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Peter B. Kutner

CAN FEDERAL COURTS REMAIN OPEN WHEN STATE COURTS ARE CLOSED?: ERIE R. CO. v. TOMPKINS ON THE INDIAN RESERVATION

PETER B. KUTNER*

I. INTRODUCTION

This article considers whether a federal court can, in the exercise of its diversity jurisdiction,[1] entertain a civil action over which the courts of its state lack jurisdiction becuase it arose within an Indian reservation and the defendant is an American Indian. It is prompted by the United States Supreme Court's denial of *certiorari* in *Poitra v. Demarrias*,[2] where the decision of the United States Court of Appeals for the Eighth Circuit on this question had created, or at least aggravated, a conflict among the circuits.[3]

II. POITRA V. DEMARRIAS

Poitra v. Demarrias arose from an automobile accident on the Standing Rock Sioux Indian Reservation in North Dakota. An automobile driven by Demarrias collided with another automobile, fatally injuring a passenger in the latter. The victim's mother brought an action against Demarrias in the United States District Court for the District of North Dakota, claiming damages for wrongful death under North Dakota law.[4] Jurisdiction was predicated on the amount in controversy and diversity of citizenship, the plaintiff being an enrolled Indian residing on the portion of the Standing Rock Reservation located in North Dakota and the defendant being an enrolled Indian residing on the portion of the reservation located in South Dakota. Counsel for the North Dakota Unsatisfied Judgment Fund, appearing on behalf of the defendant, conceded that the jurisdictional facts pleaded by the defendant satisfied the requirements of 28 U.S.C. § 1332(a) (1970),[5] but moved to dimiss the action, contend-

* A.B. 1969, Cornell; J.D. 1972, Harvard. Assistant Professor of Law, University of Oklahoma. Member of the Colorado Bar.

1. 28 U.S.C. § 1332(a) (1970).

2. 369 F. Supp. 257 (D.N.D. 1973), *rev'd*, 502 F.2d 23 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975).

3. See notes 40-49 *infra* and accompanying text.

4. N.D. CENT. CODE ch. 32-21 (1960).

5. All persons born within the United States to a member of an Indian tribe are natural-born citizens of the United States. Indian Citizenship Act of June 2, 1924, ch. 233, 43 Stat. 253; Nationality Act of October 14, 1940, ch. 876, tit. I, ch. 2, § 201(b), 54 Stat. 1138, repealed by the McCarran-Walter Act of June 27, 1952, ch. 477, title IV, § 403(a)(42),

ing that the court lacked subject-matter jurisdiction over the action because the state courts of North Dakota lacked jurisdiction over the action.

The Supreme Court of North Dakota had resolved the question of state jurisdiction in *Gourneau v. Smith*,[6] which, like *Poitra*, was an action between two Indians arising from an automobile accident on their reservation. That court's decision rested on two statutes, one state and one federal, providing for the assumption of jurisdiction by the state, with the consent of the inhabitants of an Indian reservation, over civil actions arising within the reservation to which Indians are parties.[7] In an earlier case,[8] the state statute had been held to have the effect of "completely disclaim[ing] State jurisdiction over civil causes of action arising on an Indian reservation unless the Indians themselves have acted to accept jurisdiction in the manner provided by the statute."[9] The federal statute, enacted as § 402 of the Civil Rights Act of 1968,[10] provides:

> The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.[11]

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66 Stat. 280; McCarren-Walter Act of June 27, 1952, ch. 477, tit. III, ch. 1, § 301(a)(2), 66 Stat. 235, 8 U.S.C. § 1401(a)(2) (1970). As a result, a tribal Indian is now regarded, for purposes of diversity jurisdiction as a citizen of the state in which he is domiciled. Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966); Deere v. State of New York, 22 F.2d 851 (N.D.N.Y. 1927), *aff'd sub nom.* Deere v. St. Lawrence River Power Co., 32 F.2d 550 (2d Cir. 1929); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 156, 372 (1942); C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3622 (1975). *But see* 24 Mo. L. REV. 562, 567 (1959).

6. 207 N.W.2d 256 (N.D. 1973).

7. N.D. CENT. CODE ch. 27-19 (1974); 25 U.S.C. § 1322(a) (1970). N.D. CENT. CODE § 27-19-02 (1974) and 25 U.S.C. § 1326 (1970) specify the manner in which consent to jurisdiction may be given. The procedure specified in 25 U.S.C. § 1326 must be followed if consent is to be effective. Kennerly v. District Court of the Ninth Judicial District of Montana, 400 U.S. 423 (1971). Therefore, a provision of the state "consent" statute for the acceptance of state jurisdiction by individual Indians, N.D. CENT. CODE § 27-19-05 (1974), is invalid. Nelson v. Dubois, 232 N.W.2d 54 (N.D. 1975). There is no indication in the reports of Poitra v. Demarrias that the defendant had individually accepted state jurisdiction.

8. In re Whiteshield, 124 N.W.2d 694 (N.D. 1963).

9. *Id.* at 698.

10. Act of April 11, 1968, Pub. L. 90-284, tit. IV, § 402, 82 Stat. 79, 25 U.S.C. § 1322(a) (1970).

11. Indian reservations, including state highways and other rights of way running through them, are "Indian country." 18 U.S.C. § 1151 (1970); Gourneau v. Smith, 207 N.W.2d 256, 258 (N.D. 1973).

In *Gourneau*,[12] the state supreme court held that the enactment of the two statutes deprived state courts of jurisdiction over actions between Indians arising on a reservation when consent to state jurisdiction had not been given by the Indians of that reservation.[13] As the Indians of the Standing Rock Reservation had not consented to state jurisdiction,[14] state courts lacked jurisdiction over Mrs. Poitra's wrongful death action.

In *Poitra*, the district court granted the defendant's motion to dismiss. Its brief memorandum decision stated that in its diversity jurisdiction, the court could not entertain an action not maintainable in a state court.[15] *Erie R. Co. v. Tompkins*[16] was cited for this proposition. Nor, according to a quotation from *Guaranty Trust Co. of New York v. York*,[17] could a diversity court "afford recovery if the right to recover is made unavailable by the State."[18] The Supreme Court of North Dakota having decided that an action of this nature was not maintainable in a state court,[19] the district court found itself to be without subject-matter jurisdiction.[20]

The Court of Appeals for the Eighth Circuit reversed the dismissal.[21] It believed that the Supreme Court's opinion in *Hanna v. v. Plumer*[22] had "established a subtle retreat from prior decisions," such as *Guaranty Trust, Angel v. Bullington*[23] and *Woods v. Interstate Realty Co.*,[24] which had led to an overconcern with conformity to state law in diversity actions."[25] Altlhough *Erie* required federal courts to respect the "definition of state-created rights and obligations by the state courts" where the state rule of law is "bound up" with those rights and obligations,[26] its "primary con-

12. 207 N.W.2d 256 (N.D. 1973).
13. The court said that state courts would have been without jurisdiction even if the plaintiff were not an Indian. *Id.* at 259. Subsequently, the Court of Appeals in Poitra v. Demarrias, 502 F.2d 23, 27 (8th Cir. 1974), construed 25 U.S.C. § 1322(a) (1970) as "stat[ing], in effect, that until an Indian reservation consents to the jurisdiction of the state courts, such jurisdiction may not be assumed by the state courts of any cause of acion involving Indians and arising within the boundaries of the Indian reservation." The plaintiff conceded, at least in the Supreme Court, that state courts lacked subject-matter jurisdiction over her action. Demarrias v. Poitra, 421 U.S. 934, 936 (1975) (White, J., dissenting). *See* Kennerly v. District Court of the Ninth Judicial District of Montana, 400 U.S. 423 (1971).
14. Poitra v. Demarrias, 502 F.2d 23, 27 (8th Cir. 1974).
15. 369 F. Supp. 257, 258 (D.N.D. 1973).
16. 304 U.S. 64 (1938).
17. 326 U.S. 99 (1945).
18. *Id.* at 108-09.
19. Gourneau v. Smith, 207 N.W.2d 256 (N.D. 1973).
20. Poitra v. Demarrias, 369 F. Supp. 257, 258-59 (D.N.D. 1973). It would have been more accurate to state that, rather than leaving the federal court without jurisdiction, state law required the court to refuse to exercise the jurisdiction conferred upon it by 28 U.S.C. § 1332(a) (1970). Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1098 n.68 (1963).
21. Poitra v. Demarrias, 502 F.2d 23 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975).
22. 380 U.S. 460 (1965).
23. 330 U.S. 183 (1947).
24. 337 U.S. 535 (1949).
25. Poitra v. Demarrias, 502 F.2d 23, 25 (8th Cir. 1974).
26. Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 535-36 (1958).

cerns . . . were with providing equal protection to citizen-defendants and with 'the necessary bridling of encroaching federalism in areas of state policy.' "[27] The court concluded that "in the absence of identifiable state interests which are inextricably linked with the underlying substantive right," . . ., the interest of the federal court in its own procedures and policies—particularly the protection of its own jurisdiction—dominates.[28]

This led the Court of Appeals to search for state policies which would be defeated by federal assumption of jurisdiction over the action before it. It found none. Ignoring North Dakota's disclaimer of state jurisdiction without Indian consent[29] during the period when federal law permitted the state to assume jurisdiction unilaterally[30] the court found that "the state courts of North Dakota are open to Indians. . . ."[31] State law[32] created the substantive right which the plaintiff asserted and prior to the enactment of the "consent" statutes the state courts had assumed jurisdiction over actions substantially identical to *Poitra*.[33] "The reason that North Dakota lacks jurisdiction over this civil action is because of the special status given Indians under *federal* law, not because of any *state* policy consideration."[34] In an analysis of relevant federal policies, the court determined that the federal "consent" statute[35] was intended only to prevent unilateral encraochment upon Indian self-government by the states, not to deprive Indians of state-created substantive rights by denying them access to federal courts. It thought, too, that the assertion of federal jurisdiction in a case founded upon a state wrongful death statute would not interfere with Indian self-government.[36] The Indians of the Standing Rock Reservation themselves had adopted state laws as a "guide" in the determination of civil actions in their tribal courts.[37] In the absence of "policy limitations requiring the federal court to refuse adjudication . . . when its jurisdiction is properly invoked"[38] under 28 U.S.C. § 1332(a), the district court was required to entertain the action.

The Supreme Court denied the defendant's petition for *certiorari*.[39] Justice White, dissenting,[40] would have granted *certiorari* be-

27. Poitra v. Demarrias, 502 F.2d 23, 26 (8th Cir. 1974), quoting from Prashar v. Volkswagen of America, Inc., 480 F.2d 947, 952 (8th Cir. 1973).
28. Poitra v. Demarrias, 502 F.2d 23, 26 (8th Cir. 1974).
29. N.D. CENT. CODE ch. 27-19 (1974); In re Whiteshield, 124 N.W.2d 694 (N.D. 1963).
30. Act of August 15, 1953, ch. 505, § 7, 67 Stat. 590, repealed by Civil Rights Act of April 11, 1968, P.L. 90-284, tit. IV, § 403(b), 82 Stat. 79.
31. Poitra v. Demarrias, 502 F.2d 23, 27 (8th Cir. 1974).
32. N.D. CENT. CODE ch. 32-21 (1960).
33. *See, e.g.*, Vermillon v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957).
34. Poitra v. Demarrias, 502 F.2d 23, 27 (8th Cir. 1974).
35. 25 U.S.C. § 1322(a) (1970).
36. Poitra v. Demarrias, 502 F.2d 23, 27-9 (8th Cir. 1974).
37. Code of Justice of the Standing Rock Sioux Tribe § 2.1 (July 1973).
38. Poitra v. Demarrias, 502 F.2d 23, 29 (8th Cir. 1974).
39. Demarrias v. Poitra, 421 U.S. 934 (1975).
40. *Id.* at 934-37.

cause he considered the Court of Appeals' decision to be "squarely in conflict" with two decisions of the Ninth Circuit, *Littell v. Nakai*[41] and *Hot Oill Service, Inc. v. Hall*.[42] These decisions had held that when the courts of a state lack jurisdiction over a reservation-based action by a non-Indian against an Indian, the federal district courts of that state lack diversity jurisdiction over the action. In *Poitra*, the Eighth Circuit had distinguished the Ninth Circuit decisions on the ground that they rested on a federal policy of non-interference with Indian self-government which was not apposite to Mrs. Poitra's wrongful death action.[43] But the Ninth Circuit's consideration of interference with Indian self-government was necessary only to determine whether state courts would have had jurisdiction over the actions. Prior to the enactment of the federal "consent" statute,[44] the Supreme Court's decision in *Williams v. Lee*[45] had established interference with Indian self-goverment in reservation affairs as the test of whether state courts were precluded from exercising jurisdiction over civil actions arising on reservations.[46] Determining through *Williams* that state courts lacked jurisdiction, the Ninth Circuit held, by reference to *Woods v. Interstate Realty Co.*,[47] that there could be no federal diversity jurisdiction where state courts lacked jurisdiction.[48] This the Eighth Circuit had declined to do, creating the conflict detected by Justice White.[49]

If the Supreme Court had granted *certiorari* in *Poitra*, it would have been required to consider first whether *Erie*[50] and its "progeny,"[51] particularly *Angel v. Bullington*[52] and *Woods v. Interstate Realty Co.*,[53] prevented the federal district court from entertaining an action over which the courts of its state lacked subject-matter jurisdiction. If this question were resolved in the negative, the Court would then have addressed itself to the policies underlying the absence of state jurisdiction in the instant case and the effect of the federal "consent" statute[54] in order to determine whether the dis-

41. 344 F.2d 486 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966).
42. 366 F.2d 295 (9th Cir. 1966).
43. 502 F.2d 23, 28-9 (8th Cir. 1974).
44. 25 U.S.C. § 1322(a) (1970).
45. 358 U.S. 217 (1959). Ironically, the unsuccessful plaintiff in *Littell v. Nakai* was counsel for the successful defendants in *Williams v. Lee*.
46. *Id.* at 223; Organized Village of Kake v. Egan, 369 U.S. 60, 67-8 (1962).
47. 337 U.S. 535 (1949). *See* text accompanying notes 159-70 *infra*.
48. Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965); Hot Oil Service, Inc. v. Hall, 366 F.2d 295 (9th Cir. 1966).
49. Demarrias v. Poitra, 421 U.S. 934, 935-36 (1975) (White, J., dissenting). Decisions of the Fourth and Sixth Circuits are also substantially in conflict with *Littell v. Nakai* and *Hot Oil Service, Inc. v. Hall* on this point. Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965); Miller v. Davis, 507 F.2d 308 (6th Cir. 1974). *See also* Sun Sales Corp. v. Block Land, Inc., 456 F.2d 857, 862-63 (3rd Cir. 1972). *See* text accompanying notes 201-29 *infra*.
50. 304 U.S. 64 (1938).
51. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 555 (1949).
52. 330 U.S. 183 (1947).
53. 337 U.S. 535 (1949).
54. 25 U.S.C. § 1322(a) (1970).

trict court was required to dismiss the action.[55] I intend to follow this course. Alternatively, the Court could have repudiated *Woods v. Interstate Realty Co.* This might be desirable and warranted by the development of *Erie* jurisprudence during the past quarter century.[56] I will assume, however, that the decision was correct on its facts and remains good law to that extent.

III. THE ROLE OF THE "RULES OF DECISION ACT"

As *Poitra v. Demarrias* presented the issue of whether the law prevailing in the North Dakota state courts prevails in a North Dakota federal court adjudicating a diversity action, it is subject to "the indiscriminate admixture of all questions respecting choices between federal and state law in diversity cases, under the single rubric of 'the *Erie* doctrine' or 'the *Erie* problem.' "[57] It is, however, debatable whether *Poitra* posed an "*Erie* problem" at all. *Erie R. Co. V. Tompkins* is an application of the Judiciary Act of 1789, § 34, known as the "Rules of Decision Act."[58] As slightly amended in 1948, it provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.[59]

In applying the Rules of Decision Act to *Poitra*, the threshold question is whether jurisdiction is withheld from the North Dakota state courts by the "laws of the several states." If so, one is led to consider whether "the Constitution . . . or Acts of Congress otherwise require or provide" and whether a federal diversity action is a case where the state law of jurisdiction does "apply." It should be noted at the outset that the federal constitution and statutes do not "otherwise require or provide." The congressional grant of jurisdiction over diversity actions[60] simply authorizes federal courts to adjudicate cases where diversity of citizenship and the requisite amount in controversy are present. It does not command that all causes within the provisions of the jurisdictional statute shall be heard on their merits, regardless of state law.[61] A federal court can, consistent

55. *See* Demarrias v. Poitra, 421 U.S. 934, 935-37 (1975) (White, J., dissenting).
56. Walker, *Foreign Corporation Laws: Re-Examining Woods v. Interstate Realty Co. and Reopening the Federal Courts*, 48 N.C.L. REV. 56 (1969).
57. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 697-98 (1974).
58. Judiciary Act of September 24, 1789, ch. 20, § 34, 1 Stat. 92, *as amended*, 28 U.S.C. §1652 (1970).
59. 28 U.S.C. § 1652 (1970).
60. 28 U.S.C. § 1332(a) (1970).
61. Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1095 (1963), arguing that the "abstention" doctrines developed by the Supreme Court have demonstrated that a federal court having diversity jurisdiction is not required to exercise it. *But see* Jackson, J., concurring in the result in First National Bank of Chicago v. United Air

with the grant of jurisdiction, decline to entertain a cause of action by applying the law of its state.

The North Dakota Supreme Court's decision in *Gourneau v. Smith*[62] that state courts had no jurisdiction over actions between Indians arising on a reservation rests on both state and federal law. The state and federal "consent" statutes[63] each had the effect of withholding jurisdiction from the state courts.[64] As the state "consent" statute preceded the federal statute and "completely disclaim[ed] state jurisdiction,"[65] one is entitled to conclude that a law of "the several states" operated to deprive state courts, and arguably federal courts, of jurisdiction. On the other hand, the federal "consent" statute may be taken to have occupied the field, displacing state laws on consent to state civil jurisdiction over Indians.[66] If so, the appropriate conclusion is that federal, not state, law was invoked in *Poitra* and the case was outside the provisions of the Rules of Decision Act.[67]

Identifying federal law as the source of the state courts' lack of jurisdiction does not exclude *Erie R. Co. v. Tompkins*[68] and its progeny from bearing upon a federal court's power to entertain a diversity action. On the contrary, the policies developed under the umbrella of the *"Erie* Doctrine"—particularly the policy of achieving the same result in federal court as would have been reached in state court[69]—do not hinge upon the source of the law in force in the state courts. These policies have a force of their own, independent of the Rules of Decision Act.[70] In *Littell v. Nakai*[71] and *Hot Oil Service, Inc. v. Hall,*[72] where federal law alone withheld jurisdiction from the Arizona state courts, the Court of Appeals held the federal courts to be without jurisdiction because state courts were without juris-

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Lines, 342 U.S. 396, 400 (1952), asserting that a state "door-closing" statute is not an applicable "rule of decision" under the Rules of Decision Act because Congress "otherwise required and provided" in conferring diversity jurisdiction upon federal courts in 28 U.S.C. § 1332(a).

62. 207 N.W.2d 256 (N.D. 1973).

63. N.D. CENT. CODE ch. 27-19 (1974); 25 U.S.C. § 1322(a) (1970).

64. Gourneau v. Smith, 207 N.W.2d 256 (N.D. 1973) (state and federal "consent" statutes); In re Whiteshield, 124 N.W.2d 694 (N.D. 1963) (state statute); Poitra v. Demarrias, 502 F.2d 23 (8th Cir. 1974), *cert. denied,* 421 U.S. 934 (federal statute); Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974) (federal statute).

65. In re Whiteshield, 124 N.W.2d 694, 698 (N.D. 1963).

66. *See* Kennerly v. District Court of the Ninth Judicial District of Montana, 400 U.S. 423 (1971). The absence of any reference to the state "consent" statute by the three courts which considered *Poitra v. Demarrias* may reflect the view that it is a spent force. The federal "consent" statute apparently supersedes the state statute's provision for consent to state jurisdiction by individual Indians, N.D. CENT. CODE § 27-19-05 (1974). Rolette County v. Eltobgi, 221 N.W.2d 645, 647 (N.D. 1974). *But see* the reference to defendants' failure to sign individual consents in Schantz v. White Lightning, 502 F.2d 67, 68 (8th Cir. 1974), decided on the same day by the same panel as Poitra v. Demarrias.

67. Both the district court and Court of Appeals stated that federal law precluded state jurisdiction. 369 F. Supp. 257, 258 (D.N.D. 1973); 502 F.2d 23, 29 (8th Cir. 1974).

68. 304 U.S. 64 (1938).

69. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109 (1945).

70. Meador, *State Law and the Federal Judicial Power,* 49 VA. L. REV. 1082, 1096 (1963).

71. 344 F.2d 486 (9th Cir. 1965), *cert. denied,* 382 U.S. 986 (1966).

72. 366 F.2d 295 (9th Cir. 1966).

diction. It cited *Erie* and *Woods v. Interstate Realty Co.*[73] as authority and gave avoidance of a result different from the result of litigation in state courts as the reason.[74] The Rules of Decision Act was never mentioned. To inquire whether the source of the law prevailing in state courts is state or federal begs the question. The question is whether, given that a certain law (of whatever source) deprives state courts of the power to adjudicate an action, *Erie* and its progeny require that the result be the same when a federal court's diversity jurisdiction is invoked.

For similar reasons, the determination of whether a state law withholdilng jurisdiction from state courts was intended to apply to federal courts does not control the application of that law to federal courts, though it is an element to be considered. In *Angel v. Bullingington,*[75] the Court was unwilling to confine to state courts a statute construed by the state supreme court as no more than a "limitation of the jurisdiction of the courts of this state."[76] "[The North Carolina Supreme Court] spoke only of the jurisdiction of the State courts because it was concerned only with the State courts."[77] Similarly, in *Woods v. Interstate Realty Co.*,[78] the Court applied to federal courts a state "door-closing"[79] statute construed by a federal court of appeals as "extend[ing] no further than the State courts."[80] Limitations upon judicial jurisdiction may be the means by which a state chooses to affect "substantive" law.[81] If so, a federal court is justified in applying to itself a law which by its terms or construction is addressed only to the jurisdiction of state courts. The argument that, by their very terms, state "door-closing" statutes are directed toward state courts, so that federal diversity actions are not "cases where they apply" under the Rules of Decision Act,[82] is not dispositive. The state policy implicated in a "door-closing" statute is an important factor. The North Dakota "consent" statute[83] is addressed

73. 337 U.S. 535 (1949).
74. Littell v. Nakai, 344 F.2d 486, 489 (9th Cir. 1965).
75. 330 U.S. 183 (1947).
76. Bullington v. Angel, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941).
77. Angel v. Bullington, 330 U.S. 183, 191 (1947).
78. 337 U.S. 535 (1949).
79. The state laws to which the Supreme Court required federal courts to conform in *Angel v. Bullington* and *Woods v. Interstate Realty Co.* are known as "door-closing" laws because they close the doors of state courts to a plaintiff without any inquiry into the merits of his claim. As they do not go to the existence or validity of a cause of action, a litigant with a good cause of action enforceable elsewhere is blocked at the threshold. Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1092 (1963). The law prevailing in North Dakota state courts under Gourneau v. Smith, 207 N.W.2d 256 (N.D. 1973) fits this description.
80. Interstate Realty Co. v. Woods, 168 F.2d 701, 705 (5th Cir. 1948), *rev'd*, 337 U.S. 535 (1949). In contrast, the Court of Appeals for the Fourth Circuit has refused to apply a state statute "intended to prevent resort to the federal jurisdiction." Markham v. City of Newport News, 292 F.2d 711, 713 (4th Cir. 1961).
81. Meador, *State Law and the Federal Judicial Power* 49 VA. L. REV. 1082, 1096 (1963).
82. Mentioned and described as "simply the substance-procedure formula stated somewhat differently. *Id.* at 1095-96.
83. N.D. CENT. CODE CH. 27-19 (1974).

to the state courts, but its operation is not by its terms or authoritative construction confined to them. However, to attribute to the statute an intent that it limits the power of federal courts to entertain litigation between Indians is to attribute to it an intent that Indians be deprived of the ability to enforce rights created by state law. This is unwarranted. The policy of the statute is that, in view of the state's lack of responsibility for reservation Indians, litigation involving them should not be conducted in the state courts without their consent. It is not to exclude litigation from the courts of the authority in which responsibility for reservation Indians resides: the federal government. This supports a determination that, in the terms of the Rules of Decision Act, the North Dakota "door-closing" law does not "apply" to federal diversity actions such as *Poitra*.

The Rules of Decision Act itself does not provide guidance on the question of whether state laws governing subject-matter jurisdiction "apply" to federal cases. If the intent of the act's provisions is that such laws not be "regarded as rules of decision,"[84] a federal court could decline to apply them even if they do not confine themselves to state courts. No such intent is found without reading the act either as creating a substance-procedure distinction or, perhaps, as providing for the application of state law only when the federal constitution requires it. The former reading is inconsistent with the act's past application to matters of procedure[85] and the latter reading leaves the act redundant of the Constitution.[86] No intent that state "door-closing" laws be "rules of decision" can be found, either. The term " ' rules of decision' is hardly self-defining and the legislative history is sparse."[87] To ask whether state "door-closing" laws are "rules of decision" in diversity actions is simply to ask whether diversity actions are "cases where they apply." That question is answered not by the act, but by the judicially-created policy generated, but not required, by the act and developed in cases following in the wake of *Erie*.[88]

84. 28 U.S.C. § 1652 (1970).

85. Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 76-90 (1955).

86. The Rules of Decision Act has been characterized as no more than a declaration of what the law would have been without it. Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457, 464 (1831; Mason v. United States, 260 U.S. 545, 559 (1923); Erie R. Co. v. Tompkins, 304 U.S. 64, 72 (1938); Guaranty Trust Co. of New York v. York, 326 U.S. 99, 103-04 (1945). *But see* Broh-Kahn, *Amendment by Decision—More on the Erie*, 30 KY. L.J. 3, 7 (1941). It has been said in rebuttal that "There was sufficient doubt about the matter in 1789 to induce the first Congress to legislate." Erie R. Co. v. Tompkins, 304 U.S. 64, 91 (1938) (Reed, J., concurring in part). Kurland, *Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 202-03 (1957), suggests that the Rules of Decision Act is redundant of conflict of laws doctrines which in 1789 would have applied state law to diversity actions.

87. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 710 (1974).

88. Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1096 (1963).

IV. THE POLICIES OF ERIE AND ITS "PROGENY"

Even if the Rules of Decision Act was implicated in *Poitra*, there is another sense in which, strictly speaking, the case did not present an *Erie* problem at all. *Erie* overruled *Swift v. Tyson*,[89] which "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. . . ."[90] Federal courts had always given effect to the "positive statutes of the state"[91] as well as federal statutes. The holding in *Erie* did not alter this practice.[92] Seven years after *Erie*, however, the Supreme Court addressed itself to the issue of whether a state statute of limitations must be applied to a diversity action by declaring, "Our starting point must be the policy of federal jurisdiction which *Erie R. Co. v. Tompkins* embodies."[93] *Erie* repudiated not only *Swift v. Tyson* itself, but the "view of diversity jurisdiction"[94] which it represented—one which infected the application of state statutes by giving vent to the "impulse to freedom from the rules that controlled State courts regarding State-created rights."[95] The explanation of *Erie's* application to state statutes lies not in its holding but in its "policy of federal jurisdiction."[96] What that policy is and how it should have been applied to *Poitra* is the key to the proper disposition of reservation-based diversity actions against Indians.

The policy emphasized by the *Erie* opinion itself is the preservation of the division of powers established by the Constitution.[97] It "expressed a policy that touches vitally the proper distribution of judicial power between state and federal courts."[98] By assuming the power to declare "substantive rules of common law applicable in a State" the federal courts had, in the Supreme Court's opinion, infringed upon the power of the states, reserved to them by the Constitution, to regulate their own legislative and judicial affairs.[99] It is, however, unclear whether the Supreme Court continues to accept the

89. 41 U.S. (16 Pet.) 1 (1842).
90. Erie R. Co. v. Tompkins, 304 U.S. 64, 71 (1938).
91. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 17 (1842).
92. Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1090 (1963); Walker, *Foreign Corporation Laws: Re-examining Woods v. Interstate Realty Co. and Reopening the Federal Courts*, 48 N.C.L. REV. 56, 64 (1969).
93. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 101 (1945).
94. Angel v. Bullington, 330 U.S. 183, 192 (1947).
95. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 102 (1945). *See* Walker, *Foreign Corporation Laws: Re-examining Woods v. Interstate Realty Co. and Reopening the Federal Courts*, 48 N.C.L. REV. 56, 65 (1969).
96. Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1091 (1963).
97. Erie R. Co. v. Tompkins, 304 U.S. 64, 77-79 (1938).
98. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109 (1945); *see* Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).
99. Erie R. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938). *See* Hanna v. Plumer, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring).

constitutional foundation of *Erie*.[100] It can be argued that the decision of a federal court to entertain or refuse to entertain a state-created cause of action falls within the judicial power ceded by the states to the federal government in Article III of the Constitution;[101] the federal court does not invade the state's residual sovereignty by entertaining an action which the state courts would not hear. The rejection of this argument and the survival of the constitutional doctrine of *Erie*, however, would not justify the conclusion that a federal court should not adjudicate a diversity action with Indian parties arising on an Indian reservation. Here, assertion of a power to entertain the action on its merits does not invade the authority of the states to regulate their own legislative and judicial affairs. The state courts' lack of jurisdiction stems from the very absence of state authority. State courts refrain from adjudicating reservation-based actions against Indians not to effectuate state policy on a matter falling within the state's reserved powers, but to withdraw from a matter falling outside those reserved powers. Regulation of Indian tribes is vested in the federal government and the tribes themselves. Reservation Indians are free from state control except insofar as Congress has conferred powers upon the states.[102] Whether Indians are protected from state control in the form of state-court jurisdiction by the federal "consent" statute,[103] a state "consent" statute,[104] or the federal doctrine of non-interference with tribal self-government,[105] the state courts' want of jurisdiction cannot affect

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100. The constitutional basis of *Erie* has rarely been invoked by the Court. *See* Hanna v. Plumer, 380 U.S. 460, 471-72 (1965); Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 202 (1956). The silence of the Court in Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945), is most significant. *Erie's* constitutional imperative there appears reduced to a mere "policy." C. WRIGHT, FEDERAL COURTS § 56, at 229 (2d ed. 1970). Constitutional doctrine might be implicit in the Court's reference to "cases where a legal right as the basis for relief was created by State authority, and could not be created by federal authority." Guaranty Trust, 326 U.S. 99, 102; *see* Guaranty Trust, at 114 (Rutledge, J., dissenting). But the statement that "Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law," Guaranty Trust, at 105, implies a congressional power inconsistent with the constitutional premises of *Erie*. Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 191-93 (1957).

101. U.S. CONST. art. III, § 2, cl. 1; Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1094 (1963); *see* Angel v. Bullington, 330 U.S. 183, 210-11 (1947) (Rutledge, J., dissenting); First National Bank of Chicago v. United Air Lines, 342 U.S. 396, 399 (1952) (Jackson, J., concurring in the result); Stephenson v. Grand Trunk Western R. Co., 110 F.2d 401, 405-06 (7th Cir. 1940), *cert. granted*, 310 U.S. 623 (1940), *dismissed*, 311 U.S. 720 (1940); Markham v. City of Newport News, 292 F.2d 711, 713 (4th Cir. 1961). This falls within the wider argument, clearly at odds with Justice Brandeis' opinion in *Erie*, that the federal judicial power itself includes the power to determine the rules of law that are to apply to cases within it. W. CROSSKEY, POLITICS AND THE CONSTITUTION ch. 20, 21, 25, 26, *passim* (1953); W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, 138-46 (1942); Broh-Krahn, *Amndment by Decision—More on the Erie Case*, 30 KY. L.J. 3 (1941). *Contra*, Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 439-45 (1958). *See also* Erie R. Co. v. Tompkins, 304 U.S. 64, 91 (1938) (Reed, J., concurring in part).

102. Williams v. Lee, 358 U.S. 217, 220 (1959); McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 168-73 (1973).

103. 25 U.S.C. § 1322(a) (1970).

104. N.D. CENT. CODE ch. 27-19 (1974).

105. Williams v. Lee, 358 U.S. 217 (1959); Littell v. Nakai, 344 F.2d 486 (9th Cir.

the federal government's constitutional powers to regulate in its own courts the legal rights and obligations of tribal Indians,[106] including rights and obligations founded on state law.

Apart from the desire to properly apply the Rules of Decision Act in light of perceived constitutional limitations upon federal powers, the primary "policy of federal jurisdiction"[107] voiced by *Erie* was non-discrimination.

> Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by 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 rights should be determined was conferred upon the non-citizen.[108]

The non-citizen could elect the body of common law—state or "federal general"—most favorable to his position. In *Erie*, the Court sought to terminate the election by abolishing one of the alternatives.[109] Granted that "Congress afforded out-of-State litigants another tribunal, not another body of law,"[110] permitting federal courts to entertain diversity actions arising on Indian reservations does not create the spectre of litigants choosing between two bodies of law. There is only one body of law. It consists of rights created or recognized[111] by state law. A party does not escape it by choosing to have a claim heard in a federal court. The law applied in federal court is the same which would have been applied in a state court if jurisdiction over the action existed. The policy of non-discrimination as expressed in *Erie* itself does not require that the federal court dismiss such an

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1965), *cert. denied*, 382 U.S. 986 (1966); Hot Oil Service, Inc. v. Hall, 366 F.2d 295 (9th Cir. 1966).

106. The federal government has "plenary" power over tribal Indians. Winton v. Amos, 255 U.S. 373, 391 (1921); Groundhog v. Keeler, 442 F.2d 674, 678 (10th Cir. 1971); U.S. DEPT. OF INTERIOR, FEDERAL INDIAN LAW 24 (1958); Comment, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445, 447-52 (1970).

107. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 101 (1945).

108. Erie R. Co. v. Tompkins, 304 U.S. 64, 74-75 (1938). "What [the Court] obviously had in mind . . . was that although either a resident plaintiff or a nonresident defendant can get into federal court against the other's will, the situation is not so symmetrical when a nonresident sues a resident. A resident defendant has no right to removal, *see* 28 U.S.C. § 1441 (1970), and thus is stuck with the nonresident plaintiff's choice of either forum. Thus in terms of ability to select the court, noncitizens are favored over citizens." Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 712 n.111 (1974). Before *Erie*, ability to select the court included ability to choose between state common law and federal common law. Because *Erie* has been held to require federal courts to apply state conflict of laws rules, Klaxon Co. v. Stentor Electric Mfg. Co., Inc., 313 U.S. 487 (1941), the ability of many plaintiffs to select the *state* in which suit is brought favors plaintiffs (both resident and nonresident) with ability to choose among bodies of state law. *See also* Van Dusen v. Barrack, 376 U.S. 612 (1964), under which change of venue does not change the state law applied to a diversity action.

109. Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

110. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 112 (1945).

111. Klaxon Co. v. Stentor Electric Mfg. Co., Inc., 313 U.S. 487 (1941).

action. Because there is only one body of law, the uncertainty which *Erie* identified with the existence of two co-existing bodies of law[112] should not exist. When there are two bodies of law with an uncertain demarcation line between them, either of which might eventually be applied to a transaction or occurrence, substantial uncertainty results.[113] But in the diversity actions against Indians with which this article is concerned, the standard of conduct is set by the rights and obligations created or recognized by the law of the state in which the federal court sits.[114] Opening the federal courthouse door would not create a "debilitating uncertainty in the planning of everyday affairs"[115] arising from the possible application to primary conduct of two sets of legal rules.[116] The state and federal legal systems would not provide inconsistent sets of directions.

The Supreme Court returned to *Erie's* policy of non-discrimination in *Guaranty Trust Co. of New York v. York.*[117] "Certainly," it said, "the fortuitous circumstance of residence out of a state of one of the parties to a litgation ought not to give rise to a discrimination against others equally concerned but locally resident."[118] The "policy of federal jurisdiction which *Erie R. Co. v. Tompkins* embodies"[119] went beyond the abolition of a body of "federal general common law"[120] co-existing with state common law.

> In essence, the intent of that decision was to ensure 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 court 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. . . .
> [S]ince a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is

112. Erie R. Co. v. Tompkins, 304 U.S. 64, 74 (1938).
113. *See* Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).
114. It is possible that the state, having failed to provide a state-court remedy, created or recognized no rights or obligations. *Compare* Angel v. Bullington, 330 U.S. 183 (1947), *with* Miller v. Davis, 507 F.2d 308 (6th Cir. 1974).
115. Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).
116. It is significant that substantial uncertainty exists when modern conflict of laws doctrines govern the application of legal rules to primary conduct. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 710 (1974).
117. 326 U.S. 99 (1945). It did so again in Hanna v. Plumer, 380 U.S. 460, 468 n.9 (1965).
118. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 112 (1945).
119. *Id.* at 101.
120. Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.[121]

From this emerged the so-called "outcome-determinative" test:[122] if "it significantly affect[s] the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court,"[123] the federal court must apply the state law. The outcome-determinative test required that the New York statute of limitations invoked in *Guaranty Trust* be applied, for it operated as a complete bar to a suit brought upon the same cause of action in a state court.[124] Uncritical application of the outcome-determinative test requires that any law withholding jurisdiction over a cause of action from state courts be applied in federal diversity actions, for the law operates as a complete bar to a suit brought in a state court upon the same claim. The Ninth Circuit in *Littell v. Nakai*[125] and *Hot Oil Service, Inc. v. Hall*[126] and the district court in *Poitra v. Demarrias*[127] adopted this approach where jurisdiction over causes of action arising within Indian reservations was withheld from state courts by federal law.

V. THE TRIUMPH OF OUTCOME-DETERMINATION

It was not clear after *Guaranty Trust* that the Supreme Court's philosophy of outcome-determination was intended to apply to every situation in which state courts lacked subject-matter jurisdiction over an action brought before a federal court. Its opinion had said, "Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly."[128] It is not "plain" that every law which bars recovery in a state court "bears on a State-created right vitally. . . ." The Court apparently had in mind a state procedural law which affects the "forms and mode of enforcing the right"[129] without preventing the right's enforcement when it referred to a law which "bears on a State-created right . . . merely formally or negligibly." If, however, a law prevented enforcement of the right in a state court but was not intended to bar its enforcement in every forum, and if its enforcement by a federal court would not defeat a state policy on a matter of state concern, could not a federal court pro-

121. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 108-09 (1945).
122. C. WRIGHT, FEDERAL COURTS § 55, at 226 (2nd ed. 1970).
123. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109 (1945).
124. *Id.* at 110.
125. 344 F.2d 486 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966).
126. 366 F.2d 295 (9th Cir. 1966).
127. 369 F. Supp. 257 (D.N.D. 1973), *rev'd*, 502 F.2d 23 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975).
128. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 110 (1945).
129. *Id.* at 108.

perly conclude that the law does not bear upon the state-created right "vitally" and decline to apply the law to itself?

To answer this question, it is necessary to examine the Supreme Court's decisions in *Angel v. Bullington*[130] and *Woods v. Interstate Realty Co.*[131] Both involved the application to federal courts of state statutes, characterized as "door-closing"[132] laws, which had the effect of closing the doors of state courts to plaintiffs with valid causes of action. In *Angel,* Bullington, a citizen of Virginia, had sold land in Virginia to Angel, a citizen of North Carolina. Angel paid part of the purchase price by executing a series of notes secured by a deed of trust on the land. Upon default on one of the notes, the other notes were accelerated, the trustees sold the land and the proceeds of the sale were applied to the payment of the notes. As a deficiency remained, Bullington brought suit against Angel in the Superior Court of North Carolina. Angel demurred on the ground that a North Carolina statute precluded recovery of a deficiency judgment. The statute provided:

> In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust . . . the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same. . . .[133]

The superior court overruled the demurrer but on appeal by Angel, the Supreme Court of North Carolina held that the statute operated to bar the action and ordered that the action be dismissed.[134] Bullington then brought a diversity action for the same relief in a North Carolina federal court. The district court, and on appeal the Circuit Court of Appeals for the Fourth Circuit, rejected Angel's contention that the North Carolina statute operated as a bar to Bullington's action in federal courts as well as in state courts.[135] Bullington had argued in the state supreme court that application of the deficiency judgment statute violated the "full faith and credit clause" of the federal constitution.[136] In rejecting this argument, the court had said:

> [T]he limitation created by the statute is upon the jurisdiction of the court in that it is declared that the holder of notes given to secure the purchase price of real property "shall not

130. 330 U.S. 183 (1947).
131. 337 U.S. 535 (1949).
132. *See* note 79 *supra.*
133. N.C. GEN. STAT. § 45-36 (1943), *as amended,* N.C. GEN. STAT. § 45-21.38 (Supp. 1975).
134. Bullington v. Angel, 220 N.C. 18, 16 S.E.2d 411 (1941).
135. Bullington v. Angel, 56 F. Supp. 372 (W.D.N.C. 1944), *aff'd,* 150 F.2d 679 (4th Cir 1945), *rev'd,* 330 U.S. 183 (1947).
136. U.S. Const. art. IV, § 1 (an issue which no federal court has reached).

> be entitled to a deficiency judgment on account" thereof. . . . The statute operates on the adjective law of the state, which pertains to the practice and procedure, or legal machinery by which the substantive law is made effective, and not upon the substantive law itself. It is limitation of the jurisdiction of the courts of this state.[137]

The federal district court and Court of Appeals borrowed this characterization of the deficiency judgment statute and employed it to resolve the issue of the statute's applicability to diversity actions. They held that it was not applicable, invoking the pre-*Erie* doctrine (represented by *David Lupton's Sons v. Automobile Club of America*)[138] that when a cuase of action exists and the requisites of the federal statute conferring jurisdiction are present, federal jurisdiction cannot be restricted by state statutes. The Court of Appeals[139] thought this doctrine to be unaffected by *Guaranty Trust,* despite the Supreme Court's statement that a federal court "cannot afford recovery if the right to recover is made unavailable by the State. . . ."[140]

The Supreme Court reversed,[141] Justice Frankfurter delivering an opinion not unfairly described by Justice Rutledge's dissent as "an 'and/or' hodgepodge of *res judicata* and *Erie* doctrines."[142] Justice Frankfurter took the view that the Supreme Court of North Carolina had adjudicated the "merits" of Bullington's action because it had considered whether the state deficiency judgment statute barred the action and, if so, whether its application would violate the "full faith and credit clause."[143] It followed that the judgment of the state court operated as a bar to suit on the same cause of action not only in North Carolina state courts, but also in federal courts.[144] He implied that the federal court was required by *Guaranty Trust* to dismiss the action because it could not have been entertained in the state courts after the state supreme court's decision,[145] but did not make clear whether this result flowed from the federal courts' *res judicata* doctrine or the application of state *res judicata* rules under the *Erie* doctrine.

If the state supreme court's decision rested merely on the ground that the state courts lacked power to hear the case and did not give the deficiency judgment statute a construction which closed the doors of federal courts as well as state courts, it would have been *res judicata* for purposes of Bullington's federal diversity action. The

137. Bullington v. Angel, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941).
138. 225 U.S. 489 (1912).
139. Angel v. Bullington, 150 F.2d 679, 681 (4th Cir. 1945).
140. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 108-09 (1945).
141. Angel v. Bullington, 330 U.S. 183 (1947).
142. Angel v. Bullington, 330 U.S. 183, 201 (1947) (Rutledge, J., dissenting).
143. Angel v. Bullington, 330 U.S. 183, 191 (1947).
144. *Id.* at 186-87.
145. *Id.* at 187.

lower federal courts, drawing on the language of the state supreme court's opinion, so interpreted the decision,[146] but Justice Frankfurter did not. He thought that the court had spoken only of the jurisdiction of state courts because it was concerned only with state courts. The statute, as construed, expressed a state policy that deficiency judgments on mortgages and deeds of trust should not be obtained. It was the duty of federal courts to follow this policy in diversity actions, not to defeat it by giving that which the state has withheld. It would be incongruous, thought Justice Frankfurter, to attribute to the North Carolina legislature and judiciary an intention to allow citizens of other states to obtain deficiency judgments against North Carolinians while barring suits by its own citizens, and discriminatory to achieve such a result.[147] The Court decided, accordingly, that Bullington's diversity action could not be entertained. Justice Frankfurter disposed of the doctrine that state statutes could not restrict the jurisdiction of a federal court by saying,

> Cases like *David Lupton's Sons v. Automobile Club of America* are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with *Erie Railroad Co. v. Tompkins*. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective state courts or were barred by defenses controlling in the state courts.[148]

More accurately, the "view of diversity" which made *David Lupton's Sons* "obsolete" came to an end in *Guaranty Trust*, which altered the application of state statutes to diversity actions and required federal courts to "mirror" the outcome of actions pursued in state courts,[149] even where that outcome was determined by procedural statutes.

Without doing so explicitly, *Angel v. Bullington* appears to hold that because the North Carolina statute had deprived state courts of jurisdiction to entertain actions for deficiency judgments, North Carolina federal courts must refuse to entertain such actions in order to produce the same result as in actions brought before state courts, regardless of whether an action had first been instituted in a state court.[150] But the decision rests on more than the state courts'

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146. This interpretation and the *David Lupton's Sons* doctrine that a federal court's jurisdiction cannot be affected by a state statute are the bases of the dissents by three justices in Angel v. Bullington. *Id.* at 193-201 (Reed, J., dissenting, with whom Jackson & Rutledge, JJ., joined); *Id.* at 201-11 (Rutledge, J., dissenting, with whom Jackson, J., joined).

147. Angel v. Bullington, 330 U.S. 183, 191-92 (1947).

148. *Id.* at 192.

149. Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1090-91 (1963); *see* Angel v. Bullington, 330 U.S. 183, 211 (1947) (Rutledge, J., dissenting); Woods v. Interstate Realty Co., 337 U.S. 535, 558-59 (1949) (Rutledge, J., dissenting).

150. Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1088-90 (1963).

want of jurisdiction. Justice Frankfurter denied that the state statute was a mere limitation of jurisdiction.[151] Reflected, but not clearly articulated, in his opinion is an analysis of the policies underlying the deficiency judgment statute and consideration of whether those policies could be defeated by the failure of federal courts to apply the statute to themselves. The statute was not enacted to regulate the internal machinery of the state judicial system. It was a depression-era measure obviously designed to shield North Carolina debtors from deficiency judgments[152]—an important matter of state concern. The statute had not been construed by state courts to allow deficiency judgments when the claim was founded on a contract made outside North Carolina or when the mortgage or deed of trust was held on real property located outside the state. If North Carolina federal courts entertained actions for deficiency judgments against North Carolinians, they would defeat the protection the state intended to give its debtors. The state court's characterization of the statute as a limitation of jurisdiction, pertaining to procedure and not substance,[153] was used to uphold the statute's constitutionality under the "full faith and credit clause." The Supreme Court correctly declined to borrow it for the purpose of resolving a very different issue facing the federal courts.

The policy found in the North Carolina deficiency judgment statute by the Supreme Court stands in marked contrast to the policy of the North Dakota "consent" statute[154] mentioned earlier. The latter "completely disclaim[s] state jurisdiction over civil causes of action arising on an Indian reservation unless the Indians themselves have acted to accept jurisdiction. . . ."[155] The North Carolina statute is no disclaimer. It was intended to shield debtors from liability on a matter in which the state was responsible and citizens looked to the state for legal protection. The North Dakota statute reflects no intention to shield Indians from liability for wrongful death. It disclaimed state jurisdiction because Indians were the responsibility of the federal and tribal governments and had not chosen to look to the state for legal protection, although the option was open to them. The state policy was "hands off," not "no liability." A state "hands off" policy, especially one premised upon the federal government's responsibility for the subject matter, is not defeated by a federal court's decision to entertain a cause of action which state courts cannot hear.

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151. Angel v. Bullington, 330 U.S. 183. 191 (1947).

152. It was a companion to other measures for the protection of debtors, such as a statute entitling the owner of land to an injunction against its sale or confirmation of its sale by a mortgagee or trustee, on the ground that the sale price was inadequate. N.C. GEN. STAT. § 45-32 (1943), *as amened*, N.C. GEN. STAT. § 45-21.34 (Supp. 1975).

153. Bullington v. Angel, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941).

154. N.D. CENT. CODE ch. 27-19 (1974).

155. In re Whiteshield, 124 N.W.2d 694, 698 (N.D. 1963).

When the state "consent" statute is removed from consideration and the absence of state-court jurisdiction is founded entirely on the federal "consent" statute[156] or the federal doctrine of non-interference with Indian self-government,[157] there exists no state policy which would be served by a federal court's refusal to accept jurisdiction. The "policy of federal jurisdiction"[158] found in *Angel v. Bullington* was not pure "outcome-determination," i.e., blind conformity to the result of litigation heard in state court. It ascertained state policies implicated in state law and required that federal courts give effect to those policies in diversity actions. It appeared to leave federal courts free not to conform to laws prevailing in state courts if no identifiable state policy would be served by conformity.

This freedom, if real, was short-lived. Two years after *Angel v. Bullington*, the Supreme Court in *Woods v. Interstate Realty Co.*[159] required the application of a state "door-closing" law to a diversity action without determining that this was necessary to fulfill state policy. In *Woods*, a foreign corporation sued a Mississippi resident in a Mississippi federal court. It sought recovery of a broker's commission allegedly due on the sale of the defendant's Mississippi real estate. A Mississippi statute provided that each foreign corporation doing business in the state was required to file a written power of attorney designating a resident agent for service of process in suits against it. It further provided: "Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of the state."[160] The district court found that the plaintiff was doing business in Mississippi and held that its failure to qualify to do business in the state, as required by this statute and others,[161] rendered its contract with the defendant void. On appeal by the plaintiff, the Fifth Circuit held that the effect of the statute was not to make the contract void, but to deny foreign corporations not complyling with it permission to institute actions in state courts.[162] Then it held that

> the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The State of Mississippi is without authority to limit or extend the juris-

156. 25 U.S.C. § 1322(a) (1970). The courts in Poitra v. Demarrias, 369 F. Supp. 257 (D.N.D. 1973), *rev'd*, 502 F.2d 23 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975), ignored the state "consent" statute.

157. Littel v. Nakai, 344 F.2d 486 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966). Hot Oil Service, Inc. v. Hall, 366 F.2d 295 (9th Cir. 1966).

158. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 101 (1945).

159. 337 U.S. 535 (1949).

160. MISS. LAWS 1928, ch. 90, § 11, *as amended*, MISS. CODE § 79-3-247 (1972).

161. MISS. CODE § 79-1-19 (1972); MISS. LAWS 1916, ch. 92, § 1, *repealed by* MISS. LAWS 1962, ch. 235, § 149; MISS. CODE § 27-17-325 (1972).

162. Interstate Realty Co. v. Woods, 168 F.2d 701 (5th Cir. 1948), *reh.*, 170 F.2d 694 (5th Cir. 1948), *rev'd*, 337 U.S. 535 (1949).

> diction of the federal courts. If diversity of citizenship exists, the fact that a foreign corporation may not sue in State Courts because it has not complied with the conditions of doing business within the State does not shut the doors of the federal court sitting in that State.[163]

The Supreme Court reversed,[164] holding that under *Guaranty Trust*, Mississippi's "door-closing" statute closed the doors of federal courts to diversity actions, as had North Carolina's statute in *Angel v. Bullington*.

> [F]or purposes of diversity jurisdiction a federal court is "in effect, only another court of the State. . . ."[165] [*Guaranty Trust*] was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case; that where in such cases one is barred from recovery in the state court; he should likewise be barred in the federal court.[166]

This was pure "outcome-determination." It was necessary, asserted the Court, to avoid discrimination against citizens of the forum state, as *Erie* intended.[167] But the Mississippi "door-closing" statute discriminated agaist non-citizens.[168] Non-application of the state statute to diversity actions would have enabled non-citizens to obtain remedies already available to citizens.[169]

No consideration of state policies appears in the *Woods* opinion. The Court left states unable to close the doors of their own courts

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163. Interstate Realty Co. v. Woods, 168 F.2d 701, 705 (5th Cir. 1948), citing David Lupton's Sons v. Automobile Club of America, 225 U.S. 489 (1912). On rehearing, the court stated that *Angel v. Bullington* did not overrule *David Lupton's Sons* with respect to the question before it. Interstate Realty Co. v. Woods, 170 F.2d 694, 695 (5th Cir. 1948). However, the Supreme Court's opinion in Woods v. Interstate Realty Co., 337 U.S. 535, 536-37 (1949), re-asserted the demise of *David Lupton's Sons*.

164. Woods v. Interstate Realty Co., 337 U.S. 535 (1949).

165. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 108 (1945).

166. Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949). The three dissenting justices took the position, as had the dissenters in *Angel v. Bullington*, that the state statute, as properly construed by the Court of Appeals, went no further than withholding a remedy in state courts without preventing actions elsewhere, and the absence of a state-court remedy did not require federal courts to dismiss the action. Woods v. Interstate Realty Co., 337 U.S. 535, 538-40 (Jackson, J., dissenting, with whom Rutledge & Burton, JJ., joined); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 557-61 (Rutledge, J., dissenting).

167. Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949).

168. State courts were open to suits *against* non-qualifying foreign corporations. MISS. CODE § 79-1-27 (1972); Interstate Realty Co. v. Woods, 168 F.2d 701, 705 (5th Cir. 1948).

169. Walker, *Foreign Corporation Laws: Re-examining Woods v. Interstate Realty Co. and Reopening the Federal Courts*, 48 N.C. L. REV. 56, 66-7 (1969). The view that "Congress afforded out-of-State litigants another tribunal, not another body of law," Guaranty Trust of New York v. York, 326 U.S. 99, 112 (1945), suggests that non-application of state law by federal courts is an impermissible means of neutralizing bias against non-citizens. Justice Rutledge was of the contrary view that one of the purposes of diversity jurisdiction "was to afford a federal court remedy when, for at least some reasons of state policy, none would be available in state courts." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 558 (1949) (Rutledge, J., dissenting); Guaranty Trust Co. of New York v. York, 326 U.S. 99, 119 (1945) (Rutledge, J., dissenting).

without also closing the doors of federal courts.[170] Nevertheless, it is unlikely that an analysis of state policy would have altered the result in *Woods*. The Mississippi requirement that foreign corporations qualify to do business in the state served the enforcement of state revenue laws.[171] The requirement that foreign corporations appoint a resident agent for service of process enabled persons with legal claims arising from a foreign corporation's Mississippi activities to enforce legal claims against it within the state. The protection of state revenues and the provision of a convenient forum for persons wronged by foreign corporations were important state policies promoted by the sanction of closing state courts to foreign corporations which failed to comply with state law. Non-application of the "door-closing" statute to diversity actions would have frustrated these polilcies by enabling foreign corporations to avoid the sanction when it was most costly. A foreign corporation could sue a Mississippi resident in federal court whenever the amount in controversy was more than $3,000 and it was unnecessary to join a Mississippi resident as a plaintiff.[172] A state "door-closing" law based on a desire to protect the defendant or an objection to the relief sought by the plaintiff, as in *Angel v. Bullington*,[173] or the imposition of a sanction against the plaintiff, as in *Woods v. Interstate Realty Co.*, stands in contrast to a "door-closing" law designed to conserve the resources of state courts[174] or avoid intrusion into the jurisdiction of other governments, as in *Poitra v. Demarrias*. When the latter type of "door-closing" law is invoked as a bar to diver-

170. *See* Woods v. Interstate Realty Co., 337 U.S. 535, 539 (1949) (Jackson, J., dissenting).

171. *Id.* at 539-40.

172. Judiciary Act of March 3, 1911, ch. 231, ch. 2, § 24, ¶ 1, 36 Stat. 1091, *repealed by* Judiciary Act of June 25, 1948; ch. 646, § 39, 62 Stat. 996; Judiciary Act of June 25, 1948, ch. 646, § 1, 62 Stat. 930, *as amended*, 28 U.S.C. § 1332(a) (1970) (now $10,000). Diversity of citizenship would not now exist if the corporation's principal place of business were in Mississippi. 28 U.S.C. § 1332(a) (1970).

173. *See* Teleco, Inc. v. Southwestern Bell Telephone Co., 511 F.2d 949 (10th Cir. 1975), in which the court held that a telephone customer could not obtain relief against the enforcement of tariffs filed with the Oklahoma Corporation Commission in a diversity action against the telephone company. The Oklahoma Constitution, art. IX, § 20, prohibits state courts other than the supreme court from reviewing public utility regulations prescribed by the Corporation Commission. This withholds from state trial courts jurisdiction over actions for relief from the enforcement of public utility tariffs on the ground of their invalidity. State ex rel. Oklahoma Natural Gas Co., 204 Okla. 134, 227 P.2d 666 (1950); Oklahoma Natural Gas Co. v. Bartlett-Collins Co., 204 Okla. 379, 230 P.2d 481 (1951). Citing Woods v. Interstate Realty Co., the court held that because state trial courts lacked jurisdiction over the action, federal trial courts lacked diversity jurisdiction. Teleco, Inc. v. Southwestern Bell Telephone Co., 511 F.2d 949, 953 (10th Cir. 1975). This decision served the state policy of limiting judicial review of Corporation Commission orders, but *Woods* does not close the federal courts unless all state courts are closed. *See* Markham v. City of Nwport News, 292 F.2d 711 (4th Cir. 1961); S.J. Groves & Sons Co. v. New Jersey Turnpike Authority, 268 F. Supp. 568, 573 (D.N.J. 1967). A better rationale for the decision in *Teleco* would have been that state law, in effect, provided for no cause of action against a public utility for relief from enforcement of its tariffs (just as state law in *Angel v. Bullington* provided, in effect, for no cause of action for a deficiency judgment) and a federal court could not grant relief which state law withheld. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 108-09 (1945).

174. 1A J. MOORE, FEDERAL PRACTICE ¶ 0.317[6] at 3538 (1959); Note, *Effect of State Statute on Jurisdiction of Federal Courts*, 24 IND. L.J. 418, 422-23 (1949).

sity jurisdiction, *Woods* and *Angel* can be distinguished on the ground that non-application of the law would not subvert state policy. The case could then be approached on its merits. This has been done in recent years by lower federal courts[175] but not the Supreme Court.

In *First National Bank of Chicago v. United Air Lines, Inc.*,[176] it was necessary to decide whether an Illinois statute which provided that

> no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place[177]

prevented Illinois federal courts from entertaining diversity actions for wrongful deaths occurring outside Illinois. After *Woods*, the Seventh Circuit had reversed its earlier position[178] and held that state law closed the federal courts to such actions.[179] The plaintiff in *First National Bank* argued that the statute violated the "full faith and credit clause" of the federal constitution.[180] The Supreme Court could have avoided the constitutional issue by examining the policies underlying the legislation, finding no more than a policy of reducing the caseload of state courts by the exclusion of foreign causes of action which could be pursued elsewhere,[181] determining that state policies would not be frustrated if these actions were heard in federal courts, thereby distinguishing *Woods v. Interstate Realty Co.* and *Angel v. Bullington*, and, as a consequence, refusing to apply the Illinois statute to diversity actions. This the Court refused to do. It reached the constitutional issue and decided it in the plaintiff's favor—apparently foreclosing the argument that "door-closing" laws do not bar diversity actions when leaving federal courts open does not frustrate state policies.[182] Justice Frankfurter, while dissenting

175. *See* text accompanying notes 201-36 *infra* and Trust Co. of Chicago v. Pennsylvania R. Co., 183 F.2d 640, 643-44 (7th Cir. 1950).
176. 342 U.S. 396 (1952), *reh. denied*, 343 U.S. 921 (1952).
177. ILL. LAWS 1935, p. 916, § 2, *as amended*, ILL. ANN. STATS., ch. 70, § 2 (Supp. 1975). This provision was repealed by ILL. LAWS 1963, p. 3248, § 2.
178. Stephenson v. Grand Trunk Western R. Co., 110 F.2d 401 (7th Cir. 1940), *cert. granted*, 310 U.S. 623 (1940), *dismissed*, 311 U.S. 720 (1940); Davidson v. Gardner, 172 F.2d 188 (7th Cir. 1949).
179. Trust Co. of Chicago v. Pennsylvania R. Co., 183 F.2d 640 (7th Cir. 1950); Munch v. United Air Lines, Inc., 184 F.2d 630 (7th Cir. 1950); First National Bank of Chicago v. United Air Lines, 190 F.2d 493 (7th Cir. 1951), *rev'd on other grounds*, 342 U.S. 396 (1952), *reh. denied*, 343 U.S. 921 (1952).
180. U.S. CONST. art. IV, § 1.
181. First National Bank of Chicago v. United Air Lines, 190 F.2d 493, 495 (7th Cir. 1951); Note, *Federal Courts—Federal Jurisdiction—Effect of State Statutes*, 20 GEO. WASH. L. REV. 343, 344 (1952).
182. The Court held that the Illinois statute was unconstitutional under Hughes v. Fetter, 341 U.S. 609 (1951), where it had struck down a Wisconsin statute barring actions for wrongful deaths occurring outside the state. WIS. STAT. ANN. § 331.03 (1958), *as amended*,

on the constitutional issue, was of the opinion that "the series of cases culminating in *Woods v. Interstate Realty Co.*" required Illinois federal courts to apply the state statute.[183] There are no indications that more than one of the five justices who joined the opinion of the Court in *First National Bank* disagreed with Justice Frankfurter on the latter point.[184] Accordingly, the law as it stood in 1952 was that whenever a valid state law prevented state courts from entertaining a cause of action, it also prevented the federal courts in that state from entertaining the same cause within their diversity jurisdiction. The state could not close its own doors without closing the federal courts'.[185] With federal courts required to "mirror" state courts,[186] it logically followed that when *federal* law closed state courts, it also closed federal courts to diversity actions.[187]

VI. THE DECLINE OF OUTCOME-DETERMINATION

The Supreme Court has not spoken on the question in the quarter-century since *First National Bank*, but its opinion in *Byrd v. Blue Ridge Rural Electric Cooperative*[188] has led lower federal courts

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WIS. STAT. ANN. § 895.03 (1966). The Illinois statute at issue in *First National Bank*, unlike the Wisconsin statute in *Hughes v. Fetter*, closed state courts only when an action for wrongful death existed under the laws of the place where death occurred and the defendant could be served with process there. This condition ensured that the statute would not leave a plaintiff without any forum in which his action could be entertained. This significant difference between the Wisconsin and Illinois statutes should have led the Court to conclude that the invalidation of the former in *Hughes v. Fetter* had not necessarily invalidated the latter. First National Bank of Chicago v. United Air Lines, Inc., 342 U.S. 396, 401 (1952) (Reed, J., dissenting). The Court had said that it was "not crucial here, that Wisconsin may well be the only jurisdiction in which service could be had. . . ." Hughes v. Fetter, 341 U.S. 609, 613 (1951). While "not crucial," it was "relevant." *Id.* Therefore, the explanation of the Court's reliance on a constitutional ground in *First National Bank* may be that the majority believed that no non-constitutional ground for reversal existed, rather than that the majority believed that the constitutional question in *First National Bank* was the same question it had passed upon in *Hughes v. Fetter*. Justice Jackson, on the other hand, disagreed with the Court's invalidation of the Illinois statute but believed that state "door-closing" laws do not operate to withhold diversity jurisdiction from federal courts under *Erie R. Co. v. Tompkins*, First National Bank of Chicago v. United Air Lines, Inc., 342 U.S. 396, 399-400 (1952) (Jackson, J., concurring in the result); *see* Woods v. Interstate Realty Co., 337 U.S. 535, 538-40 (1949) (Jackson, J., dissenting); Angel v. Bullington, 330 U.S. 183, 197-200 (Reed, J., dissenting, with whom Jackson & Rutledge, JJ., joined). However, he, too, made no attempt to distinguish the "door-closing" statute in *First National Bank* from those in *Woods v. Interstate Realty Co.* and *Angel v. Bullington*.

183. First National Bank of Chicago v. United Air Lines, Inc., 342 U.S. 396, 401 (1952) (Frankfurther, J., dissenting).

184. Justice Burton had joined Justice Jackson's dissent in Woods v. Interstate Realty Co., 337 U.S. 535, 538-40 (1949) (Jackson, J., dissenting, with whom Rutledge & Burton, JJ., joined). Justice Clark was appointed to the court after *Woods*. Chief Justice Vinson, Justice Black and Justice Douglas joined the opinions of the Court in both *Woods* and *First National Bank*. Justice Reed, dissenting in *First National Bank*, joined the opinion of the Court in *Woods* but had authored a dissent in Angel v. Bullington, 330 U.S. 183, 193-201 (1947) (Reed, J. dissenting).

185. A state statute which explicitly excepted federal courts from its operation might not have had the effect of closing federal courts.

186. Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1091 (1963).

187. Littell v. Nakai, 344 F.2d 486, 489 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966); Hot Oil Service, Inc. v. Hall, 366 F.2d 295, 297 (9th Cir. 1966). *Contra*, Poitra v. Demarrias, 502 F.2d 23 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975). This assumes that the governing legislation has not made an explicit exception for federal courts.

188. 356 U.S. 525 (1958), *reh. denied*, 357 U.S. 933 (1958).

to believe once again that they are authorized to entertain actions to which the courts of their states are closed.[189] In *Byrd*, the Court remanded a diversity action to the district court for resolution of a factual issue.[190] The question arose whether on remand, the trial judge should commit this issue to the jury or weigh conflicting evidence and decide the issue himself, as required by state law.[191] The defendant argued that *Erie* required the federal court to folllow state practice in this particular. The Court disagreed for three reasons. First, "[i]t was decided in *Erie R. Co. v. Tompkins* that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts"[192] by conforming to the "rule[s] intended to be bound up with the definition of the rights and obligations of the parties."[193] The state law invoked by the defendant here was not a rule "intended to be bound up with the definition of the rights and obligations of the parties." Second, although cases following *Erie* had "evinced a broader policy to the effect that the federal courts should conform as near as may be—in the absence of other considerations—to state rules . . . where [they] may bear substantially" on the outcome of litigation,[194]

> there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. . . . [T]he inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.[195]

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189. Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965); Sun Sales Corp. v. Block Land, Inc., 456 F.2d 857, 862-63 (3rd Cir. 1972); Poitra v. Demarrias, 502 F.2d 23, 25-6 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975); Miller v. Davis, 507 F.2d 308, 313-15 (6th Cir. 1974). *But see* Littell v. Nakai, 344 F.2d 486, 489 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966); Hot Oil Service, Inc. v. Hall, 366 F.2d 295, 297 (9th Cir. 1966). This trend was foreshadowed by Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1099-1101 (1963).

190. *Byrd* was a negligence action in which the defendant claimed that the plaintiff had the status of a statutory employee and was therefore barred from maintaining a common-law action against the defendant by provisions of the South Carolina Workmen's Compensation Act, S.C. CODE § 72-121 (1962), *as amended*, S.C. CODE § 72-121 (Supp. 1974); S.C. ACTS 1936, p. 1231, § 11, *repealed by* S.C. ACTS 1969, p. 622, § 2. Whether the plaintiff was a statutory employee depended upon whether the work contracted to be done by the plaintiff's employer was work of the kind also done by the defendant's own construction and maintenance crews. S.C. CODE § 72-111 (1962); Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 526-27 (1958). The Supreme Court remanded the case for a new finding on this question of fact. *Id.* at 531-33.

191. Adams v. Davison-Paxon Co., 230 S.C. 532, 96 S.E.2d 566 (1957).

192. Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 535 (1958).

193. *Id.* at 536.

194. *Id.*

195. *Id.* at 537-38.

The Court concluded that this "strong federal policy" should not yield to state law.[196] Third, the likelihood that committing the issue to the jury would cause the litigation to have a different result in federal court than it would have had in state court was not "so strong as to require the federal practice . . . to yield to the state rule in the interest of uniformity of outcome."[197]

The "influence . . . of the Seventh Amendment" and unlikelihood of different results from judge and jury determinations of the factual issue to be resolved on remand invite a "conservative reading of *Byrd*" as a decision "limited by its peculiar facts."[198] But it signals a retreat from outcome-determination to a position in which a state law need not be applied to a diversity action if it is not "bound up" with state-created rights and obligations[199] and if federal policies which would be frustrated by the application of the state law weigh more heavily on the balance than state policies underlying the law. *Byrd* may thus have opened federal courts to suits over which state courts lack jurisdiction when the law withholding jurisdiction from state courts, although it left rights without remedies and obligations without enforcement, was not "intended to be bound up with the definition of the rights and obligations of the parties"[200] and countervailing federal policies would be fulfilled by the exercise of federal jurisdiction.

The signal emanating from *Byrd* was picked up and greatly amplified by the Fourth Circuit in *Szantay v. Beech Aircraft Corp.*[201] Following an airplane crash in Tennessee, the representatives of the victims' estates, all of whom were citizens of Illinois, brought wrongful death actions in a South Carolina federal court against the Delaware corporation which manufactured the aircraft and the South Carolina corporation which serviced it before the crash. The Delaware corporation moved for dismissal, contending that the court lacked jurisdiction over the claims against it because South Carolina law withheld from state courts jurisdiction over suits brought by non-residents against foreign corporations on causes of action arising outside the state.[202] The Court of Appeals held that state law did not, under *Erie*, restrict the district court's jusisdiction and re-

196. *Id.* at 538.
197. *Id.* at 540.
198. Miller, *Federal Rule* 44.1 *and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 710 (1967).
199. Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1100 (1963).
200. Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 536 (1958). However, this suggestion appears inconsistent with the assertion in Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949), that "a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case. . . ."
201. 349 F.2d 60 (4th Cir. 1965).
202. S.C. CODE § 10-214 (1962).

quire it to dismiss the action. After reviewing *Erie*, *Guaranty Trust*, *Angel*, *Woods* and *Byrd*, the court announced:

> The spirit of these decisions makes it appropriate for a court attempting to resolve a federal-state conflict in a diversity case to undertake the following analysis:
>
> 1. If the state provision, whether legislatively adopted or judicially declared, is the substantive right or obligation at issue, it is constitutionally controlling.
>
> 2. If the state provision is a procedure intimately bound up with the state right or obligation, it is likewise constitutionally controlling.
>
> 3. If the state procedural provision is not intimately bound up with the right being enforced but its application would substantially affect the outcome of the litigation, the federal diversity court must still apply it unless there are affirmative countervailing federal considerations. This is not deemed a constitutional requirement but one dictated by comity.[203]

In applying the first two steps of this three-step analysis, the court concluded that the South Carolina "door-closing" statute was procedural, not substantive, and not "bound up" with the substantive rights asserted, i.e., the causes of action for wrongful death, because they arose under the laws of Tennessee, where the deaths occurred.[204] The "door-closing" law of one legal system is easily typed as a law not "bound up" with the rights of the parties whenever those rights and obligations are thought to arise in a different legal system. If this is sound, the North Carolina deficiency judgment statute applied in *Angel* was not "bound up" with the rights and obligations of the parties because they arose under the law of Virginia, the location of the land sold by Bullington to Angel.[205] It is difficult to accept that a statute intended to nullify otherwise existing rights and obligations of creditors and debtors was not (in the language of *Byrd*) "intended to be bound up with the definition of the rights and obligations,"[206] even though it was authoritatively described as a procedural "limitation of the jurisdiction of the courts of this state."[207] Wherever they may "arise," rights and obligations exist within a state only when they are recognized by the law prevailing in that state. If the policy of the "door-closing" law is to nullify rights and obligations within the limits of state power, the law should be regarded as "bound up" with them. If the policy of

203. Szantay v. Beech Aircraft Corp., 349 F.2d 60, 63-64 (4th Cir. 1965).
204. *Id.* at 64.
205. Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1101 (1963).
206. Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 536 (1958).
207. Bullington v. Angel, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941).

a "door-closing" law is to conserve the resources of state courts or avoid intrusion upon the spheres of other governments, and state interests are not advanced by a universal inability to enforce the rights and obligations involved, the law should be regarded as not "bound up" with those rights and obligations. The court in *Szantay* had difficulty in identifying the state policies underlying the South Carolina "door-closing" statute before it. The most likely possibilities—promotion of judicial economy and avoidance of a *forum non conveniens*[208]—support the court's conclusion that the law was not "bound up" with the parties' rights and obligations with respect to wrongful death.

The court's third step required it to identify federal policies favoring the exercise of diversity jurisdiction over the case and weigh them against state policies which would be frustrated by the exercise of jurisdiction. As no identifiable state policy would be frustrated, the weight of any federal policy favoring adjudication of the plaintiffs' claims on their merits would open the doors of the federal court.[209] One was found in the "full faith and credit clause" of the federal constitution,[210] which "expresses a national interest 'looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states.' "[211] The "most fundamental" policy, however, was

> that expressed in the constitutional extension of subject-matter jurisdiction to the federal courts in suits between citizens of different states.[212] The purpose of this jurisdictional grant was to avoid discrimination against nonresidents.[213]

The South Carolina statute was discriminatory because it denied non-residents the privilege of suing foreign corporations on foreign causes of action while granting it to residents.[214] Opening the federal courts would counteract this discrimination without creating discrimination against South Carolina residents. They could sue foreign corporations on foreign causes of action in either state or federal courts.[215] With "affirmative countervailng federal considera-

208. Szantay v. Beech Aircraft Corp., 349 F.2d 60, 64 (4th Cir. 1965). Less plausible is the hypothesis that the statute was intended to encourage foreign corporations to do business in South Caroline. *Id.* at 65.

209. The court distinguished *Angel v. Bullington* and *Woods v. Interstate Realty Co.* on the ground that in those cases, state policies existed which would have been frustrated by permitting the actions to proceed in federal courts. *Id.* at 66.

210. U.S. CONST. art. IV, § 1.

211. Szantay v. Beech Aircraft Corp., 349 F.2d 60, 65 (4th Cir. 1965), *quoting from* Hughes v. Fetter, 341 U.S. 609, 612 (1951).

212. Citing U.S. CONST. art. III, § 2.

213. Szantay v. Beech Aircraft Corp., 349 F.2d 60, 65 (4th Cir. 1965).

214. *Id.*

215. For this reason, the court believed that application of the state statute to federal courts was not indicated by the "twin aims of the *Erie* rule" which the Supreme Court had recently identified in Hanna v. Plumer, 380 U.S. 460, 468 (1965): "discouragement

tions"[216] identified, the court held that the state "door-closing" statute did not exclude the actions before it from federal courts.

Whether this decision actually served the policy of the constitutional grant of diversity jurisdiction depends, of course, upon what that policy is.[217] Constitutional policy could not have been served if diversity jurisdiction was intended only to provide a neutral tribunal in which citizens of other states might escape the prejudice which sometimes prevails against them in state courts.[218] If state courts are closed by a "door-closing" statute, non-citizens cannot suffer prejudice in them. If diversity jurisdiction had the wider objective of affording to litigants a federal court remedy when none existed in state courts,[219] constitutional policy would provide some justification for non-application of state "door-closing" laws. The authoritative judicial statement of the purposes of diversity jurisdiction— that of Chief Justice Marshall in *Bank of the United States v. Deveaux*[220] —does not suggest that the founding fathers wished to render diversity defendants more readily suable in federal courts than they would be in state courts.[221] Nevertheless, several federal courts have followed *Szantay v. Beech Aircraft Corp.* in finding that "door-clo-

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of forum-shopping and avoidance of inequitable administration of the laws." By "inequitable administration of the laws," the Court meant unfair discrimination against citizens of the forum state. *Id.* at 468 n.9. Although *Szantay* involved discrimination against non-citizens, the Court of Appeals though that it was furthering the intention of *Erie* to "prevent different legal treatment of parties merely because of a variation in the residence of their opponent." Szantay v. Beech Aircraft Corp., 349 F.2d 60, 64 (4th Cir. 1965). The plaintiffs had engaged in "forum shopping." They had chosen a federal forum because if it failed to apply the state "door-closing" statute, the governing law would favor the plaintiffs more than the law a state forum would apply—a situation the Supreme Court sought to avoid in Hanna v. Plumer, 380 U.S. 460, 468 n.9 (1965). But forum shopping is an evil only if something evil flows from it. Otherwise, it simply exercises the choice between alternatives afforded by the grant of diversity jurisdiction to federal courts. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L .REV. 693, 710 (1974). No evil flowed from forum shopping in *Szantay*. The non-resident defendant did not become liable because the plaintiffs were non-residents. It would also have been held liable in diversity actions brought by residents. Note, 51 CORNELL L.Q. 560, 564 (1966).

216. Szantay v. Beech Aircraft Corp., 349 F.2d 60, 64 (4th Cir. 1965).

217. The purposes of the fathers of the Constitution in incorporating diversity jurisdiction within the federal judicial power are considered in Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Frank, *Historical Bases of the Federal Judicial System*, 13 LAW. & CONTEMP. PROB. 3, 22-8 (1948); Phillips & Christensen, *The Historical and Legal Background of the Diversity Jurisdiction*, 46 A.B.A.J. 959 (1960); Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 869-76 (1931).

218. Warren, *New Light on the History of the Federal Judiciary Act of* 1789, 37 HARV. L. REV. 49, 83 (1923). *See* Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809); Burgess v. Seligman, 107 U.S. 20, 34 (1883); Erie R. Co. v. Tompkins, 304 U.S. 64, 74 (1938); Guaranty Trust Co. of New York v. York, 326 U.S. 99, 111 (1945).

219. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 119 (1945) (Rutledge, J., dissenting); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 558 (1949) (Rutledge, J., dissenting); Miller v. Davis, 507 F.2d 308, 316-17 (6th Cir. 1974). Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495-97 (1928), asserts that a principal reason for the grant of diversity jurisdiction was a desire to protect non-resident creditors against state legislation favorable to debtors.

220. 9 U.S. (5 Cranch) 61, 87 (1809).

221. Arrowsmith v. United Press International, 320 F.2d 219, 226-27 (2d Cir. 1963), where (in the context of deciding that Vermont state law governs whether a Vermont federal court has *in personam* jurisdiction over a foreign corporation) the court denied that there was any federal policy to provide a federal forum in Vermont to either a citizen or a non-citizen when state courts would not hear the action.

sing" laws were not "bound up" with rights and obligations arising under the laws of another jurisdiction and weighing state policies underlying "door-closing" laws against federal policies, found in the grant of diversity jurisdiction, favoring the exercise of jurisdiction by federal courts. In *Sun Sales Corp. v. Block Land, Inc.*,[222] a Pennsylvania statute barred from state courts certain actions by persons not licensed by the state as real estate brokers.[223] The Court of Appeals for the Third Circuit, adopting the three-step analysis of *Szantay*, held that state law did not prevent unlicensed New York corporations not doing business in Pennsylvania from maintaining a cause of action arising outside the state in a Pennsylvania federal court. The court said:

> [I]t is appropriate to bow to state limitations only when they advance some proper state policy.[224] It is difficult to understand what policy could be advanced by conditioning a New York corporation's access to the federal courts . . . on a requirement that the corporation register in Pennsylvania when neither the contract nor the conduct of its business falls under the control of Pennsylvania authorities. Without further justification, it seems to be the kind of blatant discrimination against citizens of other states that diversity jurisdiction was meant to avoid.[225]

In *Miller v. Davis*,[226] state law withheld from Kentucky courts jurisdiction to entertain actions concerning trusts situated outside that state.[227] The Sixth Circuit followed *Szantay's* three steps[228] in holding that state law did not prevent Kentucky beneficiaries from maintaining a diversity action in Kentucky against trustees of a fund situated in the District of Columbia and governed by District of Columbia law. The court found no state policy to inhibit Kentucky beneficiaries' enforcement of their rights against the trustees under the *lex situs*, only an eroded policy of promoting uniformity in trust administration by confining suits against trustees to the courts of the *situs*. This was outweighed by identified federal policies, including the federal interest, embodied in the grant of diversity jurisdiction itself, in having federal courts entertain actions within the jurisdictional grant when litigants seek a federal forum for the vindication

222. 456 F.2d 857 (3th Cir. 1972).
223. 63 PA. STAT. ANN. § 446 (1968).
224. Citing Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965), and C. WRIGHT, FEDERAL COURTS § 52 at 176 (1st ed. 1963).
225. Sun Sales Corp. v. Block Land, Inc., 456 F.2d 857, 862 (3rd Cir. 1972). The court went on to hold that the Pennsylvania statute, correctly interpreted, did not operate to bar the plaintiff's action. *Id.*
226. 507 F.2d 308 (6th Cir. 1974).
227. Wilder v. United Mine Workers Welfare Retirement Fund, 346 S.W.2d 27 (Ky. 1961), which involved the same trust as in *Miller v. Davis*.
228. Miller v. Davis, 507 F.2d 308, 314 (6th Cir. 1974), eliminating in each step *Szantay's* reference to constitutional requirements.

of their rights.[229] The Eighth Circuit's opinion in *Poitra v. Demarrias*[230] falls into this pattern. In *Poitra*, as in *Szantay*, state courts lacked jurisdiction over suits against non-citizens on causes of action arising in foreign jurisdictions—the Standing Rock Sioux Indian Reservation being, in effect, a jurisdiction foreign to North Dakota and its inhabitants being, in effect, non-citizens.[231] The Court of Appeals ascertained that jurisdiction was withheld from federal courts by the federal "consent" statute.[232] It drew the conclusion that no state policy was at issue in the case.[233] The "consent" statute, according to the court, was "certainly not intended to deprive Indians of state-created substantive rights."[234] Entertaining the action would not conflict with the federal policy of tribal self-government[235] and would meet the federal courts' supposed "obligation to exercise jurisdiction, when the statutory requisites are satisfied."[236] Mrs. Poitra could, therefore, have her wrongful death action heard by a federal court.

Standing against the trend set by *Szantay v. Beech Aircraft Corp.* are the two Ninth Circuit decisions mentioned earlier,[237] *Littell v. Nakai*[238] and *Hot Oil Service, Inc. v. Hall.*[239] In each, the court determined that an action by a non-Indian against a member of the Navajo

229. *Id.* at 316-17. The court also identified relevant federal interests in the uniform application of venue statutes and the equitable administration of trust funds with multi-state operations, whose beneficiaries in states without "door-closing" statutes could sue trustees in local federal courts. *Id.* at 317-18. Similar to *Miller v. Davis* is Poe v. Marquette Cement Manufacturing Co., 376 F. Supp. 1054 (D. Md. 1974), where an Illinois corporation was being sued in a Maryland federal court by shareholders dissenting from approval of a merger. They sought to recover the fair value of their shares under Illinois law. Applying the *Szantzay* three-step analysis, the court held that if Maryland law's "internal affairs" doctrine withheld jurisdiction over the action from state courts on the ground that the action involved the affairs of a foreign corporation, diversity jurisdiction was not withheld from the federal court. The state rule was attributable to the limited powers of state courts to enforce judgments against foreign corporations. The liberal federal procedures for transfer of actions, multi-district litigation and enforcement of judgments, which contributed to a "unified" federal judicial system, were deemed "affirmativ countervailing federal considerations" weighing in favor of the exercise of federal jurisdiction. *Id.* at 1058.

230. 502 F.2d 23 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975).

231. Inhabitants of the North Dakota portion of the reservation are, in law, citizens of North Dakota. Note 5 *supra*. But not having consented to state jurisdiction, they are not subject to the civil laws of the state. 25 U.S.C. § 1322(a) (1970).

232. 25 U.S.C. § 1322(a) (1970).

233. Poitra v. Demarrias, 502 F.2d 23, 27 (8th Cir. 1974). Had the court considered the state "consent" statute, N.D. CENT. CODE ch. 27-19 (1974), it could have found that state policy was merely to recede from a field outside state responsibilities, not to take from Indians the benefits and liabilities arising under the state wrongful death statute, N.D. CENT. CODE ch. 32-21 (1960). Alternatively, it could have found that the substantive rights and obligations on which Mrs. Poitra's action was founded arose under the laws of the Standing Rock Sioux Tribe, not the laws of North Dakota. The tribal code provided that, "Where appropriate, the laws of the state were the reservation is located may be employed to determine civil matters." Standing Rock Sioux Tribe Code of Justice § 2.1 (July 1973). Either determination could have led to the conclusion that the state "consent" statute was not "bound up" with the rights and obligations asserted by the plaintiff and, therefore, need not apply to federal courts. *See* text accompanying notes 204-08 *supra*.

234. Poitra v. Demarrias, 502 F.2d 23, 27 (8th Cir. 1974).

235. *Id.* at 29.

236. *Id.* at 27.

237. *See* text accompanying notes 40-9, 71-4, 125-27 *supra*.

238. 344 F.2d 486 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966).

239. 366 F.2d 295 (9th Cir. 1966).

Tribe fell under the Supreme Court's decision in *Williams v. Lee*.[240] *Williams* prohibited, in the absence of congressional authorization, exercises of state jurisdiction which would infringe upon the right of Indians to govern themselves in reservation affairs.[241] For this reason, the Arizona courts in which *Littell* and *Hot Oil* were filed lacked subject-matter jurisdiction over the actions. With little more than a citation to *Woods v. Interstate Realty Co.*,[242] the Ninth Circuit held that becuase state courts lacked jurisdiction, federal courts lacked diversity jurisdiction.[243] *Szantay* and *Byrd v. Blue Ridge Rural Electric Cooperative*[244] were not considered.

VII. POLICIES WHICH MIGHT CLOSE THE FEDERAL COURTS

The two Ninth Circuit cases and *Poitra v. Demarrias* differ in an important respect from cases in which the *Szantay* approach to state "door-closing" laws has been adopted. In the former, but not the latter, a decision to entertain the action must create serious discrimination among citizens of a state. Unlike the discrimination which concerned the Supreme Court in *Erie*—discrimination against residents of the forum state in favor of non-residents[245]—it is not produced by the statutory provisions for removal of actions and it bears upon resident plaintiffs as well as resident defendants.[246] If state courts are open equally to citizens and non-citizens,[247] as is usually the case, the effect of diversity of citizenship is no more than to provide, by choice or compulsion, the alternative of a federal forum to persons who have access to a state forum. If state courts are closed to non-citizens but open to citizens, the effect of diversity of citizenship is to make available to non-citizens what citizens already have: access to some court located within the state.[248] In either situation, the relative (dis)advantage of parties to non-diverse litigation is slight, and in the latter the overall effect is to neutralize discrimination effected by state law.[249] If, however, state courts are closed to both citizens

240. 358 U.S. 217 (1959).
241. *Id.* at 223.
242. 337 U.S. 535 (1949).
243. Littell v. Nakai, 344 F.2d 486, 489 (9th Cir. 1965); Hot Oil Service, Inc. v. Hall, 366 F.2d 295, 297 (9th Cir. 1966). Curiously, Littell v. Nakai was not cited in *Hot Oil*.
244. 356 U.S. 525 (1958), *reh. denied*, 357 U.S. 933 (1958).
245. *See* notes 108-09 *supra* and accompanying text.
246. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 712 n.112 (1974).
247. This description includes cases in which citizens of a state have access to courts of other states but not their own. *See* Stephenson v. Grand Trunk Western R. Co., 110 F.2d 401 (7th Cir. 1940), *cert. granted*, 310 U.S. 623 (1940), *dismissed*, 311 U.S. 720 (1940); Miller v. Davis, 507 F.2d 308 (6th Cir. 1974); Poe v. Marquette Cement Manufacturing Co., 376 F. Supp. 1054 (D. Md. 1974).
248. *See* Interstate Realty Co. v. Woods, 168 F.2d 701 (5th Cir. 1948), *reh.*, 170 F.2d 694 (5th Cir. 1948), *rev'd*, 337 U.S. 535 (1949); Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965); Sun Sales Corp. v. Block Land, Inc., 456 F.2d 857 (3rd Cir. 1972).
249. Walker, *Foreign Corporation Laws: Re-examining Woods v. Interstate Realty Co. and Reopening the Federal Courts*, 48 N.C. L. REV. 56, 66-7 (1969); *see* Szantay v. Beech Aircraft Corp., 349 F.2d 60, 64 (4th Cir. 1965); Sun Sales Corp. v. Block Land, Inc., 456 F.2d 857, 862 (3rd Cir. 1972).

and non-citizens, the relative (dis) advantage of parties to non-diverse causes of action is very great if federal courts exercise diversity jurisdiction over similar causes of action. Residents fortunate enough to have been wronged by a non-resident have a legal remedy; those similarly wronged, but by a co-resident, do not. Residents with the misfortune of having wronged a non-resident can incur liability; others cannot.

This form of discrimination was not scrutinized in *Erie, Littell, Hot Oil Service, Inc.* or *Poitra*. The Court of Appeals panel which heard *Poitra* must have been aware of it. On the same day as its *Poitra* decision, it held in another case that there was no federal-question jurisdiction over tort actions by non-Indians against tribal Indians for injuries suffered in an automobile accident on the Standing Rock Sioux Indian Reservation.[250] Diversity of citizenship was not present, state courts lacked jurisdiction, as in *Poitra*,[251] and the tribal court lacked jurisdiction over most claims by non-Indians, including this one.[252] The plaintiffs, therefore, were left without any judicial remedy.[253] Mrs. Poitra, on the other hand, was given an entree to the federal courts because her adversary was a South Dakotan. As an Indian, she was alslo entitled to bring her action before the tribal court.[254]

Avoidance of discrimination among co-citizens, although not addressed by *Erie*, is worth of consideration as an "*Erie* policy" and weighs on the side of applying to federal courts laws closing the doors of state courts. It is, nevertheless, a policy of insufficient strength

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250. Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974).

251. Schantz v. White Lightning, 231 N.W.2d 812 (N.D. 1975).

252. The tribal court had jurisdiction over a civil action instituted by a non-Indian only if he had been resident or doing business on the reservation for at least one year and the amount in controversy did not exceed $300. Standing Rock Sioux Tribe Code of Justice § 1.2(c)(2) (July 1973).

253. Tribal codes which exclude claims by non-Indians against Indians from tribal courts but permit tribal courts to hear similar claims by Indians against other Indians may violate the "due process" and "equal protection" provisions of the "Indian Bill of Rights," 25 U.S.C. § 1302(8) (1970). Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 220 n.107. The court disposed of this issue on procedural grounds in Schantz v. White Lightning, 502 F.2d 67, 70 (8th Cir. 1974).

254. The tribal court had jurisdiction over all civil matters where all parties were "Indians within the jurisdiction of the Court." Standing Rock Sioux Tribe Code of Justice § 1.2(c)(1) (July 1973). However, had Mrs. Poitra pursued her claim in the tribal court, she would have run the risks that the court would apply tribal law instead of state law, *Id.* § 2.1, quoted at note 259 *infra*, and that its judgment would not be recognized for purposes of obtaining payment from the North Dakota Unsatisfied Judgment Fund. Note, 63 GEO. L.J. 989, 997 n.53 (1975); *see* Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 227 n.149. *But see* Schantz v. White Lightning, 502 F.2d 67, 70 n.4 (8th Cir. 1974). Motivated by its interest in enabling members of the tribe to enjoy the benefits of the fund, the tribe filed *amicus curiae* briefs in the Court of Appeals and Supreme Court favoring the exercise of federal jurisdiction over the action. Tribal law required that motor vehicles driven on the reservation comply with state automobile registration laws. Standing Rock Sioux Tribe Code of Justice § 8.3 (July 1973). One dollar of the annual registration fee in North Dakota was paid to the state unsatisfied judgment fund. N.D. CENT. CODE §§ 39-17-01, 39-17-02 (1972). The fund was open to any resident of the state who obtained an unsatisfied judgment exceeding $300 for personal injuries or death in "any court in this state." N.D. CENT. CODE § 39-17-03 (1972). It is uncertain whether the Standing Rock Sioux Tribal Court is included within the term "any court in this state."

to close federal courts to diversity actions. When citizens of a state have decided to exclude certain actions from their courts, it is not unjust to hold them to their decision *inter se* while not applying it to non-citizens, who had no voice in the decision-making process. Any discrimination is of the citizens' own making. An non-citizen wronged by a citizen ought not be denied a remedy if closing the federal courts does not give effect to an identifiable state policy on a matter within state powers. The non-citizen wrongdoer's complaint of the advantage enjoyed by his victim vis-a-vis citizens wronged by co-citizens should not prevail. All persons, citizens and non-citizens, have the obligation to avoid conduct which is wrongful under state law, whether or not a person injured by that conduct would have a remedy. The differential treatment of diverse and non-diverse litigation under these circumstances does not give contradictory or uncertain instructions for planning primary conduct.[255] That some persons injured by wrongful conduct cannot receive redress, for want of a court in which a claim can be heard, is not a sufficient reason to deny redress to other persons, similarly injured, whose claims meet the statutory requirements of diversity jurisdiction.

The same analysis applies when federal law closes the doors of state courts to litigation against tribal Indians.[256] The doors open if a state assumes jurisdiction with tribal consent.[257] If the members of a tribe have not given their consent, it is not unjust to hold them to their decision *inter se*, while not applying it in diversity actions to non-members, who had no voice in the decision-making process. Any distinction between intra-tribal causes of action and other

255. "[D]ebilating uncertainty in the planning of everyday affairs," produced by "two conflicting systems of law controlling the primary activity of citizens," concerned Justice Harlan in Hanna v. Plumer, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring). Professor H. M. Hart once observed that "People repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown." Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 490 (1954). *Poitra v. Demarrias* is unlikely to cause any nervous breakdowns. Opening the federal courts to actions over which state courts lack jurisdiction does not produce a situation in which a person who cannot predict or control where he will be sued will lose in federal court if he does X and lose in state court if he does not. At most, it produces a situation in which a person must do X in order to ensure that he will not lose in either court. *See* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 710-12 (1974).

256. In the absence of federal enabling legislation, states have no authority to interfere with Indian tribal self-government. Williams v. Lee, 358 U.S. 217, 220 (1959); McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 168-73 (1973). The federal "consent" statute, 25 U.S.C. § 1322(a) (1970), is an example of such enabling legislation, as was its predecessor, which permitted states to assume jurisdiction over reservations without Indian consent. Act of August 15, 1953, ch. 505, § 7, 67 Stat. 590, *repealed by* the Act of April 11, 1968, tit. IV, § 403(b), 82 Stat. 79. But an effect of the "consent" statute is to prohibit states from exercising jurisdiction if the Indians concerned have not consented to state jurisdiction in the manner prescribed by 25 U.S.C. § 1326 (1970), even if the state would not be interfering with tribal self-government. *See* Kennerly v. District Court of the Ninth Judicial District of Montana, 400 U.S. 423 (1971); McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 179-80 (1973); Demarrias v. Poitra, 421 U.S. 934 (1975) (White, J., dissenting).

257. 25 U.S.C. § 1322(a) (1970).

claims is of the tribe's own making. Opening the federal courts to diversity actions arising on reservations neutralizes the discrimination between actions by non-Indians against tribal Indians, which otherwise would be heard only by tribal courts or not heard at all, and actions by Indians against non-Indians, which can be heard by state courts[258] and by federal courts in the exercise of diversity jurisdiction. If conduct is wrongful under the applicable substantive law, be it federal, state or tribal,[259] a person injured by it whose claim falls under the statutory powers of a federal district court should not lack a remedy solely because other persons, similarly situated but without diversity of citizenship, have no remedy. It can be argued that, in the absence of a claim based on federal law, the federal government has no more interest than a state in the adjudication of an action arising on a reservation; therefore, a federal court should not hear an action over which state courts lack jurisdiction.[260] Still, the federal government could have no less interest in the adjudication of diversity actions against Indians than in the adjudication of diversity actions against non-Indians. A distinction between the two, based on degree of federal interest, is not warranted. If it is accepted that the state courts' want of jurisdiction does not prevent federal courts from entertaining reservation-based diversity actions by non-Indians against tribal Indians, it should also be accepted that the state courts' want of jurisdiction does not exclude similar actions brought by Indians against other Indians, such as *Poitra*. The federal interest in the adjudication of claims of Indians against other Indians is substantial.[261] A distinction between actions among Indians and actions involving non-Indians is not justified by the Indians' participation in decisions about the jurisdiction of state and tribal courts. The effect of a "door-closing" law in force in the state to which one party belongs does not depend upon whether a "door-closing" law is in force in the state to which a opposite party belongs. No weight, therefore, should be given to the circumstance that under the federal "consent"

258. Bonnet v. Seekins, 126 Mont. 24, 243 P.2d 317 (1952); McCrea v. Busch, ——Mont. ——, 524 P.2d 781 (1974); Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966); Rolette County v. Eltobgi, 221 N.W.2d 645, 648 (N.D. 1974). *See* McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 173 (1973); Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 221.

259. Many tribal codes provide for the application of state law to proceedings in tribal courts. Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 216-18, and tribal codes cited therein. Standing Rock Sioux Tribe Code of Justice § 2.1 (July 1973) provides: "Civil matters shall be governed by the laws, customs and usages of the Tribe not prohibited by the laws of the United States. . . . The laws of the state where the reservation is located may be employed as a guide. . . . Where appropriate, the laws of the state where the reservation is located may be employed to determine civil matters."

260. Comment, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445, 480-81 (1970).

261. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 179-80 (1973), reflects the view that states have no interest in the resolution of reservation-based claims unless there is a non-Indian party. It does not follow that the federal government has no interest in the resolution of reservation-based claims unless there is a non-Indian party. *See* notes 270-76 *infra* and accompanying text.

statute, a similar action against the plaintiff could not be heard in the courts of his state.

Given the task of weighing policies favoring the exercise of diversity jurisdiction against policies favoring conformity to laws closing state courts, federal courts can properly decide to close their doors to reservation-based actions against Indians only if doing so gives effect to an identifiable federal policy relating to the governance of reservation Indians. Only a pervasive federal policy of avoiding federal interference with Indian self-government could justify the blanket exclusion of such actions from federal courts. Legislative interference with tribal government has been restrained.[262] The legislative and executive branches of the federal government have embraced a policy of favoring Indian self-determination and strengthening tribal governments.[263] Federal adjudication of actions against Indians has the same effect upon tribal authority as does state adjudication: an external power ousts the tribe as exclusive arbiter of reservation-based claims.[264] The Eighth Circuit in *Poitra v. Demarrias*[265] erred in failing to recognize the interference with tribal self-government accomplished by the exercise of federal jurisdiction over private tort and contract claims.[266] If adjudication in *Williams v. Lee*[267] of an action to recover the price of goods sold on credit would "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves,"[268] so would adjudication in *Poitra* of a tort claim arising from an automobile accident.[269] But to conclude that federal adjudication and

262. *E.g.*, Major Crimes Act, 18 U.S.C. §§ 1153, 3242 (1970); "Indian Bill of Rights," 25 U.S.C. §§ 1301-1303 (1970).

263. Indian Self-Determination and Education Assistance Act, 25 U.S.C.A. §§ 450, 450a (Supp. 1976); S. Con. Res. 26, 92d Cong., 1st Sess., 117 Cong. Rec. 46383 (1971) (passed Senate, Dec. 11, 1971; did not pass House); R. Rpt. No. 93-1600, 93rd Cong., 2d Sess. (1974); President Lyndon Johnson, *Message on the American Indian—The Forgotten American*, H.R. Doc. No. 272, 90th Cong., 2d Sess., 114 Cong. Rec. 5394, 5517 (1968); President Richard Nixon, *Message on American Indians*, H.R. Doc. No. 363, 91st Cong., 2d Sess., 116 Cong. Rec. 23131, 23258 (1970); President Richard Nixon, Special Introduction to Symposium on Indian Law, 48 N.D. L. Rev. 529 (1972).

264. Note, 63 Geo. L.J. 989, 999 (1975), *criticizing* Poitra v. Demarrias, 502 F.2d 23, 29 (8th Cir. 1974); *see* Littell v. Nakai, 344 F.2d 486, 489 (9th Cir. 1965).

265. 502 F.2d 23, 28-9 (8th Cir. 1974).

266. Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966), and Hot Oil Service Inc. v. Hall, 366 F.2d 295 (9th Cir. 1966), (see text accompanying notes 40-9, 237-44 *supra*) were distinguished on the ground that their facts put "the non-interference and tribal self-government policies from *Williams* [*v. Lee*, 358 U.S. 217 (1959)] . . . in issue" so that "the refusal by the courts to accept jurisdiction seems correct. . . ." Poitra v. Demarrias, 502 F.2d 23, 29 (8th Cir. 1974). In *Littell v. Nakai*, the plaintiff complained of the tribal chairman's alleged tortious interference with the performance of the plaintiff's contract with the tribe. *Hot Oil* involved an agreement for the lease of facilities on tribal land.

267. 358 U.S. 217 (1959).

268. *Id.* at 223.

269. Schantz v. White Lightning, 231 N.W.2d 812, 814-15 (N.D. 1975); *see* Littell v. Nakai, 344 F.2d 486, 490 (9th Cir. 1965). Under Williams v. Lee, 358 U.S. 217 (1959), state courts lacked jurisdiction over actions against Indians for torts occurring on reservations. Sigana v. Bailey, 282 Minn. 367, 164 N.W.2d 886 (1969) (Indian plaintiff; automobile accident); Valdez v. Johnson, 68 N.M. 476, 362 P.2d 1004 (1961) (same); Smith v. Temple, 82 S.D. 650, 152 N.W.2d 547 (1967) (same); Kain v. Wilson, 83 S.D. 482, 161 N.W.2d 704 (1968) (non-Indian plaintiff; wrongful possession and use of land);

state adjudication are "equally disruptive of [federal] policy," as the Ninth Circuit did in *Littell v. Nakai*,[270] assumes the existence of a policy against federal interference with tribal government correlative to the judicially recognized policy against state interference,[271] which is furthered by the federal "consent" statute.[272] This assumption fails to note that the Supreme Court's protection of tribal sovereignty[273] and Congress' enactment of the "consent" statute reflect only a purpose to control state interference.[274] Moreover, it ignores the substantial and long-existing differences between the relationship of Indians to the national government and the relationship of Indians to the states.[275] The extent of federal control over tribal governments, particularly the breadth of powers residing in the Secretary of the Interior,[276] belies the establishment of a policy against federal interference complimentary to the policy against state interference. In the absence of a federal policy which could outweigh policies favoring the exercise of diversity jurisdiction, the Eighth Circuit was correct to hold in *Poitra v. Demarrias* that 25 U.S.C. § 1322(a) did not, by preventing the exercise of state jurisdiction over the action, prevent the exercise of federal diversity jurisdiction.

VIII. CONCLUSION

Erie R. Co. v. Tompkins and its progeny do not require a fed-

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Schantz v. White Lightning, 231 N.W.2d 812 (N.D. 1975) (non-Indian plaintiffs; automobile accident). *See* Ransom & Gilstrap, *Indians—Civil Jurisdiction in New Mexico—State, Federal and Tribal Courts*, 1 N.M. L. REV. 196, 207-11 (1971). In McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 179-80 (1973), the Supreme Court implied that a state cannot assume jurisdiction over a reservation-based action to which only Indians are parties, even without infringing upon Indians' rights to self-government, because the state has no interest in the resolution of the claim.

270. Littel v. Nakai, 344 F.2d 486, 489 (9th Cir. 1965). Note, 63 GEO. L.J. 989, 999-1000 (1975), agrees.

271. Williams v. Lee, 358 U.S. 217 (1959); McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 168-70 (1973).

272. 25 U.S.C. § 1322(a); Poitra v. Demarrias, 502 F.2d 23, 27-9 (8th Cir. 1974).

273. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); United States v. Kagama, 118 U.S. 375 (1886); Williams v. Lee, 358 U.S. 217 (1959); McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).

274. Poitra v. Demarrias, 502 F.2d 23, 27-9 (8th Cir. 1974). *See* McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 (1973): "[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on *federal pre-emption*. . . . The modern cases thus tend to avoid reliance on platonic notions of Indian sovreignty and to look instead to the applicable treaties and statutes which define the *limits of state power*," (emphasis added). The Court's holding in Kennerly v. District Court of the Ninth Judicial District of Montana, 400 U.S. 423 (1971), that tribal consent to state jurisdiction is ineffective unless given in the manner prescribed by 25 U.S.C. § 1326 (1970) reflects a weak regard for tribal self-determination. *See id.* at 431-32 (Stewart, J., dissenting).

275. *See generally* Comment, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445 (1970); Green, *North America's Indians and the Trusteeship Concept*, 4 ANGLO-AM. L. REV. 137 (1975).

276. M. PRICE, LAW AND THE AMERICAN INDIAN 717-30 (1963). These powers include "management of all Indian affairs and of all matters arising out of Indian relations" through the Commissioner of Indian Affairs, 25 U.S.C. § 2 (1970); the issuance of charters of incorporation to tribes, 25 U.S.C. § 477 (1970); approval of contracts made by tribes, 25 U.S.C. § 81 (1970); the employment and compensation of legal counsel, 25 U.S.C. §§ 81, 476, 1331 (1970); leases of tribal lands, 25 U.S.C. § 415 (Supp. III 1973); and tribal constitutions, bylaws and amendments thereto, 25 U.S.C. § 476 (1970).

eral district court to refrain from adjudicating an action whenever state or federal law withholds jurisdiction over the action from the courts of its state. The court may decline to apply to itself "door-closing" laws prevailing in state courts if this does not frustrate an identifiable state policy on a matter of state concern. A state or federal law denying to state courts jurisdiction over reservation-based actions against tribal Indians is based upon the very absence of state concern. State policy, therefore, cannot be frustrated by the exercise of diversity jurisdiction. Neither is federal policy frustrated, for the federal desire to strengthen tribal self-government and foster Indian self-determination does not extend so far as to conflict with federal-court resolution of civil claims against Indians. Even though the result is to create discrimination between parties to diverse claims and parties to non-diverse claims, federal courts are obliged to entertain actions against tribal Indians arising on a reservation when they fall within the grant of diversity jurisdiction in 28 U.S.C. § 1332(a).