average person thinks in terms of legal consideration, but it is equally foolish to contend that he makes no distinction between a gratuitous promise to give and that which may in effect become a lien on his possessions. For most people the moral obligation engendered by the subscription may well disappear if circumstances change unexpectedly.[27]

The factors which have actually influenced the courts to decide against the charity in the few modern cases which have reached that result[28] can only be conjectured.[29] Yet the methods of big business have moved into the field of charities. The magnitude and pressure tactics of these operations warrant reconsideration of the public policy which has accorded to charitable subscriptions a preferential position in the law.

FEDERAL COURTS

EFFECT OF STATE STATUTE ON JURISDICTION OF FEDERAL COURTS

A Tennessee corporation acted in Mississippi as realty agent for a Mississippi resident, without having qualified to

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mentioned here only because it does have a substantial bearing on the strength of the moral obligation. A person who believes that he is making a conditional promise certainly does not feel as great a moral obligation as the person who knows that he is making a binding contract.

27. As pointed out *supra* note 18, Yale University did not even contact those who did not pay their subscriptions during the depression of the 1930's.

28. American University v. Todd, 39 Del. 449, 1 A.2d 595 (1938); American University v. Conover, 115 N. J. L. 468, 180 Atl. 830 (1935); Floyd v. Christian Church Widows and Orphans Home, 296 Ky. 196, 176 S. W.2d 125 (1943).

29. In American University v. Conover, *supra* note 28, as well as in the principal case, there was present both an "implied promise" of the organization and the recited promises of others. The decisions in both cases clearly imply that the courts did not believe these factors to constitute consideration capable of supporting a contract. In each case the court took care to point out that there was no evidence that the organization had taken any substantial action in reliance upon the subscription despite the general allegations of reliance, which had been held sufficient in previous cases. This would seem to indicate that the courts are tending to be less liberal in finding consideration for charitable subscriptions. However, no recent American case has been found where a charitable subscription has been held unenforceable solely for want of consideration while the subscriber was still living. Since the subscription has always been considered in contract terms whether the subscriber has died should make no difference. But it is possible that the courts are influenced by the policy of the Wills Acts and hence are more critical toward so-called contracts which resemble testamentary dispositions.

do business in Mississippi as required by statute.[1] Upon the Mississippi resident's failure to pay the corporation its brokerage commission, the corporation brought an action in the United States District Court for the Northern District of Mississippi. Federal jurisdiction was grounded upon the diverse citizenship of the parties. The district court dismissed the action, ruling that the realty corporation's noncompliance with the Mississippi statute rendered the contract void. The Court of Appeals for the Fifth Circuit reversed. It held that the Mississippi statute was jurisdictional and made the contract unenforceable in the courts of the state, but that the statute was without effect upon the jurisdiction of the federal court.[2] *Interstate Realty Co. v. Woods*, 168 F.2d 701 (5th Cir. 1948). On rehearing, the judgment for the corporation was reaffirmed, despite the argument that the United States Supreme Court's opinion in *Angel v. Bullington*[3] compelled the federal courts to refuse to entertain the

1. MISS. CODE ANN. (1942) §§ 5319, 5339, 5343.

2. "The general rule is, that a statute which merely closes the courts of the state to a non-complying foreign corporation doing business within a state, and which does not expressly or constructively declare the contract void, does not prevent the maintenance of an action by such foreign corporation in a federal court sitting in that state. . . . This would not be true if the contract were void in the state where it was executed." Peter & Burghard Stone Co. v. Carper, 96 Ind. App. 554, 572, 172 N. E. 319, 325 (1932). *See* David Lupton's Sons Co. v. Automobile Club of America, 225 U. S. 489, 496 (1911); Metropolitan Life Insurance Co. v. Kane, 117 F.2d 398 (7th Cir. 1941); 8 THOMPSON, CORPORATIONS § 6672 *et seq.* (3d ed. 1927); Note, 133 A. L. R. 1171, 1172-1183 (1941).

3. 330 U. S. 183 (1947). Bullington, a citizen of Virginia, had sold Virginia land to Angel, a citizen of North Carolina. For the unpaid balance of the purchase price, Angel executed notes secured by a deed of trust on the land. The trustees sold the land upon default on payment of the notes. An action for the deficiency was brought by Bullington in the North Carolina courts. The Supreme Court of North Carolina reversed a judgment for Bullington entered in the court below, ruling that the action was not maintainable because of a North Carolina statute which prohibited the recovery of deficiency judgments in the circumstances. Bullington recommenced his action in a North Carolina federal district court. A judgment for Bullington was affirmed by the court of appeals, but reversed by the United States Supreme Court in an opinion which has given rise to a great deal of confusion. Apparently the decision rests upon two grounds: 1) In the state courts, questions involving the contracts, privileges and immunities, and full faith and credit clauses of the Federal Constitution might have been decided. But they were avoided by the state court's holding that the North Carolina statute had only the effect of closing the courts of the state to deficiency claims. In Mr. Justice Frankfurter's view, these constitutional claims were reviewable upon appeal from the adjudication of the North Carolina Supreme Court. Because Bullington forewent such an appeal, the North Carolina judgment was declared to be res judicata upon the issues raised

corporation's action. *Interstate Realty Co. v. Woods*, 170 F.2d 694 (5th Cir. 1948).[4]

Since the decision in *Erie R. R. v. Tompkins*[5] made state law the lodestar for federal courts sitting in diversity cases,[6] the rule of that case has been invoked repeatedly to extend the domain in which state law is to guide. The Supreme Court has said that the rule of the *Erie* case requires federal obeisance to state rules of conflict of laws,[7] state statutes of limitations,[8] state notions of public policy,[9] and state rules allocating the burden of proof.[10] In the recent case of *Angel v. Bullington*, it was open to the United States Supreme Court to answer another question—the question posed by the instant case—by deciding whether or not, under *Erie* principles, federal courts in diversity cases must close their doors to suitors where state courts have refused to take jurisdiction.[11] Much in *Angel* suggests that a state's determination

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by Bullington in the federal district court. 2) The North Carolina statute withdrawing jurisdiction from the courts of the state is expressive of state policy, and so is controlling upon the federal court, under the rule of *Erie R. R. v. Tompkins*. Mr. Justice Reed, in dissent, conceiving that the opinion of the Court was grounded upon res judicata, stated that that doctrine had been misapplied by the majority. In a separate dissenting opinion, Mr. Justice Rutledge announced tht he, too, found the prevailing opinion's use of res judicata a novel one. Justice Rutledge criticized, too, the Court's mixing of the two reasons for decision, either one of which if valid would have been sufficient to support the result.

4. The Court of Appeals for the Seventh Circuit has recently held that the Illinois statute prohibiting the importation into that state of wrongful death actions has not the effect of closing the doors of the federal courts in Illinois to a plaintiff suing on a cause of action which arose in Missouri. Judge Major cited the principal case as one buttressing his conviction that anything said in *Angel v. Bullington* respecting the efficacy of state jurisdictional statutes to limit the jurisdiction of federal courts in diversity cases was entirely argumentative. Davidson v. Gardner (two cases), 172 F.2d 188 (7th Cir. 1949).

5. 304 U. S. 64 (1938).

6. The decision in *Erie R. R. v. Tompkins* has been said to compel application of state law in diversity cases where a failure to apply it would produce a substantial variance in the outcome of the case. *See* Angel v. Bullington, 330 U. S. 183, 192 (1947); Guaranty Trust Co. v. York, 326 U. S. 99, 109 (1945); Weiss v. Routh, 149 F.2d 193, 195 (2d Cir. 1945). It must be understood throughout the discussion which follows that reference to the duty of federal courts to follow state law is pertinent only to cases arising under diversity jurisdiction.

7. Klaxon Co. v. Stentor Co., 313 U. S. 487 (1941).

8. Guaranty Trust Co. v. York, 326 U. S. 99 (1945).

9. Griffin v. McCoach, 313 U. S. 498 (1941).

10. Cities Service Oil Co. v. Dunlap, 308 U. S. 208 (1939); *cf.* Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940).

11. To say that the question in these cases is one respecting the

respecting the jurisdiction of its own courts is binding upon the federal courts.[12] But the majority's reliance, as well, upon principles of res judicata so obscures the reasoning of the Court that confident interpretation of *Angel v. Bullington* is impossible.[13] Lower federal courts, in consequence, are now at pains to learn to what extent, if at all, the opinion in *Angel* relies upon the principles of *Erie*.[14]

Erie R. R. v. Tompkins was the rejection of a system which offered an out-of-state plaintiff opportunity to select whichever of two available tribunals afforded him the more advantageous rules.[15] In terminating the pre-*Erie* system of two bodies of law operating within one state, the United

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extent to which a state may "bind" a federal court is to overlook the fact that the decision in *Erie R. R. v. Tompkins* was no more than an interpretation of the Rules of Decision Act. REV. STAT. § 721 (1875), 28 U. S. C. § 725 (1940). Since this is true, application of state law by a federal court in a diversity case follows as a result of adherence to the authoritatively construed mandate contained in a federal statute, and not as a result of a subjugation attempted to be imposed by the state legislature and courts. *See* Angel v. Bullington, 330 U. S. 183, 210 (1947) (dissenting opinion).

12. Prior to the *Erie* decision, it had been held that a state could not, by closing the doors of its courts in certain cases, limit in like manner the jurisdiction of the federal courts hearing diversity cases in the state. David Lupton's Sons Co. v. Automobile Club of America, 225 U. S. 489 (1911). The *per curiam* opinion filed upon rehearing of the instant case manifests the court's conviction that the *David Luptons' Sons Co.* case is, nothwithstanding *Erie* and *Angel*, expressive of the going rule respecting the ability of a state to limit by its own jurisdictional statutes the jurisdiction of federal courts in diversity cases. The same opinion has, in effect, been expressed in the Seventh Circuit. *See* Davidson v. Gardner (two cases), 172 F.2d 188 (7th Cir. 1949); Stephenson v. Grand Trunk W. R. R., 110 F.2d 401, 405 (7th Cir. 1940). But see note 14 *infra*.

13. An excellent note treats the mixed grounds of decision in *Angel v. Bullington*. See Note, *State Statutes Depriving State Courts of Jurisdiction as Affected by the Rule of Erie v. Tompkins*, 56 YALE L. J. 1037 (1947).

14. In the course of the opinion in *Angel v. Bullington*, Mr. Justice Frankfurter said: "Cases like David Lupton's Sons Co. v. Automobile Club . . . are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with Erie R. Co. v. Tompkins." Angel v. Bullington, 330 U. S. 183, 192 (1947). If the conclusion contained in the passage is a necessary part of the decision, *Angel* is, it seems, properly regarded as decided in part on *Erie* principles.

15. The federal diversity jurisdiction had, by the time of *Erie*, become a vehicle for discrimination against residents of the state in which the federal court was sitting. Black & White Taxicab & T. Co. v. Brown & Yellow Taxicab & T. Co., 276 U. S. 518 (1928). *See* Erie R. R. v. Tompkins, 304 U. S. 64, 74 (1938). And see Parker, *Erie v. Tompkins in Retrospect: An Analysis of Its Proper Area and Limits*, 35 A. B. A. J. 19, 21 (1949); Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356, 362-4 (1933); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L. Q. 499, 524-7 (1928).

States Supreme Court gave the separate states exclusive power, in diversity cases brought in a federal forum, to predetermine the legal consequences to flow from facts. If that power may be held to comprehend state capacity, in effect, to limit the jurisdiction of the federal courts, the argument to that conclusion must rest upon analogy between state jurisdictional statutes and those state enactments and decisions which, by force of the rule in *Erie*, a federal court admittedly must apply.[16]

A state may withdraw or qualify the jurisdiction of its courts to hear a case or to enter judgment on an admitted cause of action for either of two reasons. The state may have determined that because of some objection to the plaintiff or to his claim, its courts are not to be open to him at all, or not until certain conditions are complied with.[17] Or the state may have determined that because efficient administration of the judicial system makes such a rule necessary, wise, or convenient, the plaintiff is not to be heard in the state courts at all, or not until certain conditions are complied with.[18] In the one situation, withdrawal of

16. In general, as *Erie* principles are currently verbalized, state statutes and decisions relating to "substance" are binding upon federal courts in diversity cases. Those which go to "procedure" are not. See note 20 *infra*.

17. The North Carolina statute involved in *Angel v. Bullington*, for example, prevented the holder of notes secured by deeds of trust upon real property from recovering a deficiency judgment in the event of sale of the realty. That statute has been identified as one evidencing a solicitude for the economic welfare of the state's debtors—a non-administrative measure, certainly. See Note, 56 YALE L. J. 1037, 1039 (1947). Similarly reflective of a concern for debtors was the New York mortgage moratorium law, which had, generally, the effect of withdrawing from the courts of the state jurisdiction to entertain mortgage foreclosure proceedings during the legislatively-extended redemption period. East New York Savings Bank v. Hahn, 326 U. S. 230 (1945).

18. A state's determination, under principles of *forum non conveniens*, that its courts are inadequate to the entertainment of actions of a certain sort should, to the extent that such a decision is one upon entirely internal, administrative matters, bind no other judicial system. It may be true, of course, that a federal court, the jurisdiction of which is invoked on grounds of diversity of citizenship, will discover that an action rejected by the state system because of inappropriateness of the forum is no less inconveniently brought before it. Dismissal of the case by the federal court in those circumstances would result not from the federal court's application of state law, but rather from an independent judgment respecting its own adequacy as a forum. That the federal court might list as indicia of inconvenience the same factors which had prompted the state system to decline jurisdiction would be coincidental, and not indicative of the projection of state principles of *forum non conveniens* into the federal court by dint of *Erie*. The United States Supreme Court has not

jurisdiction is motivated by a state policy judgment concerning the parties or the nature of the dispute between them. In the other, the withdrawal of jurisdiction evidences the state's conviction that, simply as a matter of administration, its judicial system has not the time, or the money, or the machinery to resolve the particular dispute. Declaratory of the principle that state policy should not be subverted by choice of a federal forum, the decision in *Erie R. R. v. Tompkins* persuades that only the first, or non-administrative state jurisdictional enactment is to be followed by the federal courts in diversity cases. That such a jurisdictional statute, expressive of state public policy, is closely analogous to a state rule which creates or withholds a traditional "substantive" right is readily apparent.[19] So different from these are the laws adopted in aid of the state's administrative machinery that only an absurd turn of reasoning could find in *Erie* an attempt to compel federal compliance with the latter.[20]

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passed directly on whether a federal court may apply its own *forum non conveniens* rules in a diversity case. In Gilbert v. Gulf Oil Corp., 330 U. S. 501 (1947), a Virginia resident brought an action in a New York federal district court for damages allegedly caused by the negligence of a Pennsylvania corporation in the delivery of gasoline to the plaintiff's warehouses in Virginia. The cause was dismissed by the district court because of its opinion that the New York law as to *forum non conveniens*, which had the case been brought in the New York state courts would have compelled dismissal, applied in the federal courts under the *Erie* rule. Following a reversal by the Court of Appeals for the Second Circuit, the United States Supreme Court held that the dismissal by the district court had been proper. The *Erie* premise from which the opinion in the district court had proceeded was not, however, adopted by the Supreme Court. Rather, the majority applied the federal rule as to the discretion of a court to employ the doctrine of *forum non conveniens*, which rule, to the extent that the case called for application of the doctrine, was considered to resemble the New York rule so nearly as to make unprofitable an ". . . inquiry as to the source from which [the federal] rule must flow." Gilbert v. Gulf Oil Corp., *supra* at 509. To the same effect is language in Koster v. Lumbermens Mutual Casualty Co., 330 U. S. 518, 529 (1947). By the 1948 revision of Title 28 of the United States Code, *forum non conveniens* is no longer ground for dismissal of an action brought in a federal district court. A district court may now, in its discretion, transfer a cause to a more appropriate forum. 28 U. S. C. § 1404 (a) (1948).

19. See note 16 *supra*, and note 20 *infra*.

20. Employing the terminology of the cases which have effected the extensions of the rule of *Erie R. R. v. Tompkins*, a state jurisdictional statute withdrawing jurisdiction from state courts for purely administrative reasons would not be binding upon federal courts in diversity cases, because such a statute is "procedural." See note 16 *supra*. The terms "substance" and "procedure" are unfortunate here, for they connote the existence of a line upon one or the other side of which any case may be placed, with the ultimate determination that

Given the validity of the distinction drawn between the two types of jurisdictional statutes, the crucial task of characterizing a particular statute as of one type or the other devolves upon the federal court in which the propriety of granting a trial on the merits is challenged.[21] Characterization of a state jurisdictional statute as of the purely administrative, non-binding type would be clearly called for in the case of an enactment withdrawing jurisdiction for reasons of *forum non conveniens*. Confronted by such a statute, a federal court would be free to exercise an independent judgment respecting the wisdom of entertaining suits excluded from the courts of the state by reason of the enactment.[22] Federal divergence from state *forum non conveniens* practice could be productive of none of the mischief which the decision in *Erie* sought to erase.[23] It is difficult to argue that a state's unwillingness to clutter its dockets or to inconvenience witnesses should have any effect on the power of a federal district court to entertain cases brought before it.[24] Not every case would be as clear. A state law withholding from state courts the power to entertain suits in which injunctions against labor unions were

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Erie principles apply or not dependent upon an inspection of the relation of case to line. COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS c. VI (1942). *But see* Angel v. Bullington, 330 U. S. 183, 198 (1947) (dissenting opinion). More properly, it would seem, application of the rule of *Erie R. R. v. Tompkins* should be made to depend upon an informed determination of the state's purpose as declared in its common or statutory law. That state policy is crucial in such cases has been recognized. *See* Angel v. Bullington, *supra* at 201 (dissenting opinion); Guaranty Trust Co. v. York, 326 U. S. 99, 109 (1945); Griffin v. McCoach, 313 U. S. 498, 504 (1941). And see Note, 56 YALE L. J. 1037, 1040 n.25 (1947). Questions of jurisdiction have been, on occasion, at least, treated as "procedural." Mr. Justice Reed, dissenting in the *Angel* case, said: "In matters of procedure and jurisdiction, I take it, no one would contend that the doctrine of Erie Railroad is applicable." Angel v. Bullington, *supra* at 198; *see* Stephenson v. Grand Trunk W. R. R., 110 F.2d 401, 405 (7th Cir. 1940).

21. In any case to which the rule of *Erie R. R. v. Tompkins* may be applied, it is, of course, the federal court's classification of the state statute or common law which is decisive. *See* Sampson v. Channell, 110 F.2d 754, 758 (1st Cir. 1940).

22. See note 18 *supra*.

23. See note 15 *supra*.

24. The courts of the state of New York customarily refuse to entertain actions upon foreign causes of action brought by foreign plaintiffs against foreign defendants. In certain cases, something less than complete "foreign-ness" has moved New York courts to decline jurisdiction on grounds of inconvenience. Gainer v. Donner, 140 Misc. 841, 251 N. Y. S. 713 (1931); Pietraroia v. New Jersey & H. R. R., 197 N. Y. 434, 91 N. E. 120 (1910).

prayed might, on the one hand, be expressive of state policy concerning the inviolability of labor's right to use its economic weapons; on the other hand, such a statute might be enunciative, merely, of the state's conviction that its judicial machinery is unsuited for the resolution of certain complex economic problems.[25] Although difficulties there may be, the nature of the federal judge's inquiry is clearly indicated: He must inform himself as to the history and purpose of the state law invoked to control his action.[26]

25. As the text suggests, problems might arise concerning the efficacy of the "little Norris-LaGuardia" acts as limitations upon the jurisdiction of federal courts in diversity cases. Surely each such statute reflects not a state judgment respecting the adequacy of its judicial machinery to handle labor cases, but rather a state policy concerning the economic balance which ought to obtain between management and labor. See, for example, IND. STAT. ANN. (Burns, 1933) § 40-501, *et seq.*, especially § 40-502.

26. Quite recently, the Court of Appeals for the Third Circuit passed upon a question which is near the problem in the principal case. In Beneficial Industrial Loan Corp. v. Smith, and Cohen v. Beneficial Industrial Loan Corp., (two cases), 170 F.2d 44 (3d Cir. 1948), a minority shareholder, resident in New Jersey, commenced in a federal district court in New Jersey a shareholder's derivative suit against a Delaware corporation. By the terms of a New Jersey statute having to do with derivative suits, a shareholder whose holdings are less in value than the amount therein prescribed may be required by the corporation in whose right the action is brought to give security for reasonable expenses which may be incurred by the corporation in connection with the suit. Rule 23 of the Federal Rules of Civil Procedure sets up entirely different rules governing the same subject. Here, the corporation had moved in the court below for an order requiring the furnishing of security. The district court determined that the New Jersey statute is "remedial," and therefore not binding upon a federal court in a diversity case. In disposing of the case upon appeal, the Court of Appeals for the Third Circuit reversed, declaring that the statute in question was a legislative representation of important New Jersey public policy, not to be undercut by the accident of diverse citizenship. Significant in the instant context is the method whereby the circuit court fixed upon the proper classification of the statute before it. Not content with the district court's identification of the law as a "remedial" one, the circuit court went to relevant legal and non-legal materials to determine exactly what had moved the New Jersey legislators to the enactment of the statute. Those sources afforded rather conclusive proof that the measure had been passed with an eye to the prevention of losses to corporations through "strike" suits. By way of underlining the approach of the circuit court, it should be pointed out that the substance-procedure rubric was abandoned as a legal tool in favor of a realistic examination into the *purposes* underlying the statute, with application of *Erie* principles dependent upon the conclusions discovered by the examination. The United States Supreme Court has granted certiorari in the *Smith* and *Cohen* cases. 17 U. S. L. WEEK 3257 (U. S. Mar. 1, 1949). The brief for petitioners in the *Cohen* case urges the inapplicability in the Federal courts of the New Jersey statute. Rule 23 of the Federal Rules of Civil Procedure, runs petitioners' argument, is a comprehensive enactment regulating all phases of abuse of shareholders' suits. And in a field totally occupied by a federal statute, state enactments are of no effect in the federal courts under the Rules of Decision Act.

It has been amply demonstrated in recent years that the traditional substance-procedure distinction is an imperfect guide to a satisfactory application of the *Erie* rule. The distinction developed herein between state rules embodying policy judgments and those rules developed simply to promote the smooth functioning of the state judicial system seems to provide an accurate analytical tool with which may be fashioned a sound solution to any *Erie* problem.[27] Thus, state statutes or decisions imposing upon tort defendants the burden of proving contributory negligence may be declaratory of a judgment by the state that plaintiffs should be aided in securing redress.[28] Insofar as the state statutes and decisions allocative of the burden of proof are not found to be purely administrative, federal courts should be without discretion to permit a variance from the state-prescribed rules. On the other hand, state rules calculated merely to expedite business in the judicial system of the state—*e.g.*, rules governing the printing of briefs—should not be considered binding upon federal courts in diversity cases.[29]

This analysis is quickly dispositive of the issue in the principal case. The court's initial inquiry should have led it to an examination of the nature and purpose of the statute at hand. Rather clearly, the Mississippi statute closing the

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Petitioner contends, further, that since Rule 23 is characterized as a rule of procedure, similar or conflicting state rules must also be classified as procedural. Brief for Petitioner, pp. 13-18.

27. The distinction is, moreover, a tool useful in rationalizing all that hitherto has been done in the name of *Erie R. R. v. Tompkins*. See cases cited notes 7-10 *supra*.

28. Professor Cook has pointed out that a statute shifting the burden of proof may be labeled "procedural" or "substantive" dependent upon the part the statute plays in the case in which the label is affixed. COOK, *op. cit. supra* note 20, at 167, *et seq.* Where the effect of such a statute is to shift the burden of proof merely as a matter of trial convenience, the statute is termed "procedural." *Cf.* Sackheim v. Pigueron, 215 N. Y. 62, 109 N. E. 109 (1915). On the other hand, when the burden of proving an element is laid upon the party to whose case the point is vital, the incidence of the burden is considered a matter of "substance." *Cf.* Southern Ry. v. Prescott, 240 U. S. 632 (1915); Central V. Ry. v. White, 238 U. S. 507 (1914).

29. Certain state judicial practices are so patently concerned solely with internal notions of trial convenience that any uncertainty about their applicability in the federal courts under the Rules of Decision Act was early dispelled. *See* Vicksburg & M. R. R. v. Putnam, 118 U. S. 545, 553 (1886) (state rule forbidding comments on evidence from the bench not controlling in federal courts); Nudd v. Burrows, 91 U. S. 426, 441, 442 (1875) (state rule permitting retirement of jury with written instructions not controlling in federal courts).

doors of the state courts to non-complying foreign corporations is founded on no determination that the Mississippi courts are administratively inadequate to dispose of such suits. Certainly the Mississippi statute expresses, rather, a policy judgment to the effect that a foreign corporation not meeting the standards prescribed by the state of Mississippi should not be accorded the privilege of using the state's courts.[30] It was this type of determination that the *Erie* case consigned to the exclusive power of Mississippi. No independent judgment was intended to be allowed the federal court[31] which should therefore have refused to entertain the case, precisely as a state court would have refused.

GOVERNMENT CORPORATIONS

LEGAL RESPONSIBILITY OF FEDERAL AGENCIES

A perennial dogma asserts that when a government corporate agency appears in court it enjoys a preferred legal status. That preference in its most extreme form denies all amenability to suit. But even if suability is determined, preferential treatment still may be accorded by limiting the kinds of liability to which the agency is subject, or the burdensome incidents of suit which it would otherwise bear. In either case the judicially-created notion of preference is rooted in the historic concept that suit does not lie against an unconsenting sovereign.[1]

30. Disregard of state statutes denying access to courts of the state to non-complying foreign corporations has been held to be subversive of a "policy [of the state] to protect [its] citizens against the fraud and imposition of insolvent and unreliable corporations, and to place them in an attitude to be reached by legal process from . . . courts [of the state] in favor of citizens having cause of complaint." Alabama W. R. R. v. Talley-Bates Const. Co., 162 Ala. 396, 50 So. 341, 342 (1909).

31. The Federal Constitution is, of course, prescriptive of the limits beyond which a state may not go in restricting the jurisdiction of the courts of its own system. *See* McKnett v. St. Louis & S. F. R. R., 292 U. S. 230, 233 (1934). Among the relevant limiting provisions are the contracts clause, the full faith and credit clause, the privileges and immunities clause, the due process clause, and the equal protection clause. Obviously an unconstitutional state jurisdictional statute can be of no effect in restricting the jurisdiction of a federal court sitting in a diversity case.

1. Except for the constitutional denial of federal courts' jurisdiction over suits by citizens of one state against a sovereign sister state (U. S. CONST. AMEND. XI) the doctrine of sovereign immunity