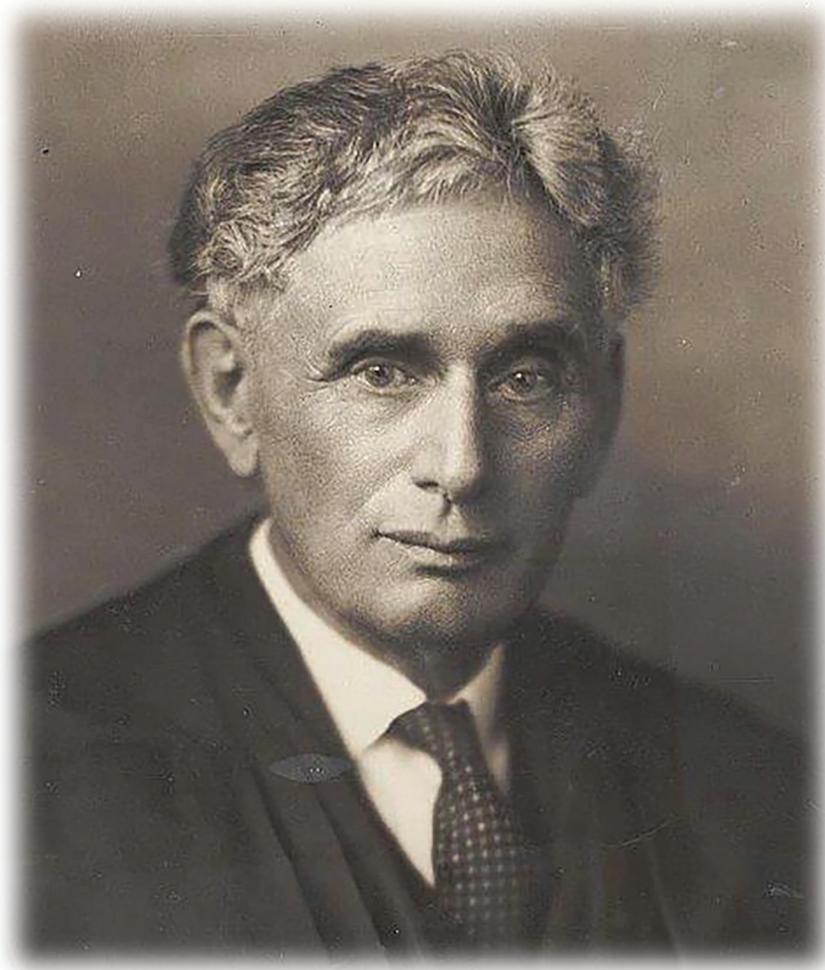


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Cases that Shaped the Federal Courts

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*Erie Railroad Co. v. Tompkins*  
1938



Justice Louis Brandeis

**Federal Judicial Center**  
2020

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## Central Question

WHAT SOURCE OF LAW WERE FEDERAL COURTS TO USE IN CASES WHERE NO STATUTE APPLIED AND THE PARTIES WERE FROM DIFFERENT STATES?

### Historical Context

Over the first half of the nineteenth century, the United States experienced what historians have called a “market revolution.” Advances in transportation and communications allowed both manufactured goods and farm products to be transported over longer distances much more quickly than could have been imagined at the close of the eighteenth century. As markets expanded and business came to be conducted not only locally, but nationally and internationally, banking and credit became crucial to the functioning of the American economy. Payments for land, raw materials, and finished goods were commonly made by negotiable instrument—a written and signed promise to pay a certain sum of money on a specific date.

A vastly larger and more complex economy based on interstate commerce and depending on more intricate financial transactions brought with it a rise in commercial litigation. Much of this litigation took place in federal court by virtue of diversity jurisdiction—the power of the federal courts to hear cases between citizens of different states, even when no federal law was involved. In 1842, a diversity case regarding a very ordinary commercial dispute produced a landmark Supreme Court decision with far-reaching implications for the American legal system.

The case of *Swift v. Tyson*, involving a plaintiff and a defendant who had not done any business with one another, illustrated how complicated financial transactions had become by the 1840s. Two men, Nathaniel Norton and Jarius Keith, sold land in Maine to George W. Tyson of New York. In partial compensation for the sale, Norton drafted a bill of exchange—a negotiable instrument by which one person directs another to pay a third party—requiring Tyson to pay John Swift of Maine, to whom Norton owed a debt. When the bill came due, Tyson refused to pay, claiming that Norton and Keith had defrauded him, not having possessed valid title to the land they had sold him. Swift sued in the U.S. Circuit Court for the Southern District of New York, which had jurisdiction based on diversity of citizenship. The judges of the circuit court, unable to come to agreement on the legal question on which the case depended, issued a certificate of division, which posed the question to the Supreme Court.

Typically, a third party such as Swift, having received the bill in the ordinary course of business, would have been entitled to payment regardless of the validity of the underlying transaction—here, the sale of the land—in which he had no involvement. A com-

plicating factor, however, was that Swift had received the bill in payment of a preexisting debt. The decisions of the New York state courts were inconsistent on the question of whether a preexisting debt was sufficient consideration—that is, something of value given in an exchange—to entitle the holder of the bill to payment where the validity of the bill was in doubt. At least some of the state court rulings suggested that someone in Swift’s position could not recover payment.

In his opinion for a unanimous Supreme Court, however, Justice Joseph Story asserted that the federal court was not obligated to follow the precedents of the New York state courts on the issue at hand. The statute governing choice of law was section 34 of the Judiciary Act of 1789, also known as the Rules of Decision Act, which provided that the federal courts were to apply “the laws of the several states” in cases not governed by a federal statute, a treaty, or the Constitution. “In the ordinary use of language,” Story wrote, “it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws.” Section 34, therefore, applied only to cases governed by a state statute. In ordinary commercial disputes to which no state statute applied, federal judges were entitled to apply “general commercial law,” deciding for themselves “what is the just rule furnished by the principles of commercial law to govern the case.”

Under the general commercial law, Story noted, it made no difference that Swift had received the bill in exchange for a preexisting debt, and he was entitled to recover payment regardless of whether the underlying transaction had been fraudulent. Scholars have suggested that Story, an ardent nationalist, hoped that the result in *Swift*, by freeing the federal courts from following the dictates of state courts in commercial cases, would facilitate a strong and independent federal judiciary as well as uniformity in commercial law.

The decades following the Civil War saw the convergence of several related trends. One was the rapidly increasing industrialization of the United States, accompanied by dramatic growth in the number, size, and power of railroads and other corporations. As businesses consolidated, the economy came to be dominated by massive corporations such as Standard Oil, International Harvester, and U.S. Steel. By the late nineteenth century, the growing prevalence of corporations and the more frequent contact Americans had with them had resulted in a steep rise in lawsuits brought by individuals against corporations. Many such cases were personal injury claims arising from industrial accidents.

As corporate litigation increased, the federal courts began to expand the *Swift* doctrine, which originally applied only to commercial disputes, to other types of cases, including property and injury suits. By the beginning of the twentieth century, courts were applying what some called “federal common law” in most diversity cases where no state statute governed. Federal common law was generally more favorable to corporate defen-

dants than state law, giving corporations a strong incentive to remove to federal court cases between diverse parties originally filed in state court. Because corporations were considered citizens only of the states in which they were incorporated, they typically had little trouble establishing diversity of citizenship in order to access the preferred federal forum.

The economic and legal changes that characterized America's Gilded Age made federal courts increasingly inhospitable forums for individual plaintiffs suing corporations. In the first few decades of the twentieth century, the alleged pro-corporate bias of the federal courts, facilitated by the *Swift* doctrine, came under attack from populists, Progressives, New Dealers, labor unions, and other groups concerned about the growth of corporate power and intrusions upon states' rights. Corporations and their attorneys, as well as social and political conservatives, argued for preservation of the *Swift* doctrine. The *Erie* case, which presented the Supreme Court with the opportunity to revisit the nearly century-old *Swift* precedent, therefore had the potential to be politically charged and highly controversial.

### **Legal Debates Before *Erie***

The first serious jurisprudential challenge to the *Swift* doctrine came from a dissenting opinion by Justice Stephen Field in the 1893 case of *Baltimore & Ohio Railroad v. Baugh*. The *Baugh* case illustrated one of the most significant areas to which *Swift* had been extended—suits involving injuries suffered by railroad workers while on the job. The Supreme Court held that the liability of the railroad to its injured employee was a matter of “general law,” which here consisted of the “fellow servant” rule, providing that no liability existed when the injury resulted from the negligence of a fellow employee. In applying this rule, the Court declined to follow the decisions of the Ohio state courts, which had carved out an exception to the fellow servant rule, providing that an employer could be liable if the injured employee was subordinate to the employee whose negligence caused the injury.

In dissent, Justice Field asserted that the case should have been governed by the law of Ohio as expressed through the decisions of its courts. “The courts of the United States cannot disregard the decisions of the state courts in matters which are subjects of state regulation,” he wrote. “Indeed, there is no unwritten general or common law of the United States on any subject. . . . The common law could be made a part of our federal system only by legislative adoption.” Because state law on a wide variety of subjects could be found only in court decisions rather than statutes, Field argued, ignoring those decisions in favor of general law “would inevitably lead to a subversion of the just authority of the State in many matters of public concern.”

A few years after joining the Supreme Court, Justice Oliver Wendell Holmes took up his pen against the *Swift* doctrine as well. In 1910 and 1917, he dissented from rulings

applying the doctrine to a real property case and an admiralty case, respectively. The most well-known of his objections to *Swift*, however, came in his dissent in the 1928 case of *Black & White Taxicab & Transfer Company v. Brown & Yellow Taxicab & Transfer Company*. In that case, Brown & Yellow Taxicab had a contract with a railroad that gave it the exclusive right to pick up passengers at the railroad's station in Bowling Green, Kentucky. When Black & White Taxicab began to pick up passengers at the station, Brown & Yellow sued both its competitor and the railroad to prevent infringement of its contractual rights.

According to the decisions of the Kentucky state courts, a contract such as the one Brown & Yellow had with the railroad was against public policy and would not be enforced. To avoid application of the unfavorable state law, Brown & Yellow reorganized its business in Tennessee, thereby creating diversity of citizenship with the Kentucky-based defendant and allowing it to bring suit in the U.S. District Court for the Western District of Kentucky. Applying general law rather than state court precedent, the district court upheld the contract and found for Brown & Yellow, and the U.S. Court of Appeals for the Sixth Circuit affirmed the judgment. The Supreme Court, applying *Swift*, affirmed as well, ruling that the Kentucky court decisions were not binding on the federal courts. "The applicable rule sustained by many decisions of this Court," wrote Justice Pierce Butler in the majority opinion, "is that in determining questions of general law, the federal courts ... are free to exercise their own independent judgment."

In his dissent (joined by Harlan Fiske Stone and eventual *Erie* author Louis Brandeis), Holmes referred to *Swift* as having created "a fallacy" that "has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." The fallacy was the belief that there existed "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." On the contrary, Holmes asserted, states had the right to decide for themselves what the law was, and a state's authority was the same regardless of whether it expressed that law through statutes or judicial decisions. Not long after the *Taxicab* case, the Supreme Court began to place limits on its application of the *Swift* doctrine. Nevertheless, *Swift* remained valid law when *Erie* came before the Court in 1938.

## **The Case**

In the early morning of July 27, 1934, Harry Tompkins was walking toward his home in Hughestown, Pennsylvania, using a footpath that ran alongside the tracks of the Erie Railroad. Although Tompkins had used the path many times before without incident, even as trains passed close by, this time would be different. As a train passed in the opposite direction he was walking, Tompkins was struck by an open door, severing his left arm and knocking him unconscious.

Under the governing state court precedent in Pennsylvania, Tompkins's personal injury claim against the Erie Railroad was doomed to failure. Case law established that a person walking along the railroad tracks was a trespasser to whom the railroad owed almost no duty of care. To avoid the application of this law, Tompkins brought his suit in the U.S. District Court for the Southern District of New York on the basis of diversity jurisdiction, the railroad being a citizen of New York. As Tompkins had hoped, the district court instructed the jury based on general law, using the more common rule that a railroad did owe a duty of care to a person using a footpath along its tracks. The jury awarded Tompkins \$30,000, and the U.S. Court of Appeals for the Second Circuit affirmed the judgment, holding that the district court had applied the correct law under the *Swift* doctrine.

The Erie Railroad appealed to the Supreme Court, but its attorney, knowing that the *Swift* doctrine was generally more favorable to corporate defendants, did not ask the Court to overturn it entirely. Instead, he asserted that the doctrine should be limited to cases in which the decisions of the state courts had not established a clear and definite rule. In Pennsylvania, he argued, the rule treating individuals such as Tompkins as trespassers was clear. Therefore, the court of appeals had erred in applying *Swift* and allowing general law to govern the case.

### **The Supreme Court's Ruling**

When *Erie* came before the Supreme Court, three members of the majority in the *Taxicab* case were no longer on the Court, and two justices of a different ideological bent, Hugo Black and Stanley Reed, had recently been appointed, suggesting that *Erie* might come out differently. On April 25, 1938, the Supreme Court ruled 6–2 in favor of the Erie Railroad, reversing the judgment of the court of appeals on the grounds that Pennsylvania law, rather than general law, should have been applied to the case. The Court's opinion, written by Justice Louis Brandeis, expressly overturned the nearly century-old precedent of *Swift v. Tyson*, though neither of the parties to the case had sought this result.

Brandeis began by noting that the *Swift* doctrine had become more controversial after the *Taxicab* case, and then went on to list the doctrine's shortcomings. The application of general law had not produced uniformity, "and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties." Moreover, *Swift* had caused the substance of common-law rights to depend on whether a case was brought in state or federal court, which had resulted in forum shopping such as that occurring in *Taxicab*. Echoing the earlier dissents of Justices Field and Holmes, Brandeis proclaimed that in common-law cases, "the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a

matter of federal concern. There is no federal general common law.” Brandeis agreed with Holmes’s opinion in *Taxicab* that the bypassing of state court precedent in favor of general law had represented “an unconstitutional assumption of powers by courts of the United States.” While his opinion was clearly grounded in concerns regarding federalism and the separation of powers, he did not cite a specific provision of the Constitution he believed had been violated by application of the *Swift* doctrine.

While Brandeis was a committed Progressive who opposed excessive corporate power and disliked the ease with which corporations could gain an advantage by removing diversity cases to federal court, none of these sentiments could be seen in his opinion. Scholars have inferred that Brandeis knew that the result in *Erie* would be met with hostility from corporate interests and conservatives, particularly because neither party to the case had sought to have the *Swift* doctrine abrogated. As a result, some believe, Brandeis kept his brief opinion dry and abstract in the hopes that the overturning of such a longstanding precedent would be seen as a neutral decision, based solely on legal principles rather than social and political concerns.

### **Aftermath and Legacy**

The result in *Erie*, while generally favorable to plaintiffs bringing suit against corporations, had unfortunate results for Harry Tompkins. The Supreme Court remanded his case to the U.S. Court of Appeals for the Second Circuit, which applied Pennsylvania law and found that the railroad owed Tompkins no duty of care. Because he had not proven that the railroad acted with reckless and wanton negligence, Tompkins could not recover damages. Devastated at seeing his \$30,000 jury verdict slip away, Tompkins sought review by the Supreme Court, which declined to hear the case.

As Brandeis had predicted, the *Erie* decision proved to be controversial. Critics felt that the Court had erred in deciding a matter that had not been presented by the parties. Many legal commentators disagreed strongly with the choice to overturn such an influential precedent, rendering useless a century of case law and creating uncertainty for the business community. Progressives and New Dealers, however, cheered the decision, believing that it had leveled a playing field that had been unfairly tilted toward wealthy corporate interests.

*Erie* proved to be doctrinally complicated, and the Supreme Court issued a large number of decisions over the ensuing years to establish the doctrine’s parameters and guide the lower federal courts in applying it. One particularly important issue was the determination of which state laws were “substantive,” and had to be applied by federal courts under *Erie*, and which were purely “procedural,” and could be ignored. In *Guaranty Trust Co. v. York* (1945), the Court established what came to be called the “outcome determination”

test. The intent of *Erie*, the Court noted, was “to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal 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.”

One of the most significant aspects of the *Erie* legacy is the extent to which it removed a major incentive for forum shopping, as Brandeis had intended, thereby diminishing the importance of diversity jurisdiction. The application of state law, rather than “federal common law,” to diversity cases eliminated an important advantage corporate defendants had sought in federal courts. Since the mid-twentieth century, policymakers have occasionally proposed the elimination of diversity jurisdiction, calling it an unnecessary burden on the federal judiciary. Advocates of retaining diversity jurisdiction have insisted that it is needed to allow out-of-state litigants the opportunity to remove a case to federal court if they fear local prejudice. While Congress has limited diversity jurisdiction by substantially raising the minimum amount in controversy, no proposal for its abolition has come close to being enacted.

Note: Edward A. Purcell, Jr.’s chapter, “The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law,” in *Civil Procedure Stories*, ed. Kevin M. Clermont (New York: Foundation Press, 2008), was an invaluable resource in preparing this summary.

## Discussion Questions

- Do you agree with Justice Story in *Swift* that the decisions of courts are evidence of what the laws are, but are not laws themselves? Why or why not?
- Was it proper for the Court in *Erie* to overturn nearly a century of precedent upon which judges, lawyers, and litigants had relied? Why or why not?
- Why might Justice Brandeis have believed the result in *Erie* to be necessary on constitutional grounds?
- What is forum shopping? Is it something the judiciary should try to curb? Why or why not?

## Documents

### **Supreme Court of the United States, Opinion in *Swift v. Tyson*, January 25, 1842**

*Justice Joseph Story's famous opinion in Swift created a legal precedent that lasted for nearly a century, establishing that federal courts could decide diversity-of-citizenship cases based on general principles of commercial law where no state statute applied. Story reasoned that "the laws of the several states" federal courts were bound to apply included state statutes, but not judicial decisions, which were merely evidence of what the law was. In later years the Supreme Court expanded the Swift doctrine until it applied to most types of diversity cases.*

[A]dmitting the doctrine [regarding bills of exchange] to be fully settled in New York, it remains to be considered, whether it is obligatory upon this Court, if it differs from the principles established in the general commercial law. It is observable that the Courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage: but they deduce the doctrine from the general principles of commercial law. It is, however, contended, that the thirty-fourth section of the judiciary act of 1789, ch. 20, furnishes a rule obligatory upon this Court to follow the decisions of the state tribunals in all cases to which they apply. . . . In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws. They are often reexamined, reversed, and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this Court have uniformly supposed, that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the

just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed.

Document Source: *Swift v. Tyson*, 41 U.S. 1, 18–19 (1842).

### **Justice Stephen Field, Dissenting Opinion in *Baltimore & Ohio Railroad Co. v. Baugh*, May 1, 1893**

*Justice Field's dissenting opinion in Baugh represented the first direct challenge to the Swift doctrine by a member of the Supreme Court. Field asserted that the federal courts were encroaching upon the rights of the states by ignoring the decisions of their courts. The general law federal courts had been applying when no controlling state statute existed, wrote Field, was an artificial creation lacking validity.*

The courts of the United States cannot disregard the decisions of the state courts in matters which are subjects of state regulation. The relations of employes, subordinate to the directors of the company but supervising and directing the labors of others under them, to their principals, and the liability of the principals for the negligent acts of their subordinate supervising and directing agents, are matters of legislative control, and are in no sense under the supervision or direction of the judges or courts of the United States. There is no unwritten general or common law of the United States on the subject. Indeed, there is no unwritten general or common law of the United States on any subject.... The common law may control the construction of terms and language used in the Constitution and statutes of the United States, but creates no separate and independent law for them. The federal government is composed of independent States, "each of which," as said in *Wheaton v. Peters*, 8 Pet. 591, 658, "may have its local usages, customs and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a

part of our federal system only by legislative adoption. When, therefore, a common-law right is asserted, we must look to the State in which the controversy originated.” ... The law of the State on many subjects is found only in the decisions of its courts, and when ascertained and relating to a subject within the authority of the State to regulate, it is equally operative as if embodied in a statute, and must be regarded and followed by the federal courts in determining causes of action affected by it arising within the State.... For those courts to disregard the law of the State as thus expressed upon any theory that there is a general law of the country on the subject at variance with it, in cases where the causes of action have arisen in the State, and which, if tried in the state courts, would be governed by it, would be nothing less than an attempt to control the State in a matter in which the State is not amenable to Federal authority by the opinions of individual Federal judges at the time as to what the general law ought to be,—a jurisdiction which they never possessed, and which, in my judgment, should never be conceded to them. That doctrine would inevitably lead to a subversion of the just authority of the State in many matters of public concern.

Document Source: *Baltimore & Ohio Railroad Co. v. Baugh*, 149 U.S. 368, 394–95, 397 (1893).

### **Justice Oliver Wendell Holmes, Dissenting Opinion in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, April 9, 1928**

*Oliver Wendell Holmes penned the most compelling challenge to Swift in the 1928 Taxicab case. The case gained notoriety primarily because of the extreme measures taken by the plaintiff—dissolving its business and reincorporating in a neighboring state—to establish diversity of citizenship and sue in federal court. Holmes claimed that federal courts were violating the Constitution by applying general law rather than following the decisions of the state courts. Ten years later, a majority of the Supreme Court adopted this line of reasoning in Erie.*

[I]n my opinion the prevailing doctrine has been accepted upon a subtle fallacy that has never been analyzed. If I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct. Therefore I think it proper to state what I think the fallacy is.—The often repeated proposition of this and the lower Courts is that the parties are entitled to an independent judgment on matters of general law. By that phrase is meant matters that are not governed by any law of the United States

or by any statute of the State—matters that in States other than Louisiana are governed in most respects by what is called the common law. It is through this phrase that what I think the fallacy comes in.

Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeals, from the State Courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else....

If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain. But when the constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words, so far as it is not interfered with by the superior power of the United States. The Supreme Court of a State does something more than make a scientific inquiry into a fact outside of and independent of it. It says, with an authority that no one denies, except when a citizen of another State is able to invoke an exceptional jurisdiction, that thus the law is and shall be. Whether it be said to make or declare the law, it deals with the law of the State with equal authority however its function may be described.

Document Source: *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532–35 (1928).

### **Supreme Court of the United States, Opinion in *Erie Railroad v. Tompkins*, April 25, 1938**

*The Supreme Court's decision in Erie, written by Justice Louis Brandeis, overturned the nearly century-old Swift precedent and sent shockwaves through the American legal system. Brandeis avoided making Progressive arguments about excessive federal judicial power, sticking to a recitation of the technical defects of Swift. The result was that federal courts were bound to apply state law in diversity cases without regard to whether that law appeared in a statute or a state court decision.*

Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

On the other hand, the mischievous results of the doctrine had become apparent. 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 right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.

The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called "general law" as to which federal courts exercised an independent judgment....

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own State and become citizens of another might avail themselves of the federal rule. And, without even change of residence, a corporate citizen of the State could avail itself of the federal rule by re-incorporating under the laws of another State, as was done in the *Taxicab* case....

Except in matters governed by the Federal Constitution or Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no general federal common law. Congress has no power to declare

substantive rules of common law applicable in a State whether they be local in their nature or “general,” be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts....

Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, “an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.”

Document Source: *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 74–79 (1938).

### **Arthur Krock, “A Momentous Decision of the Supreme Court,” *The New York Times*, May 3, 1938**

*Although the Erie decision was rather technical, observers soon realized its importance, perhaps in part because of the longstanding nature of the precedent it had overturned. As this New York Times article pointed out, the decision also tapped into an issue about which many Americans felt passionately—state sovereignty. Journalist Arthur Krock painted Erie as a return to tradition, calling it a “blow in behalf of the original American system.”*

If the Supreme Court, like so many other arms of the government, had a publicity agent, eight days would not have passed before the importance of its decision in the Tompkins case became known. Though Justice Brandeis delivered this transcendently significant opinion a week ago yesterday, it has generally eluded public notice....

Nevertheless, the ruling in the Tompkins case, from which Justices Butler and McReynolds vigorously dissented, was a stouter blow in behalf of the original American system. For it wipes out a Federal judicial record of almost a hundred years and reestablishes the sovereignty of State courts in the broad areas of “general law” they occupied before the Supreme Court laid down what Mr. Brandeis calls “the oft-challenged doctrine of *Swift v. Tyson*.” ...

This means that resort to the Federal jurisdiction will no longer be an effective course for litigants seeking to escape a State’s general law....

The Supreme Court granted the Erie’s plea of certiorari, and, taking the occasion, followed the unusual course of rendering an important constitutional decision, which it was not obliged to do in the premises, voluntarily asserting: “We merely declare that in applying this doctrine [*Swift v. Tyson*] this court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.”

So extraordinary was this that Justice Reed, though agreeing that decisions of State

courts shall henceforth be deemed a part of “the law,” balked at ruling that the lower court procedure in this instance was “unconstitutional” instead of simply “erroneous.” He wondered whether Justice Brandeis’s decision does not deprive Congress “of power to declare what rules of substantive law shall govern the Federal courts.” Many lawyers think it does. At any rate, the Supreme Court has fundamentally restored State equity jurisdiction.

Document Source: Arthur Krock, “A Momentous Decision of the Supreme Court,” *New York Times*, May 3, 1938, p. 22.

### **Arthur Krock, “More About the Epochal Tompkins Decision,” *The New York Times*, May 4, 1938**

*In another column a day after the first, Krock invoked originalism in support of the Erie decision, citing evidence uncovered by historian Charles Warren suggesting that Swift had frustrated congressional intent behind the Judiciary Act of 1789. In a 1923 Harvard Law Review article, Warren argued that earlier drafts of section 34 of the Act proved that Congress had intended the phrase “the laws of the several states” to include judicial decisions. Although Justice Brandeis credited Warren’s findings in writing the Erie opinion, scholars have since doubted their validity.*

In this space yesterday an attempt was made to explain the purport and importance of the recent Supreme Court decision in the case of the Erie Railroad Company v. Harry J. Tompkins. Among other things the court, through Justice Brandeis, asserted that for nearly a hundred years its rulings under the precedent of [Swift] v. Tyson had been an extraconstitutional exercise of its judicial power.

From the standpoint of human behavior, this confession was enough to make the decision a landmark, since voluntary confession of error is only less remarkable than admission of error under pressure. But the decision was extraordinary for several other reasons....

[T]he court acknowledged that it was accepting the evidence first offered by Charles Warren fifteen years ago that the 1842 doctrine of [Swift] v. Tyson was contrary to the intentions of the authors of the Federal Judiciary Act.

Section 34 confers upon the Federal courts jurisdiction in what is known as “diversity of citizenship” cases.... Mr. Warren explained his view of the purpose of Section 34 in *The Harvard Law Review* for November, 1923, as follows:

Mr. Warren’s Statement:

The chief and only reason for this diverse citizenship jurisdiction was to afford

a tribunal in which a foreigner or citizen of another State might have the law administered free from the local prejudices or passions which might prevail in a State court \* \* \* the Federal court was to secure to a non-citizen the application of the same law which a State court would give to its own citizens, and to see that within a State there should be no discrimination against non-citizens in the application of justice.

Mr. Warren, famous as the historian of the Supreme Court, noted that in the arguments on the act of 1789 there was not a suggestion that Section 34 should operate to discriminate in favor of a non-citizen, or that the Federal courts were not to administer State law in such cases, of which law State court interpretations are properly a part. . . .

To this affirmation [of *Swift* in the *Taxicab* case] the late Justice Holmes and Justices Brandeis and Stone emphatically dissented. . . .

Once more the Supreme Court's dissent becomes the Supreme Court's decision, but rarely in a more momentous instance than this. And there is romance, too, in what even the layman can see is no mere musty matter of law.

For Justice Holmes's co-dissenters, Justices Brandeis and Stone, lived on to the time when the great issue would be presented in the small details of a petty lawsuit; to the day when the Supreme Court was so constituted that it would follow them and the spirit of Holmes in righting the errors of almost a hundred years. That is romance. And there is romance in the part played by Mr. Warren. Searching amid crumbling documents, ransacking the Senate garrets and the ancient archives, he found the scrawl of Section 34 from which Ellsworth had struck the words "statute law" and written in "the laws," this (with other corrections) plainly indicating what was meant and what the Supreme Court re-established in *Erie v. Tompkins*.

Document Source: Arthur Krock, "More About the Epochal Tompkins Decision," *New York Times*, May 4, 1938, p. 22.

### **Suzanna Sherry, *Pepperdine Law Review*, 2011**

*In 2011 and 2013, legal scholars Suzanna Sherry of Vanderbilt University and Donald Earl Childress of Pepperdine University debated the merits of the Erie decision in the Pepperdine Law Review. Professor Sherry argued that Erie was incorrect on three grounds: the Rules of Decision Act was meant to provide for the application of federal common law in diversity cases; Erie failed to correct the purported defects of the Swift doctrine; and Erie was not, as Brandeis asserted, mandated by constitutional principles of federalism.*

A. *Erie Was Wrong*

... The majority opinion in *Erie* famously rested on three grounds: a new interpretation of the Rules of Decision Act, the “defects” of *Swift*, and the “unconstitutionality of the course pursued” under *Swift*. The Court was mistaken on each ground.

1. The Rules of Decision Act

... In 1789, there was a clear and recognized difference between two phrases: “the respective states” referred to the states individually, but “the several states” referred to the states collectively. Thus, the instruction in Section 34 to apply “the laws of the several states” directed courts not to the law of any individual state, but rather to the law of all states—in other words, to federally developed common law. The purpose was to ensure that *American* law, not British law, would apply in the federal courts. Moreover, an early draft of the Judiciary Act created a federal district that included all of New Hampshire and part of Massachusetts, further suggesting that the drafters did not expect federal courts to apply the law of any particular state. And any individual state’s law—whether statutory or judge-made—would not have been readily available at the end of the eighteenth century; the sources of law were chaotic and disorganized. Thus, the enacting Congress probably did not intend for federal courts sitting in diversity to apply either state statutory law or state common law, but rather to apply federal common law...

2. The “Defects” of *Swift*

The decision to overrule *Swift* also rested on the Court’s assertion that experience with *Swift* had “revealed its defects, political and social,” and had shown that “the benefits expected to flow from the rule did not accrue.” ...

The first—and probably least significant—problem with this rationale for *Erie* is that some of these “defects” were greatly exaggerated. Despite a perception that federal law was more favorable to corporate interests, there were many cases (including *Erie* itself) in which the opposite was true.... Similarly, the poster-child for corporate abuse of diversity jurisdiction—the *Black & White Taxicab* case lambasted in *Erie*—may well have been the only example of such abuse....

But even if we assume that the *Swift* regime caused the defects Brandeis identified, there is a more serious objection to *Erie*. The decision might be defensible if it corrected the problems. It didn’t. Under *Erie*, we still lack uniformity, some litigants—especially corporate litigants—still fare better than others as a result of happenstance, and the courts are still required to draw impossible lines.

The crux of the continuing problem is that *Erie* simply replaced the vertical forum-shopping of *Swift* with horizontal forum-shopping. Instead of choosing between state and federal courts in order to obtain the benefit of state or federal law, litigants now choose among courts (state and federal) located in different

states in order to obtain the benefit of a particular state's law. Whether litigants are successful in their search for the most favorable forum still often depends on happenstance; the constitutional limits on personal jurisdiction, which depend on the citizenship and activities of the defendant, allow some defendants but not others to escape the plaintiff's preferred forum. Discrimination persists, but now it arises from differences among state laws rather than from differences between state and federal law...

3. The "Unconstitutionality of the Course Pursued"

The unconstitutionality of the *Swift* doctrine is perhaps the most controversial ground for *Erie*. The majority held that because "Congress has no power to declare substantive rules of common law," neither do federal courts. Interpreting the Rules of Decision Act to allow federal courts to fashion common law doctrines, Justice Brandeis wrote, "invade[s] the rights which in our opinion are reserved by the Constitution to the several states." ...

The conclusion that constitutional federalism principles commanded the result in *Erie* was controversial from the beginning....

There is a reason for the controversy: *Erie's* reliance on federalism is utterly inconsistent with both contemporaneous and subsequent cases on congressional power. It is doubtful that *Erie's* federalism limitation on congressional power was correct when it was decided, and doctrinal developments have made it even less valid. As one commentator notes, the 1893 Field dissent on which *Erie* relied so heavily was written "near the height of *Lochner*-era federalism" and "is steeped in now-discredited views of state autonomy." The Erie Railroad, like many of the litigants in *Swift*-era cases in which the courts applied federal common law, was engaged in interstate commerce. Even in 1938, then, Congress would have had power to regulate the railroad's liability. And by definition, virtually all of the *Swift* cases involved interstate transactions (else they would not be in federal court under diversity jurisdiction); under modern Commerce Clause jurisprudence that was well-developed within a few years of *Erie*, Congress would have power to regulate those transactions if they had any effect on interstate commerce.

It is therefore not surprising that academic commentators eventually gave up on the notion that *Erie* was based on federalism-derived limits on congressional authority. Instead they suggested that it was based on principles of *judicial* federalism and separation of powers, that is, that the Constitution "imposes a distinctive, independently significant limit on the authority of the federal courts to displace state law." ... These scholars reason that because states are represented in Congress but not in the federal courts, Congress may override state law, but federal courts may not do so in the absence of congressional authorization.

There are several significant problems with this new constitutional justification for *Erie*. First, it finds no support in the decision itself....

The proposition that federal courts have more limited power than the feder-

al legislature is also inconsistent with the views of the founding generation and thus with any originalist interpretation of the Constitution. That generation assumed that the powers of the various departments of the federal government were co-extensive with regard to the states. While some applauded that grant of power and some feared it would lead to consolidation of all power in the federal government, none denied the power of federal courts to declare the common law.

Document Source: Suzanna Sherry, “Wrong, Out of Step, and Pernicious: *Erie* as the Worst Decision of All Time,” *Pepperdine Law Review* 39, no. 1 (2011): 132–35, 137–39, 142–45 (footnotes omitted).

### **Donald Earl Childress III, *Pepperdine Law Review*, 2013**

*In his response to Professor Sherry, Professor Childress did not disagree that the legal grounds for Erie were questionable, as evidenced by the Supreme Court’s frequent reshaping of the doctrine. Erie nevertheless remains valuable, Childress asserted, as a doctrine that no longer bears a strong relationship to the case from which it arose. At the heart of that doctrine is a reminder of the importance of thinking carefully about judicial federalism—the allocation of power between the state and federal court systems.*

As Professor Sherry explains in her article [excerpted above], Justice Brandeis rested the *Erie* decision on three contestable grounds...

By way of confession, I think it is clear that none of these arguments in whole or in part provides a satisfactory justification for what the Court did in *Erie*...

But don’t take Professor Sherry’s and my word for it. The Supreme Court itself in subsequent decisions developing the *Erie* doctrine has favored reconceptualizing the case over applying any of these precise grounds. The decisions of the Court following *Erie* “did more than simply explicate the developing *Erie* doctrine; rather, each of them redefined the scope and thrust of *Erie* in such a manner as to yield an entirely new conceptualization of it.” In other words, we accept *Erie* as controlling law but have very little agreement about why it is controlling law and upon which grounds the doctrine firmly rests.

What can we make, then, of *Erie*’s place as a supreme mistake in light of this? In my view, and to put it somewhat grandly, *Erie* is a Rorschach test. The real importance of the *Erie* decision is that it provides each generation of lawyers and law professors the opportunity to perceive anew Justice Brandeis’s inkblots and to construct their own vision of the role of federal courts, federal and state law, and federalism in our democracy...

In light of these reformulations, it is fair to observe that *Erie* is no longer a case; it is a

policy doctrine and that doctrine is “completely foreign to the decision that is its putative source.” If this is correct, Justice Brandeis has unindicted coconspirators. If *Erie* is guilty of being a supreme mistake, then, it is not simply because the decision itself was infirm but rather because what it has become is questionable, mistaken, or both in light of the doctrine’s development since the *Erie* decision....

If this is right, can *Erie* be redeemed?

I think the answer to this question is “yes.” In my view, a redeemed *Erie* doctrine would recognize first and foremost that the doctrine is about effectuating a policy of federalism. To affect that policy, we need to think more—as Professor Sherry has encouraged us—about the appropriate allocation between federal courts and state courts, and federal law and state law, in our federal system. Reflexive application of the mantras “apply state law,” “apply the conflict of laws rules of the state in which you sit,” and “there is no federal common law” may sound good, but they do little to advance a serious attempt at understanding complex decisions of law and judicial decision making generally.

Recognizing this, I think that Justice Ginsburg’s recent dissent, joined by Justices Kennedy, Breyer, and Alito, in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.* deserves close attention. As Justice Ginsburg explained, the Court’s *Erie* decisions “instruct over and over again that, in the adjudication of diversity cases, state interests—whether advanced in a statute ... or a procedural rule ... —warrant our respectful consideration.” Note, Justice Ginsburg does not say the *Erie* decisions “warrant our deference” or even “our application.” Consideration implies judgment, and we need to more forthrightly engage that question of the considered judgment of the federal courts in the context of federalism in the years to come.

*Erie*, then, can be redeemed not because of what it said or what it has been interpreted to say in the last nearly seventy-three years, but rather because of the intuition it has bestowed upon us. In its best light, *Erie* requires us to take a step back and be sensitive to the federal and state issues at play in many cases and especially multistate cases that come before the federal courts. To do otherwise risks annihilating “our federalism.” ...

In any event, it would be a supreme mistake to go on believing that *Erie* gives us an answer; instead it alerts us only to the question.

Document Source: Donald Earl Childress III, “Redeeming *Erie*: A Response to Suzanna Sherry,” *Pepperdine Law Review* 39, no. 1 (2013): 156–62 (footnotes omitted).

## Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of “the judicial power,” remedies, judicial review, the relationship between federal judicial power and states’ rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn’s Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter’s Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCordle* (1869). Could Congress remove a pending appeal from the Supreme Court’s jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Alcocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?