powers of the legislative branch and in clause eighteen the "necessary and proper clause." This eighteenth clause grants to the Congress power "to make all Laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Two rival theories arose to explain the nature of the federal system: The theory of states rights, a particularist theory, emphasizing the sovereignty retained by the states; and the nationalistic or organic theory with emphasis on the idea of a single, sovereign, national state. The central issue of American political and legal thought, and the one around which the greatest constitutional controversies have been waged, concerns the relations between the state and national governments and the distribution of powers between the two in a federal system. A large part of the work of the Supreme Court of the United States has been devoted to the demarcation of the line between federal and state functions.[8] *Chisholm v. Georgia*,[9] (decided in 1793), the first

6. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). The Court in this case held that it would be inappropriate to have the rights and duties of the United States on commercial paper issued by it controlled by state rather than federal law. "It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain." *Id.* at 367.

7. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). In a divided opinion the Court held that where § 301 of the Labor Management Relations Act (Taft-Hartley Act) granted jurisdiction of suits for violation of labor-management contracts, then the federal courts should bring into being a federal common law governing these contracts.

8. HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835 (1960).

9. 2 U.S. (2 Dall.) 419 (1793).

case of importance to come before the Supreme Court, raised this issue; and, affirming the idea of divided sovereignty, the Court stated that "the United States are sovereign as to all the powers of government actually surrendered. Each state in the union is sovereign as to all the power reserved."[10] This was a difficult line to hold.

When slavery became a national issue and intensified the conflict between nationalism and particularism, the compromise theory of divided sovereignty was replaced by rigid dogmas of state sovereignty on the one hand and national supremacy on the other.[11]

By the mid-nineteenth century nationalism was becoming the wave of the future. One of its most articulate spokesmen was Mr. Justice Story who had championed this doctrine in his commentaries on the Constitution published in 1833. It was fairly predictable that his decisions should be toward the augmentation of national federal power. In 1842, *Swift v. Tyson* carried the courts forward on this rising tide of nationalism.

The issue involved in *Swift* was whether a pre-existing debt constituted valid consideration for an endorsement of a bill of exchange. The defendant contended that such a debt was not regarded as valid consideration by the law of New York. The United States Supreme Court had, in several decisions, held that this was good consideration so that the endorsee would be a holder in due course. The decisions of the New York courts were not clear, and Mr. Justice Story decided that even if New York decisions had supported the defendant's position, the United States Supreme Court would not be bound to accept them as conclusive. Section 34 of the Judiciary Act of 1789, commonly called the Rules of Decision Act, provided that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States where they apply." Story held that this section did not require federal courts to determine questions of commercial law by reference to the decisions of state courts since the law involved was not "of a single country only, but of the commercial world."[12]

10. *Id.* at 435.
11. GETTELL, *op. cit. supra* note 5, at 416.
12. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842).

The foundation of Justice Story's decision was his understanding of what he considered to be the normal meaning of the word "laws," and certain policy considerations which the Court regarded as important.[13] In connection with what the word "laws" means, he stated, "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 themselves laws."[14] Following his statement as to the nature of laws, he distinguishes between two types of laws: local laws and general laws. Under the heading of local laws he included state statutes and constructions of state statutes, and decisions as to real estate and other immovables. This he contrasts with "general law" such as general commercial law, dependent not on "the decisions of the local tribunals, but on the general principles and doctrines of commercial jurisprudence."[15] His quotation of Cicero's remark that commercial law cannot be one thing in Rome and another in Athens has been cited as evidence that Justice Story was seeking through this decision to advance his idea of uniformity of law.[16]

The implications of *Swift* were manifold. First, it assumed a theory that common law existed independently of states or nations and the judges merely discovered the law and applied it. This was the higher-law concept of the common law decisional process. If we consider federal common laws as formulated in at least two ways, Story was referring to what is known as pure common law, the law made by judges without statutory guidance. The other, which has been given the fancy name "interstitial" law, or the "filling-in-the-gaps" type, is common law made when a court, called upon to construe a statute, fills in the gaps which inevitably legislators leave. Some might call this simply statutory construction, but it is generally included in discussions of the federal common law.[17] It should be noted that the latter type of interstitial common law is possible for the courts only when necessary and proper under a validly exercised power of Congress.

13. WRIGHT, FEDERAL COURTS 188 (1963).

14. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842). Currency was given during the life of the doctrine of *Swift v. Tyson* that Mr. Justice Story's interpretation of "laws" derived from Blackstone's statement "that the decisions of courts of justice are the evidence of what is common law." Teton, *The Story of Swift v. Tyson*, 35 ILL. L. REV. 519, 520 (1941).

15. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842).

16. WRIGHT, *op. cit. supra* note 13, at 188.

17. *The Future of a Federal Common Law*, 17 ALA. L. REV. 10, 17 (1964).

The second was that state courts are somehow inferior to federal courts, and that citizens engaged in business activities which cross state lines need the protection of a better type judicial system and a higher type law. This they might have through diversity suits in which general federal law would be applicable.[18]

The third was that uniformity of the law was desirable, that unity rather than diversity was an essential part of nationalism, and that it could best be achieved through the federal judicial system.[19]

A sense of delicacy dictates that no more than a passing reference be made to the resolution of the differences between the nationalist movement and the states right movement. The main question of constitutional construction underlying the debate gave rise to a conflict incapable of rational solution. Suffice it to say that some one hundred years ago there was an unpleasantness between the sections of this country, and in the test of arms that ensued, the theory of state sovereignty was pretty well destroyed. It survives as a mere device within the American federal system, and the conflicts which plague state and federal courts today are mostly concerned with housekeeping within that system.[20]

A high watermark in the expansion of nationalism and of the *Swift* doctrine is found in the case of *Gelpcke v. City of Dubuque*,[21] decided in 1863, when the Court declared: "We shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice."[22]

Like most movements in history, however, no sooner was the doctrine of *Swift v. Tyson* beginning to expand than difficulties

18. *Study of the Division of Jurisdiction Between State and Federal Courts,* The American Law Institute, Proposed Final Draft No. 1, Commentary on General Diversity Jurisdiction, p.50.

19. Teton, *supra* note 14, at 523.

20. In this view, shared by other thoughtful observers, it is futile to engage in controversy over the expansion of federal, or "central" power at the expense of the states or, even worse, to put the question in terms of "state's rights." For persons in government, intent on solving specific and pressing problems, the question of federal-state relations cannot be discussed, let alone resolved, in terms of abstract systems of power. Within the limits of our constitutional framework, the question of federal-state relations has become essentially one of method, and the methods of co-operation—or of drawing lines—between levels of government are a pragmatic business, responding to changing needs and pressures.
Grad, *Federal-State Compact,* 63 COLUM. L. REV. 825, 830 (1963).

21. 68 U.S. (1 Wall.) 175 (1863).

22. *Id.* at 206-207.

in its application became apparent. The triumph of nationalism in this country and in Europe was paralleled by a growing worldwide tendency to examine the social, economic, and political forces that make up the life of a state rather than theories of sovereignty.[23] It is a pity that Mr. Justice Story could not have had the advantage of the wisdom of John Chipman Gray's remark that, "Dirt is only matter out of place; and what is a blot on the escutcheon of the Common Law may be a jewel in the crown of the Social Republic."[24]

Had the decision in *Swift v. Tyson* been limited to questions of commercial law, all might have been well. But in dealing with the doctrine, the courts were like the small boy who protested that he knew how to spell the word banana, but he just didn't know where to stop. The decision was not limited to commercial law, and ultimately it was held that federal courts were to decide on their own, as a matter of federal common law, questions of the law of torts.[25] As a rule state law of real property was followed, but if the federal courts regarded the law as unsettled, they felt that they could properly take their own view of the law.[26] It was generally held that state court decisions construing a state statute or constitution were to be followed in federal courts, but where they conflicted with an earlier federal construction of the statute or constitution, or where the state decision came down after the case had been tried in a lower federal court, federal courts were not bound to follow them.[27]

The division of laws into categories denominated "general," which the federal courts were free to find for themselves, and "local," in which state decisions were binding, proved highly unsatisfactory. Predictability of the outcome of any case was beclouded by the near impossibility of distinguishing in advance of trial what the courts would regard as general law and what

23. GETTELL, *op. cit. supra* note 5, at 418. See also Woodrow Wilson's remark that, "The question of the relation of the States to the federal government is the cardinal question of our constitutional system. . . . It cannot . . . be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question." WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 173 (1908).

24. GRAY, RESTRAINTS ON ALIENATION (preface) (2d ed. 1895).

25. WRIGHT, *op. cit. supra* note 13, at 188, citing Baltimore & O.R.R. v. Baugh, 149 U.S. 368 (1893).

26. WRIGHT, *op. cit. supra* note 13, at 188, citing Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910).

27. WRIGHT, *op. cit. supra* note 13, at 188, citing Rowan v. Runnels, 46 U.S. (1 How.) 134 (1847); Burgess v. Sligman, 107 U.S. 20 (1883).

they would regard as local law. The body of the federal general law was so meager that prediction at the planning stage was almost impossible. A lawyer could not tell whether the issue would be litigated in a state court where the substantive controlling law would be state law or in a federal court where it might be governed by general federal law.[28]

Even in the area where Mr. Justice Story was most sanguine, the development of a uniform body of commercial law through federal court decisions, the current of the times was against the direction set by *Swift*. By the end of the 1930's, it became impossible for the United States Supreme Court or any single court to maintain uniformity of commercial law by the force of example. The nation's judicial business had grown beyond this prospect, and although the New York Court of Appeals might bow to the superior wisdom of the United States Supreme Court speaking through Mr. Justice Story on a point of commercial law, one could hardly expect similar deference to a decision of three judges of an intermediate federal court of appeals.[29]

The trend toward making law by statute struck another blow against the uniformity through decisional process promised in *Swift*. In accordance with the clear command of the Rules of Decision Act, Story had excepted from the "general" law which federal courts were free to determine, "the positive statutes of the state, and the construction thereof by local tribunals."[30] The Negotiable Instruments Law and other uniform statutes declaratory of the common law were held to be excepted from the *Swift* doctrine, and Story's ideal was thereby frustrated in the very area in which it was designed to operate.[31]

The adoption of the fourteenth amendment to the Constitution and the flood of federal legislation beginning with Theodore Roosevelt increased the review of state action and required the Supreme Court to devote the bulk of its time to constitutional law and the interpretation of federal statutes. Judge Augustus Hand noted in 1930 that "relatively few cases where rights under the Federal Constitution and statutes are not involved are likely to get beyond the Circuit Court of Appeals" and therefore "there is much less chance than formerly of securing or even promoting

28. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 406 (1964).

29. *Id.* at 405-06.

30. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842).

31. Friendly, *supra* note 28, at 405-06.

uniformity through the decisions of the Supreme Court" on issues of "general" law.[32]

By 1893 the doctrine of *Swift v. Tyson* had come under heavy attack. Mr. Justice Field in a dissenting opinion in *Baltimore & Ohio R.R. v. Baugh*[33] stated that he had "an abiding faith that this, like other errors, will, in the end 'die among its worshipers.' "[34] The next generation of jurists were prepared to state that judges do not find the law, they make it. To Mr. Justice Holmes common law was not a brooding omnipresence in the sky, but the articulate voice of some identifiable sovereign.[35]

The aid of historical research was sought in the attack on *Swift*. In 1923, Professor Charles Warren wrote that he had discovered evidence that the original draft of the Rules of Decision Act read that "the Statute laws of the several states in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise," should be rules of decision in federal court. The statutory phrase "laws of the several states" Professor Warren deduced was merely an abbreviated statement of the original draft and was intended as an expression of the same idea, therefore, decisions of state courts were intended to be included.[36]

The most unfortunate result of the *Swift* case was that the accidental circumstance of the citizenship of one of the parties at the time of suit determined the rule of law applicable in a particular litigation, resulting often in a determination which clearly contradicted the law of the forum state.[37] Thus, upon the constant exacerbation of the nationalism versus states rights conflict, which has always been a threat to friendly co-existence within the United States, was superimposed the additional irri-

32. *Ibid.*

33. 149 U.S. 368 (1893).

34. Baltimore & O.R.R. v. Baugh, 149 U.S. 368, 403 (1893).

35. Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917). In the growing criticisms of *Swift v. Tyson*, even the personality of Justice Story came under attack. Factors of this nature bearing on the decision are suggested by Gray to be Story's character and seniority, reputation of great learning, preoccupation in writing a book on bills of exchange, and restless vanity. GRAY, NATURE AND SOURCES OF LAW 253 (2d ed. 1921). Even Brandeis comes in for his own share of criticism in the *Erie* case when so open an admirer as Judge Wyzanski points out that the *Erie* case is "one conspicuous exception" to Brandeis' record of strict avoidance of unnecessary constitutional issues. WYZANSKI, WHEREAS—A JUDGE'S PREMISES 57 (1965).

36. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 84-88 (1924).

37. WRIGHT, *op. cit. supra* note 13, at 191.

tant of patently inequitable results. It was from the absurd results of forum shopping in diversity cases that the most telling argument against the doctrine of *Swift v. Tyson* came. Conspicuous among these was the decision in 1928 in the case of *Black & White Taxi Co. v. Brown & Yellow Taxi Co.*[38] where a Kentucky taxicab company, in order to avoid law which had been settled in Kentucky for thirty-five years against enforcement of a contract for the exclusive right to provide taxi service at a particular station, reincorporated itself in Tennessee. The Kentucky corporation was dissolved and the contract assigned to the new Tennessee corporation. Suit was then brought against the competitor taxi company in federal court on the basis of diversity of citizenship. The injunction granted against the second taxi company was upheld by the United States Supreme Court on the ground that the question presented was one of general law, that the common law permitted exclusive contracts of this nature, and that the Kentucky decisions preventing enforcement of the contract were not binding in federal court.

The culmination of the discontent with *Swift v. Tyson* came in the very surprising decision rendered by the Supreme Court in 1938 which is the subject of our discussion this afternoon. One Harry Tompkins was walking along the right-of-way of the Erie Railroad at Hughestown, Pennsylvania, when he was struck by something which appeared to be a door projecting from one of the moving cars of a passing train. By one view of Pennsylvania law, Tompkins would have been regarded as a trespasser, and therefore, the railroad would not be liable except for wanton or willful misconduct. Under the "general" law, recognized by the federal courts under *Swift v. Tyson*, Tompkins had the status of a licensee, and the railroad company would be liable for simple negligence. Tompkins, a resident of Pennsylvania, brought suit against the New York corporation in the federal court at New York City. He was awarded a 30,000 dollar verdict which was upheld by the Circuit Court of Appeals for the Second Circuit. The United States Supreme Court granted certiorari. The appellant railroad stated in its brief, "We do not question the finality of the holding of this court in *Swift v. Tyson* . . ." and argued only that the Pennsylvania doctrine as to the duty owed those in Tompkins' position declared a Pennsylvania rule sufficiently "local" in nature to be controlling.[39]

38. 276 U.S. 518 (1928).

39. WRIGHT, *op. cit. supra* note 13, at 191.

The case was decided on constitutional grounds which had never been raised either in the briefs or in argument. Four of the other justices agreed with Mr. Justice Brandeis, and Mr. Justice Reed concurred in part. Although he disapproved of the doctrine of *Swift v. Tyson*, he would have avoided the constitutional issue by merely holding that "the laws" referred to in the Rules of Decision Act covered state decisions as well as state statutes. The dissent of Justices Butler and McReynolds pointed out that Mr. Justice Fields, after his one famous outburst, had acquiesced in the doctrine, and that Mr. Justice Holmes, although dissenting in the *Black and White Taxi* case, only stated that while he would not extend the doctrine of *Swift v. Tyson* into new fields, he would not advocate overturning it.[40]

Much critical reaction followed the new *Erie* doctrine. The court was accused of having engaged in a plan whereby *Swift* was "exhumed, convicted of Constitutional heresy, and its moldering bones burned at the stake."[41] Judge Clark speculated "how the gentler touch of Cardozo might have left" the doctrine of *Swift v. Tyson* if the *Erie* decision had gone to him, as contrasted with Brandeis' failure "to realize that an ancient doctrine, already tending toward decay, did not need the sledgehammer blows he employed for its destruction.[42] Mr. Justice Stone, three years after he concurred in the decision, referred to Mr. Justice Brandeis' constitutional arguments as "unfortunate dicta."[43]

In the broad political history of the Court's work it was a swing from nationalism back to particularism. Judge Friendly considers in defense and praise of *Erie* that the Hegelian dialectic has been at work here.[44] (I make no apology for citing his

40. The dissenting Justices also with some sarcasm pointed out and protested the fact that the Court was considering a constitutional question without giving notice to the Attorney General and giving him an opportunity to participate. This was a survival of the famous 1937 "court packing" bill. WRIGHT, *op. cit. supra* note 13, at 192.

41. LLEWELLYN, THE COMMON LAW TRADITIONS 417 (1960). Llewellyn points out that Story's successors have now for a generation seemed disposed not only to wipe out a ruling they found "unconstitutional" but to swing on into the building of a worse one in its place. He states that the *Swift* rule is not even yet clearly reversed, which made a single clear expression, by even "any jackleg judge" of an inferior state court, control the federal court absolutely, control without regard to the sense of the ruling or to its possible or probable reversal or rejection above.

42. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 295-96 (1946).

43. WRIGHT, *op. cit. supra* note 13, at 196.

44. Friendly, *supra* note 28, at 421.

esoteric analogy, for at least one United States Senator from South Carolina believes that an understanding of dialectical materialism is a necessary part of the training of every red-blooded recruit in the United States Marines). If *Swift v. Tyson* is the thesis, *Erie*, the antithesis, then Judge Friendly sees a new specialized federal common law as the resultant synthesis.

When the dust had settled, however, Tompkins was out of 30,000 dollars, and new devils began to inhabit the federal courts swept clean by Mr. Justice Brandeis with the *Erie* broom. Let me leave you with three:

Since *Erie*, the federal courts have seemed to be advised by the Supreme Court to determine whether on a given issue state law may be inappropriate as a rationale, and in such instances to follow federal common law. The problem is, when is state law particularly appropriate, and what issues are particularly inappropriate for resolution by state common law?

The second, what is the limit of constitutional authority in differentiating substance from procedure?

Last of all, is the specialized federal common law, which Judge Friendly suggests as the healthy off-shoot of *Erie*, merely another step toward the preemption of vast areas of law by the federal courts further accelerating the decline of a federal system?[45] Is it indicative of another swing from particularism to nationalism?

Dean John G. Hervey, of the Oklahoma City University Law School, in predicting the eventual expansion of federal common law to include both contract and tort law applicable in diversity suits, states that he bases his prediction on the lecture given by the head devil in hell at the graduation banquet honoring the younger devils who were finishing their course and going to earth to start their work.[46] This is recorded in the addendum to the second edition of the *Screwtape Letters* by C. S. Lewis, wherein the head devil says to the lesser devils: "Now you're going to find your work on earth far easier than I found it when I graduated because they have on earth a number of great movements, among which are unity and togetherness."

45. *Id.* at 405.

46. Morgan, *The Future of a Federal Common Law*, 17 ALA. L. REV. 10, 42 (1964).