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Choice of Law In Federal Courts: A Reply

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I am grateful to the editors of the *Brandeis Law Journal* for allowing me to reply to a thoughtful article by Mr. Scott Fruehwald,¹ which appeared in a recent issue of this Journal. Without minimizing the scope of Mr. Fruehwald's article, it is, in large part, a response to a 1993 article of mine.²

While we appear to agree on a fair amount, there are points of divergence between us that deserve fuller treatment. It is apparent that Mr. Fruehwald is a great deal fonder of the Supreme Court's decision in *Erie R.R. Co. v. Tompkins*³ than am I, but his treatment of my analysis is somewhat incomplete. Mr. Fruehwald seemingly attributes to me the view that *Erie* should be overruled,⁴ but this isn't quite what I said. My 1993 article argued at some considerable length that *Erie* was mistaken in its interpretation of the Constitution and of Section 34 of the Judiciary Act, the statute now commonly known as the "Rules of Decision Act."⁵ But, notwithstanding *Erie*'s mistaken history and weak conceptual foundations, I argued for its retention,⁶ a point that Mr. Fruehwald later acknowledges.⁷ Interestingly enough, Mr. Fruehwald and I both wind up arguing for the overruling of the same decision: *Klaxon Co. v. Stentor Electric Manufacturing Co.*⁸ *Klaxon*, as is well known, held that federal courts sitting in diversity are required to follow their home state's choice-of-law rules, a doctrine that the Supreme Court thought was compelled

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¹ See Scott Fruehwald, *Choice of Law in Federal Courts: A Reevaluation*, 37 *BRANDEIS L.J.* 21 (1999).

² See Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 *TEX. L. REV.* 79 (1993). Mr. Fruehwald characterizes his article as "discuss[ing] Borchers's article in depth throughout." Fruehwald, *supra* note 1, at 22, n. 6.

³ 304 U.S. 64 (1938).

⁴ See Fruehwald, *supra* note 1, at 29 ("Professor Borchers sets forth several grounds for overruling *Erie*.").

⁵ See Borchers, *supra* note 2, at 110-23.

⁶ See Borchers, *supra* note 2, at 124.

⁷ See Fruehwald, *supra* note 1, at 44.

⁸ 313 U.S. 487 (1941).

by *Erie*'s more general directive to diversity courts to apply state (substantive) law.

Mr. Fruehwald is surely correct, however, to point out that we have greatly differing views as to the soundness of *Erie*'s rationale. Mr. Fruehwald recounts some of my reasons for believing that *Erie* mistakenly construed the Rules of Decision Act and the Constitution.⁹ In his résumé of my position, however, Mr. Fruehwald omits several points, at least two of which are quite damaging to the conventional wisdom regarding *Erie*.¹⁰

First, Mr. Fruehwald, like many commentators, focuses on the Supreme Court's 1842 decision in *Swift v. Tyson*¹¹ as the fountainhead of the Supreme Court's pre-*Erie* approach to the applicable law in diversity cases.¹² It is clear beyond peradventure, however, that federal courts, including the Supreme Court, from the beginning of the Republic understood their role in diversity cases to be to apply general common law principles unless the dispute was a "local" one.¹³ In fact, so embedded was this practice, and so unconcerned with the Rules of Decision Act was the Supreme Court, that more than a decade before *Swift* it said that "the thirty-fourth section of the judiciary act . . . has been uniformly held to be no more than a declaration of what the law

⁹ See Borchers, *supra* note 2, at 158.

¹⁰ Mr. Fruehwald's efforts to divorce admiralty jurisdiction from the rest of the body of general common law do not withstand close analysis. See Fruehwald, *supra* note 1, at 33 ("Admiralty jurisdiction, however, does not raise the same federalism problems as diversity jurisdiction because admiralty jurisdiction is vested exclusively in the federal courts."). First, as an historical matter, it is quite clear that "no distinction between civil admiralty and maritime jurisprudence and commercial law was drawn originally; they were one in the same jurisprudence." RANDALL BRIDWELL & RALPH U. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW* 61 (1977). While admiralty jurisdiction is nominally exclusive, the famous "saving to suitors" clause, see 28 U.S.C. § 1333, has always been interpreted to give state courts concurrent jurisdiction over common law admiralty matters. See THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* 60-61 (1994). As a result, from the early days of the United States "state courts . . . recognized the international character of maritime law." BRIDWELL & WHITTEN, *supra* note 10, at 60. Thus, Mr. Fruehwald's assertion that admiralty is fundamentally different "because admiralty jurisdiction is vested exclusively in the federal courts" is quite mistaken. Fruehwald, *supra* note 1, at 33.

¹¹ 41 U.S. (16 Pet.) 1 (1842).

¹² See Fruehwald, *supra* note 1, at 23.

¹³ See Borchers, *supra* note 2, at 112-13 (citing cases from as early as 1797 determining the applicable law based upon its local or general nature). See also William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984) (tracing federal courts' pre-*Swift* application of general common law principles to disputes involving marine insurance).

would have been without it.”¹⁴ I actually agree with Mr. Fruehwald when he says that the evidence from the Constitutional Convention and state ratifying conventions is insufficient to fully support my theory.¹⁵ But, the fact remains that immediately after the passage of the Judiciary Act of 1789, federal courts sitting in general diversity understood their role to be to apply the general common law and not any particular state’s law. Federal courts continued to do so for nearly a century and a half.¹⁶ This longstanding practice is surely strong evidence that *Erie* engaged in unsupported revisionism when it decided that the Rules of Decision Act was actually an all-encompassing mandate to apply state law in diversity cases and that the 150-year-old, pre-*Erie* understanding of that statute was unconstitutional.

Second, the history surrounding the Judiciary Act and the Process Act (passed only a few months later) quite strongly supports the notion that diversity courts were to apply general law, and not any particular state’s law, in diversity cases.¹⁷ One piece of evidence, to which I devoted considerable attention, but which Mr. Fruehwald bypasses, is the failed effort to amend the Process Act to allow debtors in federal courts to invoke state insolvency laws.¹⁸ It bears remembering that the friends of diversity jurisdiction were aligned with creditor interests.¹⁹ State insolvency and debtor-relief laws were a major problem for creditor interests because those laws often gave debtors extended time to repay debts, allowed for the repayment of debts in land, and generally favored debtors over creditors.²⁰ If diversity courts were required to apply state law, including, obviously, state debtor-relief laws, then diversity jurisdiction would have been much less of an aid to creditor interests and much less of a problem for debtor interests.

Interestingly, the September 26, 1789 edition of the *Gazette of the United States* contained the following report of the debates on the Process Act:

In the committee of the whole [House], on the bill for regulating processes in the Judicial Courts. . . .

¹⁴ *Hawkins v. Barney’s Lessee*, 30 U.S. (5 Pet.) 457, 464 (1831).

¹⁵ See Fruehwald, *supra* note 1, at 29; see also Borchers, *supra* note 2, at 98 (“In sum, the historical record on the drafting and the ratifying of the Constitution does not speak with absolute clarity on the matter of the law to be followed by diversity courts.”).

¹⁶ See Borchers, *supra* note 2, at 112-13.

¹⁷ See Borchers, *supra* note 2, at 98-110.

¹⁸ See Borchers, *supra* note 2, at 107-09.

¹⁹ See Borchers, *supra* note 2, at 94.

²⁰ See Borchers, *supra* note 2, at 88.

A clause was proposed for insertion, by which debtors should be enabled to avail themselves of the insolvent extant acts in the respective States. — This was negated by a large majority.— The adoption of this Clause was urged by Mr. [Aedanus] Burke [of South Carolina], and Mr. [James] Jackson [of Georgia], from the peculiar situation of persons indebted to British and other foreign merchants.²¹

If diversity courts were already required by Section 34 of the Judiciary Act to apply state law, this motion to amend the Process Act would have been pointless. But, of course, diversity courts in commercial matters did not apply any particular state's law; they applied general commercial principles.²² Thus, the entire sequence—two Southern representatives attempting to protect their debt-ridden constituencies and failing in that effort—is perfectly consistent with the notion that diversity courts were not bound to and would not follow any particular state's law.

As I noted above, however, despite our different paths, Mr. Fruehwald and I arrive at a common intermediate destination, which is to argue that *Klaxon* was a seriously misguided decision. I heartily endorse his observations regarding the absurdities generated by *Klaxon*.²³ Mr. Fruehwald's solution, like mine, is to allow federal courts to strike out on their own in choosing between state laws, rather than deferring to the choice-of-law methodologies of the state-court counterparts.²⁴

We differ, however, in the choice-of-law approach that we urge upon diversity courts. Mr. Fruehwald's proposed methodology is one that he calls "multilateralist,"²⁵ though it is a rather soft form of multilateralism, resembling the Second Conflicts Restatement's Section 6.²⁶ History has shown, however,

²¹ Borchers, *supra* note 2, at 108 (quoting *Proceedings of Congress, In the House of Representatives*, 1789 Gazette of the U.S. 191 (Sep't 26, 1789)).

²² See BRIDWELL & WHITTEN, *supra* note 10, at 61.

²³ See Fruehwald, *supra* note 1, at 36-44.

²⁴ See Fruehwald, *supra* note 1, at 45.

²⁵ See Fruehwald, *supra* note 1, at 49.

²⁶ See Fruehwald, *supra* note 1, at 51 n.182. Mr. Fruehwald is anxious to point out his perceived differences between his "closest connection to the controversy" approach and the Second Restatement. He correctly points out that his approach bears at least some verbal kinship to the "seat of the relationship" test proposed by the great German author Savigny. See Fruehwald, *supra* note 1, at 51 n.182. Whatever nuanced differences might exist, however, all approaches of this type lump personal connecting factors (such as domicile, residence, place of business and the like) with territorial connecting factors (the place of the injury, the place of contracting, and so on), and then make an effort to determine which of those connecting factors

that soft, multi-factor tests ultimately produce results that cannot be distinguished easily from the overtly result-selective approaches that I endorse, such as Professor Leflar's.²⁷

In fact, I submit, this tendency is revealed by Mr. Fruehwald's discussion of at least one of the cases that I chose to illustrate my proposed approach. Both of us criticize the district court's decision in *Boardwalk Regency Corp. v. Travelers Express Co.*²⁸ In that case, the district court, following Michigan's forum-favoring choice-of-law approach, dismissed a suit by a New Jersey casino against a Michigan gambler and the issuer of various money orders. In that case, the money orders had been presented to the casino to allow the gambler to open an account. Purporting, however, to enforce Michigan's allegedly strong policy against gambling,²⁹ the district court dismissed the casino's lawsuit. I criticized the result because of the manifest absurdity in requiring a casino to steer clear of parochial state policies such as Michigan's.³⁰ Mr. Fruehwald likewise endorses application of New Jersey law, but purports to do so applying his "closest connection" test. I am at a loss, however, to see why New Jersey's connection is any closer than Michigan's. As Mr. Fruehwald notes, the contacts with the two states are about evenly divided, but he concludes that "based on a qualitative and quantitative analysis of the connections with New Jersey and Michigan, . . . the court should have chosen New Jersey law and enforced the money orders."³¹

is more important in the particular case.

The "closest connection" formulation actually has been in wide use in Europe for some time. See Peter Hay, *The Case for Federalizing Rules of Civil Jurisdiction in the European Community*, 82 MICH. L. REV. 1323, 1331 (1984). It appears in various international codifications of conflicts principles as well. See, e.g., Nathalie Vaser, *Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 319, 341, n. 122 (1996) (noting use of "closest connection" test in the Swiss codification).

²⁷ Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 377 (1992).

²⁸ 745 F. Supp. 1266 (E.D. Mich. 1990).

²⁹ Detroit, by the way, is now a home to licensed casinos. See Robert Ankeny, *Before Casinos, There Was Caille: Slot Machine Maker was Big Wheel in Detroit*, CRAIN'S DETROIT BUSINESS, Aug. 30, 1999, at 1 ("MGM Grand Detroit Casino's auspicious opening . . . wasn't the first time Detroit has made money legally from slot machines.").

³⁰ Borchers, *supra* note 2, at 127 ("After all, what is the casino to do with future customers? Is it to check their drivers' licenses and require cash from all Michigan gamblers?").

³¹ Fruehwald, *supra* note 1, at 57.

It is here that I have difficulty squaring Mr. Fruehwald's enthusiastic defense of *Erie* with the rest of his argument. Referring to the *Boardwalk Regency* case and to his earlier assertions about *Erie*, he argues: "For a federal judge to decide that New Jersey's policy of allowing free negotiation of money orders trumps Michigan's policy against gambling goes against the concept of federalism contained in the Tenth Amendment and *Erie* and is contrary to notions of interstate justice."³² If one fully embraces this proposition, then a federal court should refuse to apply its home state's substantive law only if that state (that is, that state's courts) would similarly refuse. Otherwise, the federal judge engages in unconstitutional "trumping" of the forum state's policies. But this, of course, is essentially the holding of *Klaxon*, that diversity courts must follow their home state's choice-of-law methodology and thus subordinate state policy only under the circumstances in which the forum state would permit it. All of this, it seems to me, is very difficult to reconcile with Mr. Fruehwald's stated position that the *Boardwalk Regency* court should have done what a Michigan court would not have, which was to apply New Jersey law.

While I find his "closest connection" analysis unconvincing, I am happy to endorse Mr. Fruehwald's conclusion that application of New Jersey law would have been "sensible and fair."³³ The heart of the matter, it seems to me, is the fairness of allowing Michigan gamblers a "do over" if they lose in an out-of-state casino.³⁴ Moreover, the hairsplitting nature of such tests can cause the result to shift depending on apparently innocuous changes in the facts. Should the result really depend on, say, where the money orders were purchased? While Mr. Fruehwald does not appear to place any significance on this connection, it is easy to imagine a court finding it important in attempting to ascertain which state is more closely connected. Mr. Fruehwald's sense of justice seems keen enough that in his hands the "closest connection" test avoids such silly holdings, but similar tests have produced some noxious results in the courts.³⁵ If, as I believe, an original and continuing rationale for diversity

³² Fruehwald, *supra* note 1, at 56.

³³ Fruehwald, *supra* note 1, at 57.

³⁴ This was essentially the New York Court of Appeals' rationale in enforcing a Puerto Rican gambling debt against a New Yorker, even in the face of a suggestion that to do so would violate New York's public policy. *Intercontinental Hotels Corp. v. Golden*, 203 N.E.2d 216 (N.Y. 1964).

³⁵ See *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679 (N.Y. 1985) (applying New York's "grouping of contacts" approach to hold that New Jersey's charitable immunity statute immunizes charities for liability relating to sexual molestation of two young boys even though

jurisdiction is the avoidance of parochial, aberrational and unfair state laws, then its purpose will only be furthered by focusing the attention of federal courts on doing justice in such cases.

I am grateful to Mr. Fruehwald for taking the time to analyze and critique my 1993 article, and I endorse, in particular, his observations about *Klaxon* and its operation in a modern conflicts world. I continue to believe, however, that fundamental justice has always been the northstar of diversity jurisdiction, and that it will function effectively only if diversity courts navigate accordingly.

major part of molestation took place in New York).

