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definite nature could have been said at that stage of German develop-
ment.

Second, to do justice to the topic of this book would have required a
unified point of view with regard to the relevance of problems and the
standards of evaluation. Only a single author or an integrated group
of authors thinking alike could have met these requirements. It was
bound to be fatal to the realization of these requirements to select the
several authors exclusively in view of their technical competence and of
the fact that they all happen to have professional competence in some
phase of German government. The result of such a principle of selection
is bound to be not a book but a collection of essays of very unequal in-
terest and value. The present writer has himself edited a book on Ger-
many and knows whereof he speaks!

Finally, and most important, in the contrast between its own lack of
vitality and the vital importance of the subject with which it deals, this
book is but another example among many of that self-mutilation and
self-stultification which are widely taken as the mark of scientific en-
deavor in the social sciences. In their concern with surface phenomena
and factual accounts the contributions to this volume, with the few no-
table exceptions mentioned above, have been successful in evading those
qualities of systematic interpretation, theoretical understanding, and in-
tellectual imagination which the social scientist is supposed to shun rather
than cultivate. What de Tocqueville or Lord Bryce could have done
with a subject such as this! But then they knew that there can no more
be a political science without a theory of politics than there can be a
social or natural science without a theory of society or of nature. It is
this basic intellectual deficiency which has frustrated the objective of
this book, eminently worthwhile in itself.

HANS J. MORGENTHAU *

THE FEDERAL COURTS AND THE FEDERAL SYSTEM. By Henry M. Hart,
Jr.1 and Herbert Wechsler.2 Brooklyn: The Foundation Press,
Inc. 1953. Pp. lvii, 1445. $11.00 with Supplement.

A casebook ought not to be reviewed. Ordinarily all that can be said
by a reviewer of such a compilation — except perhaps as to its value
as a pedagogical tool — is that he approves the selection of certain cases,
regrets the omission of others, and likes or dislikes the emphasis on cer-
tain portions of a traditional law school course. Certainly then a case-
book ought not to be reviewed by anyone who has not used it as a
teaching implement; and I have not had the opportunity so to use this
book.

The Hart and Wechsler materials, however, are so much more than a
casebook should pretend to be that they command recommendation to a
wider audience than the students and faculty who might meet the book.

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BOOK REVIEWS

in the classroom. It may well be said that as of this time this book is the definitive text on the subject of federal jurisdiction in spite of its casebook label. It is a text largely in the sense that Plato's Socratic dialogues constitute a text. (Indeed a portion of the book takes the form of a dialogue.) For the authors, in addition to providing the reader with cases and authorities of a quantity and quality more than adequate to fulfill the needs of a lawyer looking for answers, have concerned themselves with asking the right questions.

The book deals primarily with "the relationship of federal and state law, both as guides to judicial decision and in every day affairs, no less than with the jurisdiction of federal courts and the relation of those courts to the tribunals of the states . . . but it also has two secondary themes. In varying contexts [the authors] pose the issue of what courts are good for — and not good for — seeking thus to open up the whole range of questions as to the appropriate relationship between the federal courts and other organs of federal and state government. [They] also pose throughout the problem of the organization and management of the federal courts, wishing to promote understanding of the task of federal judicial administration and of the means available for its improvement."4

The great compass of the book's search, as indicated by the quotation from the preface, makes it impossible to examine all of its contributions. I thought, therefore, that the sense of the book might best be conveyed by detailing some of the questions the authors ask, along with the off-the-cuff answers I should give to the questions. For example, in the area of the relationship of state and federal law, after setting forth the opinions in Guffey v. Smith5 and Guaranty Trust Co. v. York,6 and a long note on "State Law and Federal Equity," Professors Hart and Wechsler present a series of questions directed to the York case and titled "Note on 'Substance and Procedure' Versus 'Outcome.'"7 I have chosen these questions as an example because they relate to one of the truly fundamental problems of the state-federal relationship. While the existent doctrine bears the label of Erie,8 I think it should more accurately be called after York. For though it was Erie which destroyed the elaborate structure raised on the foundation of Swift v. Tyson,9 it is York which forms the cornerstone of the new doctrine which has replaced Tyson.

In the following dialogue, in which I try to play Alcibiades to their Socrates, they their questions are italicized. Unfortunately, the following

4 Pp. xi–xii.
5 237 U.S. 101 (1915).
9 16 Pet. 1 (U.S. 1842).
10 "Alcibiades. And what should he do, Socrates, who would make the discovery? "Socrates. Answer questions, Alcibiades; and that is a process which, by the grace of God, if I may put any faith in my oracle, will be very improving to both of us. 
materials demonstrate all the deficiencies of written interrogatories as compared with oral depositions.

Q. Was the New York statute of limitations in York one of the type which bars the remedy only or one which measures and extinguishes the right?

A. The New York courts seem to regard the general statutes of limitations, such as the one involved in York, as barring the remedy and not the right. Where the statute creating the right also specifies the time within which the right might be enforced after it accrues, the New York courts would probably consider the period of limitations as barring the right as well as the remedy.

Q. Did the cause of action arise in New York or in some other state such as Ohio?

A. In New York, so far as I can tell.

The almost metaphysical question involved in determining where this claim arose is difficult of solution. The alleged wrongdoing on Guaranty's part consisted primarily, according to the complaint, in conspiring with J. P. Morgan and Co. and acting to protect its personal interest in securities of the debtor in conflict with its fiduciary obligations as indenture trustee of the bonds. The possibilities include at least the states of Ohio, where the debtor conducted its affairs, Delaware, where the debtor was incorporated, Pennsylvania, which was the domicile of the plaintiff, and New York, where the defendant was incorporated and carrying on its business. The alleged wrongful conspiracy between J. P. Morgan and Co. and the defendant probably can be assigned to New York.

It appears that none of the parties nor any of the courts dealing with the case felt or had any occasion to suggest that the law of some jurisdiction other than New York gave rise to the claim. Perhaps some conflict of laws doctrine could be discovered which would assign the law of another jurisdiction than New York as the proper sponsoring law. But, even so, it would seem to make no difference so far as the New York courts were concerned. The same statute of limitations would have been a bar to the action in the New York courts even if it were deemed to have originated elsewhere.¹¹

Q. If it arose elsewhere, would an action upon it have been held to be barred in the courts of that state?

A. Possibly it would not have been held to be barred. But this involves at least three questions rather than one. First, how would this hypothetical jurisdiction characterize the plaintiff's claim; second, what would be the applicable period of limitations; third, when would the applicable period begin to run.

Since Ohio is the jurisdiction which conflict of laws doctrine is most likely to settle on—other than New York—as the place of origin of the claim, I have glanced at the Ohio digest to find answers to these questions. So far as I can tell, the characterization problem has not been

¹¹ "Alcibiades. If I can be improved by answering, I will answer." I Plato, Alcibiades 127 (Jowett transl., 3d ed. 1892).

answered. If the claim were characterized as the Court of Appeals for the Second Circuit characterized it under New York law—as an action for fraud—the applicable period would be four years, but the period would not begin to run until after discovery. In any event, the period would not be deemed to have started to run so long as the defendant was not available within the jurisdiction for service of process. I do not know whether Guaranty Trust could be served with process in Ohio. If the action were to be characterized by Ohio as one involving a “continuing and subsisting trust,” mere lapse of time would not be a bar to the action.

I think it safe to state that if the claim had arisen elsewhere than New York, it might still have been alive in that other jurisdiction at the time the plaintiff filed her suit in the United States District Court for the Southern District of New York.

Q. If not, would a judgment in a New York state court, or in a federal court sitting in New York, sustaining a plea of the New York statute prevent a later action in the courts of the other state, or in a federal court sitting in that state? See Bank of United States v. Donnally, 8 Pet. 361, 370 (U.S. 1834).

A. No. The answer suggested by Mr. Justice Story in Donnally and by the Restatement of Judgments 15 is that the plaintiff could try again in another jurisdiction in spite of the judgment by a New York court which, according to its own characterization, would have held only that it would not afford the plaintiff a forum and not that she did not have any claim.

Q. Did Justice Frankfurter fail to mention these questions because he thought the answers immaterial?

A. Yes. Of course, I cannot tell you what Mr. Justice Frankfurter “thought” when he wrote the opinion for the Court in York. But the language of the opinion is clear to me. Perhaps, too, it is not irrelevant to point out here that the Court’s grant of certiorari in this case was limited to the single question: “In an equity case in a Federal court based on diversity of citizenship, is the court bound by the State statute of limitations held to govern like cases by the State courts?”

Q. Was he undertaking to decide at the same time all the different cases that would be presented under all the variant states of fact that the questions suggest?

13 Id. § 11228.
14 Id. § 1236.
15 § 49, comment a (1942).
16 “The fact that under New York law a statute of limitations might be lengthened or shortened, that a security may be foreclosed though the debt be barred, that a barred debt may be used as a set-off, are all matters of local law properly to be respected by federal courts sitting in New York when their incidence comes into play there. Such particular rules of local law, however, do not in the slightest change the crucial consideration that if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery.” 326 U.S. at 110.
17 Brief for the Petitioner, pp. 1–2.
A. Yes. I think the Court's opinion does cover all the variants suggested by the questions. Your question seems to suggest that the courts of New York might treat each of these situations differently. But insofar as the Supreme Court opinion says that the same rule is to be applied in the United States District Court for the Southern District of New York as would be applied in the Supreme Court of New York, it leaves for the New York courts and the New York legislature the issue whether these different situations warrant different treatment.

Q. Was this sound?

A. Yes. Assuming the soundness of Erie R.R. v. Tompkins and its edict against forum-shopping between state and federal courts, I think York necessarily followed.19

Q. Even assuming the cause of action were forum-created, would it really offend the constitutional plan for a federal chancellor to administer a juster justice than the New York state courts by refusing to permit the defendant to profit by his own fraud to defeat the liability?

A. No. But seldom is an answer more completely contained in a question than in this one. The answer that the question as it is framed necessarily elicits, however, is not the answer to the problem posed to the Court by York. I think a better answer might be arrived at by breaking down the question.

First, you asked about an offense to "the constitutional plan." In spite of the language of Mr. Justice Brandeis in Erie,20 I do not believe that the issue presented by Erie or York is a constitutional one. (I think it was convenient for the Court in Erie to label it as such so that a decision as ancient and venerable as Swift v. Tyson might be overruled.) I think that Mr. Justice Reed's concurrence in Erie21 was correct on this point: that the issue involved a construction of a federal statute and no more. And I should predict that the Court would so hold if squarely faced with the question today. It is for that reason that I do not think it would offend the constitutional plan to have the United States District Court for the Southern District of New York laying down a different rule from the courts of the State of New York. I do

18 See note 16 supra.

19 On this position, indeed on almost all the problems considered by this book, the recent volumes by my colleague Professor Crosskey cast a heavy shadow. See Crosskey, Politics and the Constitution (1953). To say that I am not convinced by Professor Crosskey's views on Erie and York is not to say that he creates no doubts in my mind. I think it unfortunate that Professor Crosskey's volumes and this one made an almost simultaneous appearance, for I should like to have had more of Professors Hart's and Wechsler's views on Professor Crosskey's thesis. Perhaps they will be forthcoming.

20 "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." 304 U.S. at 77-78.

"In disapproving that doctrine we do not hold unconstitutional § 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." Id. at 79-80.

21 Id. at 90-92.
think it would be unwise. And I think that the cases leading up to *Erie*
point up the reasons why it would be unwise.22

Second, you speak of a “federal chancellor.” That’s a picturesque
metaphor. But I find it difficult to think of Chief Judge Knox, for ex-
ample, as sometimes a Judge of Common Pleas or Queen’s Bench and at
other times as sitting on the woolsack. At all times he’s a federal district
court judge. The historical accident of which court granted what relief
in pre-Revolutionary England is hardly a basis for a similar division of
functions today. Insofar as the Constitution has fastened such a distinc-
tion upon us, as it has with reference to jury trials, it cannot be easily
changed. But I think it would be most unfortunate should we pretend
that a “juster justice” may be made available by a “chancellor” than by
a “judge.” 23

What about this “juster justice?” Does it lie in allowing the bringing
and litigating of stale claims, or in prohibiting them? And who is to
make that decision, individual judges or a legislature? Statutes of
limitations, like the equitable doctrine of laches, in their conclusive
effects are designed to promote justice by preventing surprises through
the revival of claims that have been allowed to slumber until evidence
has been lost, memories have faded, and witnesses have disappeared.
The theory is that even if one has a just claim it is unjust not to put the
adversary on notice within the period of limitations and that the right
to be free of stale claims in time comes to prevail over the right to
present them.

So said the Supreme Court 24 and the New York legislature seems
to have reached a similar conclusion when it decided to revise the ap-
licable rules so that even in cases of fraud the period was to be an
absolute one and would not depend upon discovery as a time for starting
the period running. It did so only after a long period of living with the
“federal” rule.

Finally, you talk of “refusing to permit the defendant to profit by his
own fraud to defeat the liability.” At best this is prejudgment of an
issue never resolved by the courts. The New York rule says that you
can’t put a defendant to his proof after a certain period of time has
elapsed. Possibly guilty defendants will escape under the rule, just as
innocent defendants might be punished under the opposite rule. Cer-

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22 See note 26 infra.
23 On this issue I would go much further than does the opinion for the Court in
York. There Mr. Justice Frankfurter, on behalf of the Court, said:
"From the beginning there has been a good deal of talk in the cases that
federal equity is a separate legal system. And so it is, properly understood. The
suits in equity of which the federal courts have had cognizance ever since 1789 con-
stituted the body of law which had been transplanted to this country from the
English Court of Chancery. But this system of equity ‘derived its doctrines, as well
as its powers, from its mode of giving relief.’ Langdell, Summary of Equity Plead-
ing (1877) xxvii.” 326 U.S. at 105.
tainly this choice was within the legislature's competence. The York case was never resolved on its merits. The Court of Appeals for the Second Circuit had done no more than to remand the case for trial.\textsuperscript{25} The state of the record hardly justifies the conclusion that the defendant has been allowed to profit by its own fraud.

Q. Would it do so even though, by New York's own law, the courts of other states were still free to hear the case?

A. I think it would be unwise — though not unconstitutional — for the federal courts to be applying a different rule in diversity cases from that of the state courts in which they sit, even if courts of other states are "still free to hear the case." Such other courts would still be free to hear the case even after the federal court in New York had treated it in the same manner as would a state court, that is, holding the action barred by limitations.

Implicit in the question is the suggestion that since other state courts could hear the case on the merits though the New York court would not, the federal courts in New York should be open. That a choice is available among state courts is inherent in our federal system. Even if the Supreme Court had the power of final resolution of all questions of law, whether federal or state, this diversity among state courts would exist. (Incidentally, I don't believe that, as an administrative matter, the Supreme Court could handle this burden.) I do not believe that even the most ardent of the anti-Erie cult would suggest that the Supreme Court could frame rules in the non-federal area which would supersede the power of state legislatures. The question then is, do we add to the power of the forum-shopper not really one more choice of forum, but up to as many more choices as there are circuits, or perhaps even as many more choices as there are districts. I can see no reason for doing so. And I think that the cases cited by Mr. Justice Brandeis in note 1 of his Erie opinion\textsuperscript{26} provide adequately horrible examples of the result of leaving the federal courts free to make their own governing rules in cases involving state-created rights. Those seeking the goal of uniformity of law through a Swift v. Tyson doctrine would do better to exert their energies to secure uniform legislation and more certainty within the choice of law doctrines of conflict of laws.

\textsuperscript{25} 143 F.2d 593 (2d Cir. 1944). Indeed, Judge A. N. Hand in his dissenting opinion came up with a different conclusion on the merits: "I can see no reason to suppose that the Guaranty Trust Co. was guilty of a breach of any fiduciary relation which it assumed under the trust indenture." Id. at 530.

\textsuperscript{26} After providing the citation to Swift v. Tyson, the Court continued:

"Leading cases applying the doctrines are collected in Black and White Taxicab Co. v. Brown and Yellow Taxicab Co., 276 U.S. 518, 530, 533. Dissent from its application or extension was expressed as early as 1845 by Mr. Justice McKinley (and Chief Justice Taney) in Lane v. Vick, 3 How. 464, 477. Dissenting opinions were also written by Mr. Justice Daniel in Rowan v. Runnels, 5 How. 134, 140; by Mr. Justice Nelson in Williamson v. Berry, 8 How. 495, 550, 558; by Mr. Justice Campbell in Pease v. Peck, 18 How. 595, 599, 600; and by Mr. Justice Miller in Gelpcke v. City of Dubuque, 1 Wall. 175, 207, and Buts v. City of Muscatine, 8 Wall. 575, 585. Vigorous attack upon the entire doctrine was made by Mr. Justice Field in Baltimore and Ohio R. Co. v. Baugh, 149 U.S. 368, 390, and by Mr. Justice Holmes in Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370, and in the Taxicab case, 276 U.S. at 532." 304 U.S. at 69 n.1.
Q. If the answer to these last two questions is yes, would there have been an equal offense to sound principles if the cause of action had arisen in another state and New York was connected with the case only as a haven?

A. I am glad to see you shifting the question from one of "offense to a constitutional plan" to one of "offense to sound principles."

There are several issues here. If New York is only a haven, I think that the federal courts must be free to refuse to entertain the law suit. This power existed before 1948, but received congressional sanction at that time. I am not sure whether a federal court sitting in New York should be required to refuse to hear a diversity case on grounds of forum non conveniens simply because a state court would have refused a forum on these grounds. I rather think that the federal courts are so bound. But if the suit is entertained by the federal court in New York, it matters not that New York is only a "haven." In such a case, the federal courts should follow the whole law of the state, including the conflict of laws doctrines of that state.

Q. What did Justice Frankfurter mean in York by "outcome" when he said that it was the intent of Erie that in diversity cases "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of the litigation, as it would be if tried in a State court"?

A. I assume that in using the word "outcome" he was concerned with whether the plaintiff or the defendant prevailed in the lawsuit. The word "outcome" doesn't seem to me to present the difficult problem of construction, it is rather the phrase "so far as legal rules determine the outcome of litigation."

Q. Did he mean only that a federal decision finally settling the rights of the parties with respect to the transactions and occurrences in question ought not to be predicated upon a different view of their primary legal relations than the state court would take if it were similarly making a final decision?

A. I'm afraid that I can't answer the question, for I don't know what you mean by the phrase "primary legal relations." But I do have the vague notion that what you are asking relates to his words "legal rules" rather than "outcome."

Q. Or did he mean that a federal court should not only avoid using different premises about primary legal relations but should refrain also from giving any different kind of relief, on the basis of those premises, than the state court would give if it were finally adjudicating the right to that kind of relief?

A. Skipping that portion of the question which relates to "primary legal relations," I think that the Court's opinion says that in a diversity case the federal court should not grant relief where the state court would not grant relief; where the state court would grant relief, so too should the federal court. But as to the form which the relief should take,

York does not bind the federal court to follow the state court. And, where the only relief adequate is of a character which the federal court cannot afford, the federal court should refuse to entertain the suit.

Q. Or did he mean to say, in addition, that the federal courts should refrain from acting at all on the controversy if the state court would refuse to act, even though the state court's refusal would be without prejudice?

A. This much was, to my mind, clearly indicated by York and was made more specific in Angel v. Bullington, Cohen v. Beneficial Industrial Loan Corp., and Woods v. Interstate Realty Co.

Q. Did he mean to say also that the federal court ought not to refuse to act on the controversy, even though it does so without prejudice, if the state court would be willing to act?

A. I do not believe that you can find this proposition in the York opinion. The Court had held prior to York, however, that the federal courts are not free to reject diversity jurisdiction at their will. But there certainly are instances in which the federal courts may refuse to grant relief, without prejudice to the bringing of the suit elsewhere. I have already suggested that possibility with regard to forum non conveniens. Clearly they have acted in this manner with reference to probate and domestic relations matters. Nevertheless, the underlying

28 "This does not mean that whatever equitable remedy is available in a state court must be available in a diversity suit in a federal court, or conversely, that a federal court may not afford an equitable remedy not available in a State court. Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery... a plain, adequate and complete remedy at law must be wanting... explicit Congressional curtailment of equity powers must be respected... the constitutional right to trial by jury cannot be evaded... That a State may authorize its courts to give equitable relief unhampered by any or all such restrictions cannot remove these letters from the federal courts... State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it."

326 U.S. at 105-06.

29 330 U.S. 183 (1947). The authors' suggestion that this case would be clarified by a rearrangement of the opinion is a good one. See p. 668.

30 337 U.S. 541 (1949). The relationship between the York doctrine and the applicability of the Federal Rules of Civil Procedure, raised by Beneficial and Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949), is considered elsewhere in the Hart and Wechsler materials. Pp. 674-78. I have not attempted here, therefore, to deal with the many problems raised by that relationship. My own preference, stemming perhaps from my participation on the losing side of the Beneficial case, would be a doctrine that where the Court had decided to cover the subject in the Rules, the Rules should prevail over state law.


32 Meredith v. Winter Haven, 320 U.S. 228, 236-37 (1943): "Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine. ... We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess."

33 See the materials on pp. 1013-18.
rationale of diversity jurisdiction, as propounded by the Court in *York*, would militate against closing the federal courts in diversity cases where the state courts would afford relief, except for the most compelling reasons.

Q. What did Justice Frankfurter mean by “legal rules” which “determine” the outcome of litigation?

A. In University of Chicago tradition, let me begin an answer by quoting Aristotle: "... it is the mark of an educated man to seek precision in each class of things just so far as the nature of the subject admits; it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from the rhetorician scientific proofs." (As Mr. Justice Frankfurter pointed out in his initiation of the Ernst Freund Lectures at the University of Chicago Law School, these remarks predated the acceptance of doctrines of indeterminacy.) We do not and cannot in the nature of things find a rule of mathematical precision in the *York* case. Judicial administration would be a far easier task if such feats were possible. The phrase “legal rules” is not an exact one, but one which must be interpreted from case to case in light of the *Erie* policy as announced in *York*: “The nub of the policy that underlies *Erie R.R. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of a State court a block away should not lead to a substantially different result.” The litigant ought not to be able to shop between a federal and state forum for a different result.

With this purpose in mind, it seems to me that the “legal rules” which determine the outcome of litigation might have been meant to include only those rules which would themselves necessarily cause the case to be decided for one side or the other. Just such a rule is a statute of limitations. If the construction of the phrase were so restricted, the federal courts would not be bound to follow those rules promulgated by state legislatures or state courts which merely give to one side or the other an advantage in the proceedings of the law suit, but which would not command a result. Here, I am speaking of such a thing as allocation of the burden of proof, or the scope of discovery proceedings. But it would seem that the opinion meant to include some “legal rules” which fall in the second category, for it cites with approval *Cities Serv. Corp. v. Dunlap* which bound the federal courts to follow state rules of burden of proof. So I take it that included in the Court’s definition are those

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34 “Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. The Framers of the Constitution, according to Marshall, entertained ‘apprehensions’ lest distant suitors be subjected to local bias in State courts, or, at least, viewed with ‘indulgence the possible fears and apprehensions’ of such suitors. *Bank of the United States v. Deveaux*, 5 Cranch. 61, 87. And so Congress afforded out-of-state litigants another tribunal, not another body of law.” 326 U.S. at 111-12.

35 NICHOMACHEAN ETHICS 1094(b) (Ross transl. 1942).

36 FRANKFURTER, *SOME OBSERVATIONS ON SUPREME COURT LITIGATION AND LEGAL EDUCATION* (to be published in the very near future by the University of Chicago Law School).

37 326 U.S. at 109.

38 308 U.S. 208 (1939).
rules which in the judgment of those empowered to judge can be said in advance of trial — and taking them in the abstract rather than with reference to the facts of a particular case — to be such as substantially to favor one side or the other. Thus, allocation of the burden of proof would be included, while the scope of discovery proceedings would not.

My own opinion is that the narrower reading would probably have satisfied the requirements of the Erie rationale and, at the same time, made the York rule easier to administer.

Q. Did he mean to include legal rules, such as that which empowers the federal judge to comment on the evidence, which may determine the outcome of the litigation as a practical matter but do not purport to do so?

A. If I am right in my rationalization of the opinion, the answer to this question is no.

Q. Did he mean to include all legal rules which purport to direct, in given circumstances, the final decision? E.g., a rule of evidence which calls for reversal if it is violated? Or a rule of procedure which calls for dismissal if an indispensable party has not been joined? Or a rule of pleading which permits dismissal if an answer is not filed on time?

A. Again, I think the answer to this question is no. These would probably fall within the category of those rules which concern "merely the manner and the means by which a right to recover, as recognized by the State, is enforced." Any difficulty may result from the way the questions are framed. So that if you had asked, is a state law rule of admissibility of evidence binding on the federal court, or is a rule as to indispensability of parties governing in the federal court because of York, or is a state rule as to when pleadings must be filed in the state court binding on the federal court, I think the answer comes up no. But I have difficulty with the indispensable party question.

Q. Or did he mean to exclude all rules which depend for their application upon what parties or counsel do after litigation is begun and which might have been done differently under different rules of procedure? In other words, housekeeping rules?

A. Recognizing the deluding sound of certainty of the definitions in your question, I should say that "housekeeping rules" fall outside of the compulsion of York on the federal courts to follow state law.

Q. Did he mean to include at least all rules which purport to control the final judgment upon proof or failure of proof of given pre-litigation circumstances? Only those rules?

A. If my reading of the case is correct, the answer to the first of these questions is yes; to the second, no.

Q. Is the outcome test a material improvement upon the ancient dichotomy between substance and procedure?

A. Definitely yes. This "ancient dichotomy" gives rise to as many constructions as there are situations in which the dichotomy may be used. To my mind, the appropriate results are more likely to be

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40 The opinion adequately expresses the reason for rejecting the "ancient dichoto-
secured by using different designations in each new situation so that
immaterial doctrines are not carried over to the new situations because
of the use of old labels. This is new wine; it ought to be bottled in new
bottles.

When I started this review, I had planned to go through a series of
questions and answers dealing with each of the three major subcategories
noted in my quotation from the authors' preface. But it seems to me that
I have already taxed the patience of even the most persevering reader
far beyond my rights to do so. Simply a closing note then.

A short while ago, one of the authors of this volume set forth some
criteria for a good law book: "To work out hard answers, what you
want is a book which deals with the reasons for rules — with the ma-
terials of thought and argument. You want a persistent search for the
rationale of statutory provisions, court rules, and judicial decisions alike,
and persistent effort to lay bare competing considerations." 41 Suffice
it to say that this volume admirably measures up to these stand-
ards. Thus, for the same reason that Professors Hart and Wechsler are
grateful "To Felix Frankfurter who first opened [their] minds to these
problems," many of us will be grateful to them. To emulate them fully
in this regard, it is necessary to understand that gratitude does not in-
volve sycophancy.

PHILIP B. KURLAND *

LEGAL EDUCATION IN THE UNITED STATES. By Albert J. Har-
no.1 San

This book is a report prepared for the Survey of the Legal Profession.
The author undertakes a dual task: a history of legal education in the
United States and an appraisal of that education as it exists in the mid-
twentieth century. Those chapters that deal with history present a sur-
vey. They could do no more because little of the laborious spade work
necessary for a full historical study has been accomplished. Dean
Harno recognizes this limitation. He looks forward to the future when
"in the ripeness of time the history of legal education will be written."

His survey, however, is no perfunctory performance; it has great value
for the study even of the history of the law itself in spite of the author's
preoccupation with the historical record of the teaching of the law. His
work begins, by way of inevitable and necessary background, with the
common law of medieval England, primarily a judge-made law to be

1 See, for example, 326 U.S. at 108.
3 Associate Professor of Law, University of Chicago.
4 Dean, University of Illinois College of Law.