fair-traded. When the integrated firm's loss from fair-trading qua manufacturer is exceeded by its gain from wholesaling its own and other fair-traded goods qua wholesaler, this will tip the scales of its over-all interest in favor of resale price maintenance. In such a case the economic interest of an integrated manufacturer is not that of a non-integrated one but that of a wholesaler, and it can be said to be "acting as a wholesaler." Accordingly, its resale price-maintenance contracts should not qualify for immunity under Miller-Tydings.

Because the integrated firm's balance of interests will at least occasionally be that of wholesaler, and because it is impractical to require a court to weigh nicely the respective gains and losses from resale price maintenance to determine when that condition exists, where the wholesaling facilities of an integrated manufacturer sell competing brands this should be sufficient justification for regarding it as a wholesaler and condemning its participation in resale price maintenance.[59] Since the McKesson & Robbins wholesale division purchased and resold competing brands the result reached by the court is consistent with the foregoing analysis. But upon that analysis it is equally clear that despite its broad language the *McKesson* case ought not to be taken to condemn resale price maintenance by a firm which "compete[s]"[60] with those with whom it contracts only by performing similar functions solely with respect to its own manufactured products. Finally, the autonomous nature of the McKesson manufacturing division, and the care taken to assure that the price-maintenance contracts were negotiated and executed exclusively by that division[61] suggests that the decision is not to be avoided by a separate incorporation of the integrated facilities.

[59] The suggested analysis also offers a solution to the situation where the integrated firm is the wholesaling (or retailing), rather than the manufacturing, party to the contract. Since the wholesaling division of the integrated firm is handling the goods of other manufacturers it will be regarded as a wholesaler. If it enters into fair-trade contracts with a manufacturer whose integrated facilities wholesale the goods of other producers, the contract would be condemned as between wholesalers. If it enters into fair-trade contracts with a manufacturer who wholesales no goods, or no goods other than its own, the contract would be proper, as between a manufacturer and wholesaler. But compare the language of the Court quoted in text at note 40 supra, and in note 40 supra.

[60] Consult the language of the Court quoted in note 40 supra.

[61] Consult text at notes 29–33 supra.

PENDENT JURISDICTION—APPLICABILITY OF THE *ERIE* DOCTRINE

Even in the absence of diversity of citizenship, a federal court may, under the doctrine of pendent jurisdiction,[1] allow joinder of a non-federal claim

[1] The term "ancillary jurisdiction" is sometimes used to describe those situations in which disputes involving state-created rights are adjudicated by federal courts in non-diversity cases. "Pendent jurisdiction" is used in this comment to refer to that ancillary jurisdiction

with a substantial and closely related federal claim.[2] Although this doctrine[3] is of general application, it is most frequently employed and pressure for its liberal use is most pronounced in cases involving common-law unfair competition claims joined with claims under the federal copyright, patent or trademark statutes.[4]

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situation where the plaintiff joins a non-federal claim to a substantial and closely related federal claim. Other examples of ancillary jurisdiction include counterclaims (see, e.g., Moore v. New York Cotton Exchange, 270 U.S. 593 [1926]); impleader (see, e.g., Morrell v. United Air Lines Transport Corp., 29 F.Supp. 757 [S.D. N.Y., 1939], and consult Hart and Wechsler, The Federal Courts and the Federal System 942–43 [1953]); intervention (consult ibid., at 932–33, 936–37). The position of this comment, that state law should govern enforcement of state-created rights in pendency cases, would appear applicable to most or all ancillary jurisdiction situations.

[2] In Siler v. Louisville and Nashville R. Co., 213 U.S. 175, 191 (1909), the Court held that, upon acquiring jurisdiction by an attack on the constitutionality of a Kentucky railroad commission statute, a federal court "had the right to decide all questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." Hurn v. Oursler, 289 U.S. 238 (1933), a case involving a claim for patent infringement with pendent common-law unfair competition claims, relied upon Siler and enunciated a general rule of pendent jurisdiction. As part of the 1948 revision of the Judicial Code, 28 U.S.C.A. § 1338(b) was enacted: "The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trade-mark laws." This section was intended to be a codification of the Hurn rule, but points of distinction are evident. Whereas the Hurn rule was stated as a general principle applicable to all cases of pendent jurisdiction, the statute is limited to unfair competition and "related" copyright, trademark or patent law claims. On the other hand, the requirement of the statute that the federal question be merely "related" would seem clearly to be pointed toward a relaxation of the "substantial identity of facts" test which the second circuit derived from the language of the Hurn case. See Musher Foundation v. Alba Trading Co., 127 F.2d 9 (C.A. 2d, 1942). In spite of the 1948 revision, the trend appears to be toward the "substantial identity of facts" test. See, e.g., Schreyer v. Casco Products Corp., 190 F.2d 921 (C.A. 2d, 1951).

[3] Doubt has been expressed about the validity of pendent jurisdiction under Article III, Section 2 of the United States Constitution: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and the treaties made. . . ." See Judge Wyzanski's comments in Strachman v. Palmer, 82 F.Supp. 161 (D. Mass., 1949), wherein jurisdiction over a common-law damage claim was denied. A non-federal claim, of course, cannot be said to arise under the Constitution, laws or treaties of the United States. On appeal, the Strachman case was remanded for further proceedings on the common-law claim. Strachman v. Palmer, 177 F.2d 427 (C.A. 1st, 1949). In a special concurring opinion Judge Magruder discussed the constitutional problem, citing Chief Justice Marshall, Osborn v. Bank of United States, 9 Wheat. (U.S.) 738, 822 (1824), for the proposition that the judicial power of the United States under Article 3, Section 2 extends to all cases in law and equity and includes "the whole case," not merely "those parts of cases only which present the particular question involving the construction of the constitution or the law." Strachman v. Palmer, supra, at 431. The latter interpretation, although clearly not necessary from the wording of the constitutional provision, has been accepted for over 130 years and appears to be firmly established.

[4] Some examples of pendent claims other than unfair competition are Southern Pacific Co. v. Van Hoosear, 72 F.2d 903 (C.A. 9th, 1934) (action to recover intrastate freight rates pendent to action under Interstate Commerce Act); Manosky v. Bethlehem-Hingham Ship-

One of the problems arising from this assumption of jurisdiction is whether federal or state law shall govern the pendent claim.[5] Prior to 1938, during the reign of *Swift v. Tyson*,[6] federal courts were not bound by state decisional law in the disposition of cases involving non-federal claims, whether or not pendent, but applied the common law as interpreted by the federal courts.[7]

Erie Railroad Co. v. Tompkins,[8] in overruling *Swift v. Tyson*, declared that state decisional law, as well as statutes, was to be applied by federal courts in all cases in which a non-federal issue was in controversy.[9] However, since *Erie* was a diversity case, it left undecided the question of whether its reversal of the prior law extends to all non-federal claims before federal courts, or only to cases where jurisdiction is founded on diversity of citizenship. Subsequent decisions have elaborated upon *Erie*, but the limits of the doctrine as well as its underlying policy are still the subject of controversy.[10] Analysis of this policy, however, should determine the applicability of *Erie* to the specific situation of pendent jurisdiction.

An examination of the cases which have involved the question of choosing between federal or state law in pendency cases reveals considerable confusion. A majority of them apply only federal law or both federal and state law, without attempting any theoretical justification or even expressly ruling on the issue. In the unfair competition cases, most courts which have not ex-

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yard, 177 F.2d 529 (C.A. 1st, 1949) (common-law claim for incentive wages pendent to claim for overtime compensation under the Fair Labor Standards Act); Strachman v. Palmer, 177 F.2d 427 (C.A. 1st, 1949) (common-law negligence claim pendent to an Interstate Commerce Act claim); Lindquist v. Dilkes, 127 F.2d 21 (C.A. 3d, 1941) (common-law contract action pendent to claim of employer liability under the Fair Labor Standards Act). Consult note 17 infra.

[5] For discussion of other pendent jurisdiction problems, consult generally: Federal Jurisdiction and Procedure, 36 Va. L. Rev. 545 (1950); Jurisdiction in Federal Courts over Non-Federal Claims When Joined with a Federal Question, 52 Yale L. J. 922 (1943); Jurisdiction of the Federal Courts in Multiple Question Cases, 1 U. of Chi. L. Rev. 480 (1934).

[6] 16 Pet. (U.S.) 1 (1842).

[7] "Swift v. Tyson, 16 Pet. 1, 18, 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 thirty-fourth 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 intended 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. . . .'" Erie R. Co. v. Tompkins, 304 U.S. 64, 71 (1938).

[8] 304 U.S. 64 (1938).

[9] Ibid., at 78. "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."

[10] Hart and Wechsler, The Federal Courts and the Federal System, 610–78 (1953).

pressly ruled on the issue have applied federal law without comment.[11] Other courts have used federal law or both federal and state law, while observing that the result was the same under either.[12] A few courts have applied state law without comment.[13] All courts which have expressly decided the question

[11] Fram Corp. v. Boyd, 230 F.2d 931 (C.A. 5th, 1956); National Lead Co. v. Wolfe, 223 F.2d 195 (C.A. 9th, 1955); Strey v. Devines, Inc., 217 F.2d 187 (C.A. 7th, 1954); American Chicle Co. v. Topps Chewing Gum, Inc., 208 F.2d 560 (C.A. 2d, 1953); Ross Whitney Corp. v. French Laboratories, 207 F.2d 190 (C.A. 9th, 1953); Nancy Ann Storybook Dolls v. Dollcraft Co., 197 F.2d 293 (C.A. 9th, 1952); Schreyer v. Casco Products Corp., 190 F.2d 921 (C.A. 2d, 1951); Fawcett Publications, Inc. v. Bronze Publications, 173 F.2d 778 (C.A. 5th, 1949); Harris v. National Machine Works, 171 F.2d 85 (C.A. 10th, 1948); Best & Co. v. Miller, 167 F.2d 374 (C.A. 2d, 1948); California Fruit Growers Exchange v. Sunkist Baking Co., 166 F.2d 971 (C.A. 7th, 1947); J. S. Tyree Chemist, Inc. v. Thyine Borine Laboratory, 151 F.2d 621 (C.A. 7th, 1945); Standard Brands v. Smidler, 151 F.2d 34 (C.A. 2d, 1945); Greisedieck Western Brewer Co. v. Peoples Brewing Co., 149 F.2d 1019 (C.A. 8th, 1945); Seven-Up Co. v. Cheer Up Sales Co., 148 F.2d 909 (C.A. 8th, 1945); Horlicks Malted Milk Corp. v. Horlick, 143 F.2d 32 (C.A. 7th, 1944); Rudens v. Bowers, 136 F.2d 887 (C.A. 9th, 1943); Quaker Oats Co. v. General Mills, Inc., 134 F.2d 429 (C.A. 7th, 1943); N.S.W. Co. v. Wholesale Lumber & Millwork, 123 F.2d 38 (C.A. 6th, 1941); California Fruit Growers Exchange v. Windsor Beverages, Ltd., 118 F.2d 149 (C.A. 7th, 1941); Hemmeter Cigar Co. v. Congress Cigar Co., 118 F.2d 64 (C.A. 6th, 1941); General Shoe Corp. v. Rosen, 111 F.2d 95 (C.A. 4th, 1940); Emerson Electric Mfg. Co. v. Emerson Radio & Phonograph Corp., 105 F.2d 908 (C.A. 2d, 1939); Sinko v. Snow-Craggs Corp., 105 F.2d 450 (C.A. 7th, 1939); United Lens Corp. v. Doray Lamp Co., 93 F.2d 969 (C.A. 7th, 1937); Brooks v. Great A & P Tea Co., 92 F.2d 794 (C.A. 9th, 1937); Industrial Rayon Corp. v. Dutchess Underwear Corp., 92 F.2d 33 (C.A. 2d, 1937); Warner Publications v. Popular Publications, 87 F.2d 913 (C.A. 2d, 1937); L. Waterman Co. v. Gordon, 72 F.2d 272 (C.A. 2d, 1934); Sunbeam Corp. v. Spear, 120 F.Supp. 538 (E.D. Pa., 1954); Telechron, Inc. v. Telicon Corp., 97 F.Supp. 131 (D. Del., 1951); King Pharr Canning Operations v. Pharr Canning Co., 85 F.Supp. 150 (W.D. Ark., 1949); Finnerty v. Wallen, 77 F.Supp. 508 (N.D. Cal., 1948); Gort Frocks, Inc. v. Princess Pat Lingerie, Inc., 73 F.Supp. 364 (S.D. N.Y., 1947); Fruit Growers Co-op. v. M. W. Miller & Co., 73 F.Supp. 90 (E.D. Wis., 1947); Augstein v. Saks, 69 F.Supp. 547 (N.D. Cal., 1946); Prince Matchabelli, Inc. v. Anhalt & Co., 40 F.Supp. 848 (S.D. N.Y., 1941); Time, Inc. v. Barshay, 27 F.Supp. 870 (S.D. N.Y., 1939); Keystone Macaroni Mfg. Co. v. Arena & Sons, 27 F.Supp. 290 (E.D. Pa., 1939); Plough, Inc. v. Intercity Oil Co., 26 F.Supp. 978 (E.D. Pa., 1939); Moxie Co. v. Noxie Kola Co. of N.Y., 29 F.Supp. 167 (S.D. N.Y., 1939).

[12] Mershon Co. v. Packmayr, 220 F.2d 879 (C.A. 9th, 1955); Hyde Park Clothes v. Hyde Park Fashions, 204 F.2d 223 (C.A. 2d, 1953); Admiral Corp. v. Penco, Inc., 203 F.2d 517 (C.A. 2d, 1953); Brown & Bigelow v. B • B Pen Co., 191 F.2d 939 (C.A. 8th, 1951); Hanson v. Triangle Publications, Inc., 163 F.2d 74 (C.A. 8th, 1947); Coca Cola Co. v. Snow Crest Beverages, 162 F.2d 280 (C.A. 1st, 1947); San Francisco Ass'n for the Blind v. Industrial Aid for the Blind, Inc., 152 F.2d 532 (C.A. 8th, 1946); James Heddings Sons v. Millsite Steel & Wire Works, 128 F.2d 6 (C.A. 6th, 1942); Oxford Book Co. v. College Entrance Book Co., 98 F.2d 688 (C.A. 2d, 1938); Chum King Sales v. Oriental Foods, 136 F.Supp. 659 (S.D. Cal., 1955); Upjohn Co. v. Schwartz, 131 F.Supp. 649 (S.D. N.Y., 1954); Bourns v. Edcliff Instruments, 125 F.Supp. 503 (S.D. Cal., 1954); G. B. Kent & Sons v. P. Lorillard Co., 114 F.Supp. 621 (S.D. N.Y., 1953); Conde Nast Publications, Inc. v. Vogue School of Fashion Modelling, Inc., 105 F.Supp. 325 (S.D. N.Y., 1952); Swarthmore Classics, Inc. v. Swarthmore Jr., 81 F.Supp. 917 (S.D. N.Y., 1949); Hygienic Products Co. v. Judson Dunaway Corp., 81 F.Supp. 935 (D. N.H., 1948); Lone Ranger, Inc. v. Currey, 79 F.Supp. 190 (M.D. Pa., 1948).

[13] Artype, Inc. v. Zappalla, 228 F.2d 695 (C.A. 2d, 1956); Lane Bryant, Inc. v. Maternity Lane, Ltd., 173 F.2d 559 (C.A. 9th, 1949); Consumers Petroleum Co. v. Consumers Co. of

in unfair competition cases have, with one exception,[14] held that state law should be applied to the pendent claim. While some of these courts have then relied solely on state cases,[15] others have used federal, or federal and state, precedents.[16] In the non-unfair competition area, state law seems to be applied universally.[17]

Advocates of adjudication of pendent claims under federal law might adopt either of two positions—that federal law controls all pendent claims or only those pendent claims where the parties are not diverse. These two positions differ simply in their interpretation of the scope of *Erie*. The former limits *Erie* to cases where jurisdiction is founded solely on diversity.[18] The latter supposes *Erie* applicable to all cases where the citizenship of the parties is diverse, even though jurisdiction over the state-created right could be sustained on pendency. Both of these positions take an unjustifiably limited view of the policy of *Erie*.

Illinois, 169 F.2d 153 (C.A. 7th, 1948); Grocers Baking Co. v. Sigler, 132 F.2d 498 (C.A. 6th, 1942); Adam Hat Stores, Inc. v. Scherper, 45 F.Supp. 804 (E.D. Wis., 1942).

[14] Bulova Watch Co. v. Stolzberg, 69 F.Supp. 543 (D. Mass., 1947).

[15] Mishawaka Rubber & Woolen Mfg. Co. v. Panther-Panco Rubber Co., 55 F.Supp. 308 (D. Mass., 1944), aff'd 153 F.2d 662 (C.A. 1st, 1946); Skinner Mfg. Co. v. General Foods Sales Co., 52 F.Supp. 432 (D. Neb., 1943), aff'd 143 F.2d 895 (C.A. 8th, 1944); Rytex v. Ryan, 126 F.2d 952 (C.A. 7th, 1942); Time, Inc. v. Viobin Corp., 128 F.2d 860 (C.A. 7th, 1942); Springfield Fire & Marine Ins. Co. v. Founders Fire & Marine Ins. Co., 115 F.Supp. 787 (N.D. Cal., 1953); Silvers v. Russell, 113 F.Supp. 119 (S.D. Cal., 1953); Thuberg v. Bock, 107 F.Supp. 639 (D. N.J., 1952); Lorraine Mfg. Co. v. Lorraine Mfg. Co., 101 F.Supp. 967 (D. N.J., 1952); Vickers, Inc. v. Fallon, 48 F.Supp. 221 (E.D. Mich., 1943); National Fruit Co. v. Dwinell-Wright Co., 47 F.Supp. 499 (D. Mass., 1942); Triangle Publications v. New England Newspaper Publishing Co., 46 F.Supp. 198 (D. Mass., 1942). This compilation excludes cases attempting to create federal question jurisdiction over unfair competition. Consult note 27 infra.

[16] Sunbeam Furniture Corp. v. Sunbeam Corp., 191 F.2d 141 (C.A. 9th, 1951); Creamette Co. v. Conlin, 191 F.2d 108 (C.A. 5th, 1951); Campbell Soup Co. v. Armour Co., 175 F.2d 795 (C.A. 3d, 1949); Cridlebaugh v. Rudolph, 131 F.2d 795 (C.A. 3d, 1942); Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 119 F.2d 316 (C.A. 6th, 1941); Safeway Stores, Inc. v. Sklar, 75 F.Supp. 98 (D. Pa., 1947); Folmer Graflex Corp. v. Graphic Photo Service, 44 F.Supp. 429 (D. Mass., 1942).

[17] Often pendency cases not involving unfair competition do not mention the existence of any choice of law problem. Consult note 4 supra. See also Markert v. Swift & Co., 187 F.2d 104 (C.A. 2d, 1951); South Side Theater v. United West Coast Theatre Corp., 178 F.2d 648 (C.A. 9th, 1949); Local 1104, etc. v. Wagner Electric Corp., 109 F.Supp. 675 (E.D. Mo., 1951); Jacobs v. N. La. & Gulf R. Co., 69 F.Supp. 5 (W.D. La., 1946). Other such cases have expressly chosen state law: Cromwell v. Hillsborough, 149 F.2d 617 (C.A. 3d, 1945); Iannetta Funeral Home v. State Board of Undertakers, 27 F.Supp. 518 (E.D. Pa., 1939); American Fidelity & Casualty Co. v. Owensboro Milling Co., 15 F.R.D. 352 (W.D. Ky., 1954).

[18] Consult Zlinkoff, Erie v. Tompkins in Relation to the Law of Trade-Marks and Unfair Competition, 42 Col. L. Rev. 955, 989 (1942), and Zlinkoff, Some Reactions to the Opinion of Judge Wyzanski in National Fruit Product Co. v. Dwinell-Wright Co., 32 T.M. Rep. 131, 135 (1942). This proposal was made in relation to claims for unfair competition pendent to claims arising under the copyright, patent or trademark laws.

Any application of federal law to a pendent claim must rest on one of two arguments. The first—that the *Erie* doctrine seeks only to remove that advantage of choice between variant state and federal law which arises from the fortuitous presence of diverse citizenship—is based upon an interpretation of particular language in the *Erie*[19] and subsequent[20] opinions. Where there is no diverse citizenship and therefore jurisdiction of the state-created right may be sustained only on pendency, the ability to exploit the variance between state and local law does not rest upon the "accident of diversity," and therefore does not, under this interpretation, fall under the disapprobation of the *Erie* doctrine. The objection to this argument is that a litigant having a choice between state and federal forums should not be able to vary the result by exercising his choice.[21] Unless state law were applied to the pendent claim, the plaintiff could obtain one result by asserting the state-created right independently in a state court and another result by asserting that right pendent to a federally created right. Since *Erie* represented a conscious choice to sacrifice uniformity in the federal system in order to achieve uniformity among federal and local courts sitting in the same state,[22] it would appear that the doctrine is not to be limited to cases where the parties are of diverse citizenship.[23]

The second argument for application of federal law to the pendent claim is that, because of the close interrelationship between the federal and nonfederal issues in the case, both issues should be governed by the same law.

[19] "Swift v. Tyson introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. . . ." 304 U.S. 64, 74–75 (1938).

[20] In Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945), Justice Frankfurter stated: "In essence, the intent of that decision [Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)] was to insure that, in all cases where a federal court is exercising *jurisdiction solely because of the diversity of citizenship of the parties,* the outcome of the litigation in the federal courts should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the *accident of a suit by a non-resident litigant* in a federal court instead of in a State court a block away should not lead to a substantially different result." (Italics added except to citation.) In D'Oench Duhme & Co. v. FDIC, 315 U.S. 447, 467 (1941), Justice Jackson, dissenting, stated: "The Court has not extended the doctrine of Erie R. Co. v. Tompkins beyond diversity cases." Chief Justice Hughes said in Fidelity Union Trust Co. v. Field, 311 U.S. 169, 180 (1940): "It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts *owing to the circumstance of diversity of citizenship.*" (Italics added.)

[21] This is a general principle pervading the entire conflict of laws area. Consult Stumberg, Principles of Conflict of Laws 14 (1937).

[22] Guaranty Trust Co. v. York, 326 U.S. 99, 103, 109 (1945).

[23] For the contrary position, consult Keefe, Gilhooley, Bailey and Day, Weary Erie, 34 Cornell L. Q. 494 (1949); Parker, Erie v. Tompkins in Retrospect: An Analysis of Its Proper Area and Limits, 35 A.B.A.J. 19 (1949).

This theory was accepted in *Bulova Watch Co. v. Stolzberg*[24] where the court, although recognizing much authority to the contrary, stated that:

> This Court has jurisdiction because of the interrelationship of the issues of unfair competition with those raised under the Trade-Mark Act. Federal law should govern both aspects of the complaint, while the local law of unfair competition is restricted to those cases where federal jurisdiction is sustainable only on diversity.[25]

The justification for this position is unclear. The opinion indicates that the court was impressed with the difficulty of applying state conflict of laws rules to multi-state acts of unfair competition. Insofar as the court's interrelationship argument has any doctrinal justification, it must be that federal legislation, at least in the trademark area, has occupied the field, thereby making unfair competition a federal question. However, the *Bulova* opinion adopted an inconsistent position because, assuming such was the result of the legislation, there could be no local law of unfair competition, at least concerning trademarks, even where diversity of citizenship was the only basis of jurisdiction.[26] Whether or not unfair competition has become a federal question is beyond the scope of this comment.[27] It is sufficient to observe that if unfair competition is a federally created right, federal jurisdiction over an unfair

[24] 69 F.Supp. 543, 546 (D. Mass., 1947). There was diverse citizenship in this case, but jurisdiction was founded on a federal question.

[25] Ibid., at 546.

[26] "Federal law should govern both aspects of the complaint, while the local law of unfair competition is restricted to those cases where federal jurisdiction is sustainable only on diversity." Bulova Watch Co. v. Stolzberg, 69 F.Supp. 543, 546 (D. Mass., 1947).

[27] Attempts have been made to treat unfair competition as a federal question, thus eliminating the necessity of utilizing pendent jurisdiction and removing the claim from the scope of the Erie doctrine. For example, The Lanham Act, 60 Stat. 427–44 (1946), 15 U.S.C.A. §§1051–1127 (1952), as amended 15 U.S.C.A. §§1057a, 1071, 1122 (Supp. 1956), has been held to have created a federal law of unfair competition. Pagliero v. Wallace China Co., 198 F.2d 339 (C.A. 9th, 1952); Stauffer v. Exley, 184 F.2d 962 (C.A. 9th, 1950). But compare Ross Products Inc. v. Newman, 94 F.Supp. 566 (S.D. N.Y., 1950), and American Automobile Ass'n v. Spiegel, 205 F.2d 771 (C.A. 3d, 1953). Consult also Federal Jurisdiction Over Unfair Competition, 37 Minn. L. Rev. 268, 278 (1953). Some courts have relied on the theory of Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176 (1942)—"But the doctrine of that case [Erie] is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they effect must be deemed governed by federal law having its source in those statutes, rather than by local law."—to hold that unfair competition is governed by federal law. See Landstrom v. Thopre, 189 F.2d 46 (C.A. 8th, 1951); Philco Corp. v. Phillips Mfg. Co., 133 F.2d 663 (C.A. 7th, 1943).

Bunn, The National Law of Unfair Competition, 62 Harv. L. Rev. 987 (1949), developed the theory that the Federal Trade Commission Act of 1914, 38 Stat. 717 (1914), as amended, 52 Stat. 1111 (1938), 15 U.S.C.A. §41 (1951), was a use of congressional power to regulate methods of competition in interstate commerce. The conclusion that federal courts having jurisdiction of a private unfair competition case involving interstate commerce should apply federal law was based on the following language of the act: "Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are hereby declared unlawful." Ibid. This theory does not appear to have been followed by any court.

competition claim is available independently of diversity or pendency, and the *Erie* doctrine is clearly inapplicable. Insofar as the *Bulova* case stands for a position less drastic than holding unfair competition to be a federal question, it reveals a confusion between jurisdictional and choice of law issues. The justification advanced by most authorities for the doctrine of pendent jurisdiction is the economy of a single action in the federal courts.[28] If the federal courts were to refuse jurisdiction over the non-federal claim, there would result considerable duplication of effort through the separate trials of the claim. This single-action consideration has no relevance to determination of the law governing the pendent claim for, whether state or federal law is chosen, only one action is necessary.

The basis for the extension of the *Erie* doctrine beyond diversity cases is that pendent claims have their origin solely in state law. State-created rights are normally brought before the federal courts only in diversity cases or when pendent to a federal question.[29] As in diversity cases, so in pendency cases, state law should be applied to "the enforcement of state-created rights and state policies going to the heart of those rights."[30]

This position is strengthened by the statement in *Erie* that there is no federal *general* common law—that is, federal law concerning state-created rights —which would supersede state decisions on non-federal questions.[31] There is only a federal common law[32] consisting of precedents concerning federally created rights. As Justice Holmes observed:

> [L]aw 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.[33]

Thus, although it is through the medium of diversity jurisdiction that state-created rights are most often before the federal courts, the underlying basis

[28] See Zalkind v. Scheinman, 139 F.2d 895 (C.A. 2d, 1943) (dissent); Musher Foundation, Inc. v. Alba Trading Co., 127 F.2d 9 (C.A. 2d, 1942) (dissent); Lewis v. Vendome Bags, Inc., 108 F.2d 16 (C.A. 2d, 1939) (dissent). Consult also 2 Moore, Federal Practice 375 (2d ed., 1950); 2 Nims, Unfair Competition and Trademarks 1125 (4th ed., 1947).

[29] Consult note 1 supra.

[30] Bernhardt v. Polygraphic Co., 350 U.S. 198, 208–9 (1955) (Frankfurter, J., concurring).

[31] 304 U.S. 64, 79 (1938).

[32] Although Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), stated that there is no federal *general* common law, the decision in Hinderlider v. LaPlata, 304 U.S. 92, 110 (1938), also delivered by Justice Brandeis, and on the same day as Erie, held that the apportionment between states of water of an interstate stream was a question of " 'federal common law,' upon which neither the statutes nor the decisions of either State can be conclusive."

[33] Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 533–34 (1928), quoted in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

of the *Erie* doctrine appears equally applicable to all non-federal claims before the federal courts.[34] Such claims, although adjudicated because pendent to a federal question, are nevertheless creations of state authority and, therefore, should be adjudicated under state law.[35]

This viewpoint was accepted in *National Fruit Product Co. v. Dwinell-Wright Co.*,[36] as the basis for applying local law to a claim of unfair competition pendent to a federal claim under the trademark laws. Judge Wyzanski cited a passage in which Professor John Chipman Gray maintained:

> Since the Federal jurisdiction is of an exceptional character, it would also seem desirable that the Federal courts should draw their rules from the same sources from which the State courts draw theirs, namely, fom the statutes of the State legislatures and decisions of the State courts.[37]

Some courts and commentators, impressed with alleged difficulties of applying state law to pendent claims for unfair competition,[38] have been willing to

[34] Consult note 1 supra.

[35] Strongly advocating the limitation of Erie R. Co. v. Tompkins to diversity cases, Parker, Erie v. Tompkins in Retrospect, 35 A.B.A.J. 19, 85–86 (1949), argues that adherence to the Erie doctrine "cannot be permitted when its effect would be to limit and hamper exercise of power by the federal government itself. Federal statutes and constitutional provisions must be interpreted in the light of existing law. . . ." However, this rationale does not support the contention that the non-federal pendent claim be governed by federal law since that claim does not involve interpretation of federal statutes or constitutional provisions. Judge Parker cites in support of his thesis Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), an action by the United States to recover on a guarantee by the defendant of a forged indorsement of a lost check issued by the United States. The Court applied federal law, thus avoiding the Pennsylvania laches rule. Consult Clearfield: Clouded Field of Federal Common Law, 53 Col. L. Rev. 991, 1007 (1953), where the conclusion reached is that a "federal general common law" had been applied. The Clearfield decision did not make clear whether Erie was inapplicable because the case was a non-diversity action, because the United States was a party, or because the case involved federal interests substantial enough to justify the use of federal law in order to obtain a uniform rule throughout the country. In Bank of America v. Parnell, 352 U.S. 29 (1956), state law was held applicable in a diversity action between private parties for an alleged conversion of United States guaranteed bonds. The Clearfield decision was distinguished because the instant litigation was purely between private parties and because substantial federal interests were not involved. This construction makes Clearfield inapplicable to show that Erie is limited to diversity cases.

[36] 47 F.Supp. 499 (D. Mass., 1942).

[37] Gray, The Nature and Sources of the Law 249 (2d ed., 1921).

[38] Little pressure seems to exist for the application of federal law to pendent claims in areas other than unfair competition. The problem of finding a substantial and closely related federal question to sustain pendency is present, and jurisdiction is refused in a great proportion of cases. See Kleinman v. Betty Dain Creations, 189 F.2d 546, 548 n.3 (C.A. 2d, 1951), for a compilation of cases in which jurisdiction has been refused or the pendency doctrine strictly applied. See also Bell v. Hood, 71 F.Supp. 813 (S.D. Cal., 1947). Consult May Federal Court, Acquiring Jurisdiction Because of Federal Question But Deciding Question Adversely to Party Invoking Jurisdiction, Decide Non-Federal Questions, 12 A.L.R.2d 695, 703 (1950), for a list of cases in which pendent jurisdiction was invoked in non-unfair competition cases. Consult note 17 supra.

overlook the doctrinal, and perhaps constitutional,[39] arguments for applying state law. An examination of these "practical" considerations reveals that, while they may raise significant problems in individual cases, they are neither unique to pendency situations nor of compelling importance.

First, application of state law is supposedly impossible because many states have no developed body of precedents concerning unfair competition. Any federal judge sitting in a diversity case not involving unfair competition faces this problem where there is no state precedent directly in point. Moreover, in an unfair competition action where jurisdiction is sustained solely on diversity, the state unfair competition precedents will be no less sparse, but this consideration will not alter the *Erie* rule. In all of these situations, the federal court should be guided by whatever state precedents are available and, if none are available, should seek to predict from the law of other jurisdictions the decision that the state court would make.[40]

Second, since under *Klaxon v. Stentor Electric Mfg. Co.*[41] the conflict of laws principles of the state in which the federal court sits are controlling and since acts of unfair competition are likely to occur in many states, it has been contended that if state law is applicable the federal courts will face an impossible task of applying the substantive law of many states. Assuming the laws of the states where the acts occurred are conflicting, the argument is nevertheless unpersuasive. A state court deciding a multi-state unfair competition action would be unlikely to apply the familiar rule of thumb that the law of the state of the injury governs, but rather would simply apply its own law.[42] If the state court had in the past applied the substantive law of each state in

[39] In Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), Justice Brandeis rested his decision on the Constitution. He approved Justice Holmes' dictum that the doctrine of Swift v. Tyson, 16 Pet. (U.S.) 1 (1842), was "an unconstitutional assumption of powers by the Courts of the United States. . . ." Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 533 (1928) (dissent). Brandeis maintained that "no clause in the Constitution purports to confer" the power upon the federal courts to apply federal law "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress." Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). If Erie governs the pendency situation at all, then it may do so with the force of a constitutional mandate.

[40] See Meredith v. Winter Haven, 320 U.S. 228, 234, 237 (1943); Maryland Casualty Co. v. Cassetty, 119 F.2d 602, 605 (C.A. 6th, 1941). Consult Moore, Commentary on the U.S. Judicial Code 335–40 (1949); Federal Court's Disposition of Unsettled Questions of State Law, 48 Col. L. Rev. 575 (1948); How a Federal Court Determines State Law, 59 Harv. L. Rev. 1299 (1946).

[41] 313 U.S. 487 (1940).

[42] This was the prediction of Judge Wyzanski concerning decisions of the Massachusetts courts. National Fruit Product Co. v. Dwinell-Wright Co., 47 F.Supp. 499, 504 (D. Mass., 1942). It must be conceded, however, that such a state conflicts rule would increase litigants' ability to forum shop among the various federal districts since the federal court would follow state precedent and apply the substantive law of the forum state to multi-state torts, wherever the injury occurred. This problem is discussed in The Choice of Law and Multi-State Unfair Competition: A Legal-Industrial Enigma, 60 Harv. L. Rev. 1315 (1947).

such unfair competition actions, then the federal court should not be excused from doing the same.

Third, the area of unfair competition is said to be peculiarly appropriate for national regulation and therefore state law should not be applied to a pendent claim. It appears that this consideration is simply an argument for creation of federal rights concerning unfair competition, in which case a claim solely for unfair competition would be a basis for federal jurisdiction. So long as Congress has not chosen to make unfair competition a federal question,[43] the federal judiciary should not on its own initiative attempt such trade regulation.

Even if these "practical" considerations are to be given unjustified weight, the doctrine of the *Erie* case would appear to require application of state law to pendent claims. In any event, these considerations would not apply to pendent claims not involving unfair competition. Furthermore, if the Supreme Court is prepared to follow the contention of Justice Brandeis that the *Erie* rule is a constitutional requirement,[44] then the repeated application of federal precedents to pendent claims stands condemned by the Constitution.

[43] Consult note 27 supra. [44] Consult note 39 supra.

NOTICE BY PUBLICATION: *WALKER V. CITY OF HUTCHINSON*

"It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property."[1] Stamping this common knowledge with the imprimatur of due process, the Supreme Court in *Walker v. City of Hutchinson*[2] held invalid a condemnation proceeding based on notice by publication. Though the Court's decision brings this area of the law into pace with the times, its extension of *Mullane v. Central Hanover Trust Co.*[3] creates a host of problems involving the validity of concluded proceedings.

The *Mullane* case,[4] a landmark decision defining a new approach to the due process requirement of notice, was a proceeding by a trustee for a settlement and accounting of a common trust fund established under a New York statute. Notice had been published weekly for four successive weeks in a newspaper of general circulation as required by the statute. On appeal from

[1] Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956).

[2] Ibid.

[3] 339 U.S. 306 (1950).

[4] Ibid. The case caused a good deal of comment. Consult, e.g., Perry, The Mullane Doctrine—A Reappraisal of Statutory Notice Requirements, Current Trends in State Legislation 33 (1952); Fraser, Jurisdiction by Necessity—An Analysis of the Mullane Case, 100 U. of Pa. L. Rev. 305 (1951).