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# Wrong, Out of Step, and Pernicious: *Erie* as the Worst Decision of All Time

Suzanna Sherry\*

- I. INTRODUCTION
- II. THE WORST OF THE WORST
- III. THE TROUBLE WITH *ERIE*
  - A. *Erie Was Wrong*
    - 1. The Rules of Decision Act
    - 2. The “Defects” of *Swift*
    - 3. The “Unconstitutionality of the Course Pursued”
  - B. *Erie Is Not a Reflection of Its Time*
  - C. *Erie Is Pernicious*
- IV. CONCLUSION: JUDICIAL ACTIVISM AND THE WORST CASES OF ALL TIME

## I. INTRODUCTION

A symposium on the most maligned Supreme Court decisions of all time risks becoming an exercise best described by Claude Rains’s memorable line in *Casablanca*: “Round up the usual suspects.” Two things save this symposium from that fate. First, each of the usual suspects has been appointed defense counsel, which makes things more interesting. Second, a new face has found its way into the line-up: *Erie Railroad Co. v. Tompkins*.<sup>1</sup> My goal in this essay is to explain why *Erie* is in fact guiltier than all of the usual suspects.

I begin, in Part II, by setting out the three criteria that I believe must be satisfied for a decision to qualify as the worst of all time. I also explain briefly why each of the usual suspects fails to meet one or more of those

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1. 304 U.S. 64 (1938).

criteria. The heart of the essay is Part III, examining in detail how *Erie* satisfies each of the three criteria. I close with some concluding thoughts on the surprising relationship between *Erie*'s flaws and those of the other suspects.

## II. THE WORST OF THE WORST

What do we mean—what *should* we mean—when we label a Supreme Court decision “the worst of all time”? I suggest that to be worthy of such infamy, a decision must satisfy three criteria: it must be wrong, it must not be explainable as a product of its time, and it must have lasting detrimental effects. The requirement that the decision be wrong needs no explanation, but the other two criteria are worth a brief discussion.

One difficulty in searching more than two centuries of Supreme Court cases for the worst decision is that the older cases necessarily reflect different sensibilities than our own and are therefore more likely to seem wrong, even egregiously so. But it is anachronistic to evaluate Supreme Court decisions by contemporary standards; even worse, it partakes of the whiggish historian's fallacy that our current standards are inevitably superior. The only way to avoid the problem is to judge the cases by contemporaneous standards, and thus to exclude from consideration any cases that are easily explained as products of their times. Note that I am not asking whether a particular result was inevitable under the circumstances, but only whether it reflects values and beliefs that were widely shared at the time.

The final requirement arises from the recognition that the Supreme Court inevitably makes mistakes. Some mistakes, however, are more significant than others. If the errors are quickly corrected, or if for some other reason the case has no lasting significance, it is inappropriate to condemn that error as harshly as those that endure. Thus, to qualify as the worst decision of all time, a case should have lasting and significant deleterious effects.

All of the cases selected for this symposium meet the first requirement: They are all wrong.<sup>2</sup> But all of them fail the second requirement. Each one reflects the circumstances and prevalent values of its time and place, and although some Americans—and some Justices—rejected those values, it is anachronistic for us to condemn the majority for its failure to do so. *Dred Scott*<sup>3</sup> represented an accurate interpretation of the original public meaning of the 1787 Constitution, and a choice among two (soon to be literally)

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2. Each is wrong under some plausible definition of “wrong.” It is possible that there is no single definition that encompasses all five cases.

3. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

warring belief systems.<sup>4</sup> *Plessy*<sup>5</sup> reflected what one scholar has described as the consensus of both elite opinion makers and the political branches, who “displayed no enthusiasm for an assault on legally imposed racial separation.”<sup>6</sup> It also conformed to the pervasive racist assumptions and the widespread view shared by the drafters of the Fourteenth Amendment and many whites (Northern and Southern) in the 1890s that blacks, even if they were entitled to equal civil and political rights, were not the social equals of whites.<sup>7</sup> *Buck*<sup>8</sup> was grounded in the pseudo-scientific eugenics movement, which had broad and deep support across the political spectrum.<sup>9</sup> And *Korematsu*<sup>10</sup> was decided at a time when racism was not yet universally condemned—the armed forces were still segregated and *Brown v. Board of Education*<sup>11</sup> was almost a decade in the future—and the memory of the day that would live in infamy was raw and fresh. Moreover, as subsequent research has revealed, government lawyers fundamentally misled the Court as to the likelihood of a Japanese invasion,<sup>12</sup> making the case even less surprising.

As for lasting detrimental effects, only *Plessy*—which allowed Jim Crow laws to deepen, racism to become more entrenched, and the status of African-Americans to deteriorate for almost sixty years—qualifies. The decision in *Dred Scott*, by contrast, became effectively moot four years later as the Civil War began and the holding was officially reversed with the ratification of the Fourteenth Amendment.<sup>13</sup> *Buck*, although it allowed sterilization of many individuals, was thoroughly discredited (and all but

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4. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

5. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

6. JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER 1888–1910*, at 155 (1995).

7. See, e.g., JOHN BRAEMAN, *BEFORE THE CIVIL RIGHTS REVOLUTION: THE OLD COURT AND INDIVIDUAL RIGHTS* 121 (1988); CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 93–115 (1987); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 504–08 (2d ed. 1985).

8. *Buck v. Bell*, 274 U.S. 200 (1927).

9. See VICTORIA F. NOURSE, *IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS* 21–23 (2008). According to Nourse, public opinion did not shift away from support for eugenics until it became linked with Nazism, a decade after *Buck*. *Id.* at 126–31.

10. *Korematsu v. United States*, 323 U.S. 214 (1944).

11. 347 U.S. 483 (1954).

12. See generally PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE INTERNMENT CASES* (1983).

13. Nor did the case cause the Civil War; the same conflicts over slavery and other issues that led to the case itself were inevitably drawing the nation into war.

overruled) fifteen years later in *Skinner v. Oklahoma*.<sup>14</sup> The decision in *Korematsu* was even shorter-lived. On the same day it upheld the exclusion order in *Korematsu*, the Supreme Court limited the damage by invalidating the internment order in *Ex parte Endo*.<sup>15</sup> The case was famously condemned by a leading scholar before the war was even over,<sup>16</sup> a federal court later overturned Fred Korematsu's conviction for violating the exclusion order,<sup>17</sup> and the federal government eventually apologized and made restitution.<sup>18</sup> *Korematsu*'s most lasting contribution was its assertion—ignored in the case itself but bearing fruit later—that “legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and must be subjected to “the most rigid scrutiny.”<sup>19</sup>

Although all of the usual suspects are guilty, then, they are in some sense not pernicious. As I demonstrate in the next Part, only *Erie* satisfies all three requirements: it is wrong, it cannot be described as a product of its time, and it had—and continues to have—significant detrimental effects.

### III. THE TROUBLE WITH *ERIE*

#### A. *Erie Was Wrong*

Just in case you've forgotten your Civil Procedure course: The question in *Erie* was whether state or federal law should apply to state-law claims that were brought in federal court under diversity jurisdiction.<sup>20</sup> The Rules of Decision Act—originally enacted as Section 34 of the Judiciary Act of 1789—provides that “[t]he 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.”<sup>21</sup> In 1842, in *Swift v. Tyson*,<sup>22</sup> the Court interpreted that Act as requiring the application of

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14. 316 U.S. 535 (1942). One recent case notes that “the only part of *Buck v. Bell* that remains unrepealed” is the statement that an Equal Protection Claim for selective enforcement “is the usual last resort of constitutional arguments.” *Feiger v. Thomas*, 74 F.3d 740, 750 (6th Cir. 1996) (quoting *Buck v. Bell*, 274 U.S. 200, 208 (1927)).

15. 323 U.S. 283 (1944). As one commentator notes, “*Endo* shows *Korematsu* to be marginal.” Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1967 (2003).

16. See Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

17. *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

18. See Act of Aug. 10, 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified as amended at 50 U.S.C. §§ 1989–1989b).

19. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

20. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71 (1938).

21. 28 U.S.C. § 1652 (2006). Although there have been stylistic changes to the statute since its enactment in 1789, the substance has not changed. For the original Judiciary Act, see the Judiciary Act of 1789, 1 Stat. 73 (1789).

22. 41 U.S. (1 Pet.) 1 (1842).

only state *statutory* law, and not state *common law*.<sup>23</sup> In the absence of a state statute, federal courts were to apply federal common law.<sup>24</sup> In *Erie*, the Court overruled *Swift* and held that in adjudicating state-law claims, federal courts should apply both state statutes and state common law.<sup>25</sup>

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

The Court rested its statutory reinterpretation on the “recent research of a competent scholar,” which, it said, established that the *Swift* Court’s interpretation was “erroneous.”<sup>26</sup> Relying on Charles Warren’s *New Light on the History of the Federal Judiciary Act of 1789*,<sup>27</sup> the Court concluded that the purpose of the Rules of Decision Act was “to make certain that . . . the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written.”<sup>28</sup> Unfortunately, there are three fatal flaws in the Court’s reasoning. First, Warren’s research showed no such thing. Second, research subsequent to Warren’s demonstrates that it is probable that *Swift* itself gave too much credit to state law and thus that the move from *Swift* to *Erie* took the law *further* from the intent of the enacting Congress. Third, for almost a century between 1842 and 1938, not only had Congress acquiesced in *Swift*, but bills to amend the Act and overrule *Swift* had failed to pass, suggesting that *Swift* accurately represented the continuing will of Congress.

Warren’s research unearthed a manuscript copy of the bill that eventually became the Judiciary Act, together with a handwritten draft of Section 34 providing that “the Statute law of the several States in force for the time being *and their unwritten or common law* now in use” should apply in “trials at common law in the courts of the United States in cases where they apply.”<sup>29</sup> From this he concluded that the language actually enacted—“the *laws* of the several States”—must be read to include both statutory law

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23. *Id.* at 18–19.

24. *Id.*

25. *Erie*, 304 U.S. at 79–80.

26. *Id.* at 72.

27. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

28. *Erie*, 304 U.S. at 72–73.

29. Warren, *supra* note 27, at 86–87 (emphasis added).

and common law.<sup>30</sup> In the absence of any further evidence (and Warren had none), however, there is no way to determine whether the change in the italicized language was or was not intended to change the substantive meaning of the statute. Perhaps, as Warren suggested, Congress assumed that “laws” included common law, and the change was stylistic.<sup>31</sup> Or perhaps Congress instead deliberately meant to *exclude* common law from the Rules of Decision Act and changed the language for that reason.

A further contemporaneous indication that Warren’s conclusion was incorrect is that Section 34 is near the end of the 1789 Judiciary Act, far from the sections on diversity jurisdiction. The draft Warren found indicated that it was to be inserted on page fifteen of the bill, again, near the end and far from the sections on diversity jurisdiction.<sup>32</sup> Thus, Section 34 was placed—and seemingly was intended to be placed—among other sections dealing with *all* suits in *any* federal courts, and was most likely a general direction about how federal courts should go about their adjudicatory business rather than a specific direction about the law applicable to state claims in diversity cases.<sup>33</sup>

More recent research confirms that Justice Story’s interpretation in *Swift* was closer to the intent of the enacting Congress than was Warren’s. Let us begin with the language of the Act itself. 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.<sup>34</sup> 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.<sup>35</sup> The purpose was to ensure that *American* law, not *British* law, would apply in the federal courts.<sup>36</sup> 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

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30. *Id.* at 86 (emphasis added).

31. *Id.* at 86–88.

32. Warren himself thought the page notation on the newly discovered draft referred to the page of the thirty-seven page manuscript copy of the bill, but it is more probable that it referred to the page of the printed bill, which ran only fifteen pages. See WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 137–40 (1990); JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 463–66 (1971).

33. For elaboration, see RITZ, *supra* note 32, at 136–37.

34. *Id.* at 83–87, 140–41.

35. *Id.* at 140.

36. *Id.* at 148. Ritz suggests that Section 34 was even more limited: It was “intended as a temporary measure to provide an applicable American law for national criminal prosecutions” until Congress enacted statutes defining and governing federal crimes. *Id.* For a further argument that Warren’s reinterpretation was “shaky,” see Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 903–04 (1986).

federal courts to apply the law of any particular state.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

Finally, examination of the legislative history of the Process Act,<sup>40</sup> passed immediately after the Judiciary Act, further suggests that Section 34 was not intended to make state law applicable in federal courts. The Process Act explicitly directed federal courts to use state procedural law, providing that “the modes of process” in the federal courts “shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.”<sup>41</sup> In the course of debates over the Process Act, an amendment was proposed that would have incorporated state substantive laws on insolvency and debtor relief; according to a newspaper account, the amendment “was negatived by a large majority.”<sup>42</sup>

We can draw several strong inferences from this account. First, the use of “respectively” rather than “severally” in the Process Act bolsters the linguistic argument that the use of “severally” in Section 34 refers to federal common law rather than to state law. Second, the Congress did not think that Section 34 required the application of any state substantive law, else the amendment would have been unnecessary.<sup>43</sup> Third, a “large majority” of the House did not want at least a particular type of state substantive law to apply in federal diversity cases. This last inference is further supported by the best explanation of the original purpose of diversity jurisdiction: to protect creditors and other commercial interests from parochial state laws, especially those favoring debtors or interfering with the growth of the

37. See Wythe Holt, “To Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421, 1506–07.

38. See RITZ, *supra* note 32, at 49–50; see also GOEBEL, *supra* note 32, at 471.

39. To the extent that *Swift* was itself incorrectly decided, Congress's failure to correct the error—which reflected judicial decisions from the early 1800s on—diminishes the seriousness of that error.

40. Process Act of 1789, ch. 21, 1 Stat. 93, § 2 (1789).

41. *Id.*

42. See Patrick J. Borchers, *The Origins of Diversity Jurisdiction, The Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 108–09 (1993).

43. The timing supports this inference. The House agreed to the Senate version of the Judiciary Act, ceasing debate, on September 21, 1789; the Act was signed by President Washington on September 24. See GOEBEL, *supra* note 32, at 507. The amendment to the Process Act was proposed on September 24, 1789. See Borchers, *supra* note 42, at 108.



national economy.<sup>44</sup> Those parochial state laws, of course, were as likely to be statutory as to be common law (and maybe more likely), thus confirming again that even the *Swift* Court’s reading of Section 34 was incorrect insofar as it required the application of state statutes in diversity cases.

Reading Section 34 as a direction to apply federal common law is also consistent with the historical precursors of diversity jurisdiction and with the immediate post-enactment practice. Eighteenth-century American lawyers would have been quite familiar with the concept of applying a specialized type of law to transnational or non-local disputes: Greek, Roman, and English law had developed such specialized sources of law.<sup>45</sup> During the ratification debates, a number of Federalists and Anti-Federalists suggested that federal courts would apply general common law.<sup>46</sup> Unsurprisingly, the newly-created federal courts immediately began to develop and apply general federal common law; *Swift* was merely an unexceptional example of a longstanding practice.<sup>47</sup> Moreover, the conventional modern assumption that *Erie* returned to an original understanding of “profound limits on nonstate, judge-made law in the federal court” is called into question by the fact that “[o]n the equity side of the docket, application of uniform, nonstate, judge-made law was the norm.”<sup>48</sup> And in 1828, Congress rejected proposals to force federal courts to follow state law in equity cases, after extensive debates in the House of Representatives raising both federalism and

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44. See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Holt, *supra* note 37; Borchers, *supra* note 42, at 86–98; David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1265–70 (2007) (collecting sources); see also Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1010–17 (2007) (providing further historical background to demonstrate that the pro-creditor account is superior to the traditional “state-court bias” account). One set of commentators draws a distinction between cases in which states are likely to be biased in the application of law and cases in which states are likely to be biased in the creation of law. In the former circumstance, a neutral forum in the form of diversity jurisdiction is sufficient; in the latter, a separate source of law—federal common law—is needed to combat the bias. Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 627–30 (2006). I suggest that while the distinction is useful, those who included diversity jurisdiction in Article III and Section 34 in the Judiciary Act were equally concerned about both types of bias.

45. Borchers, *supra* note 42, at 82–86.

46. Defending the grant of diversity jurisdiction, James Wilson argued: “I would ask, how a merchant must feel to have his property lay at the mercy of the laws of Rhode Island? I ask further, how will a creditor feel, who has his debts at the mercy of tender laws in other states?” James Wilson, Speech to the Pennsylvania Convention (Dec. 7, 1787), in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 519 (1976). See also Agrippa, V, in 4 THE COMPLETE ANTI-FEDERALIST 77–78 (Herbert J. Storing ed., 1981) (A federal court in diversity “is not bound to try [a case] according to the local laws where the controversies happen; for in that case it may as well be tried in a state court. The rule which is to govern the new courts, must, therefore, be made by the court itself, or by its employers, the Congress.”).

47. See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1513 (1984).

48. See Kristin A. Collins, “A Considerable Surgical Operation”: Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249, 335 (2010).

separation-of-powers arguments about the legitimacy of federal judicial lawmaking.<sup>49</sup> No wonder *Swift* was unanimous, joined even by a Justice “who has been characterized as the most extreme states’ rights enthusiast ever to sit on the Supreme Court.”<sup>50</sup>

All of the contemporaneous evidence, then, suggests that the enacting Congress did not intend even the *Swift* interpretation of Section 34, much less the Warren and *Erie* interpretation. But what about subsequent Congresses? Congress’s failure to amend the Rules of Decision Act in the century following *Swift* suggests, albeit weakly, congressional acquiescence in *Swift*’s interpretation. A stronger inference can be drawn from the fact that in the decade preceding *Erie*, three bills had been introduced in Congress to override *Swift*, and none had passed.<sup>51</sup> On any theory of statutory interpretation, therefore, *Erie* got it wrong.

## 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.”<sup>52</sup> The court focused on three failures of the *Swift* regime: it caused “grave discrimination” between citizens and non-citizens of a state, it did not produce the hoped-for uniformity of law, and it introduced new uncertainties by requiring courts to draw an impossible line between general and local law.<sup>53</sup> The subtext of the decision, and probably the motivation for at least Justice Brandeis’s condemnation of *Swift*, also focused on the anti-Progressive consequences of allowing large corporations to substitute hospitable federal law in place of hostile state law.<sup>54</sup>

49. *Id.* at 304–15.

50. TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM 3 (1981).

51. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77 n.21 (1938). See also FREYER, *supra* note 50, at 109 (showing that at least eight bills to curb corporate abuse of diversity jurisdiction were introduced between 1928 and 1932).

52. *Erie*, 304 U.S. at 74.

53. *Id.*

54. For an account of Justice Brandeis’s Progressive politics as underlying *Erie*, see generally EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000) (describing *Erie* as arising out of Brandeis’s Progressive politics, especially his commitment to social justice and hostility to large corporations); see also THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 80–142 (1984) (describing Brandeis as fundamentally opposed to big business). Ironically, it was a similar agrarian prejudice against the mercantile class that led to the need for *Swift* in the first place. See FREYER, *supra* note 50, at 9–10, 40–41.

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. In two of the cases in which Justice Holmes had previously railed against *Swift* in dissent, for example, the Court upheld the rights of landowners—against a coal company in one case and an elevated railway company in the other—under general federal law despite state law to the contrary.<sup>55</sup> Similarly, the poster-child for corporate abuse of diversity jurisdiction—the *Black & White Taxicab* case<sup>56</sup> lambasted in *Erie*—may well have been the *only* example of such abuse.<sup>57</sup> As several scholars have noted, the claim of discrimination between citizens and non-citizens was inaccurate; both could invoke the jurisdiction of the federal courts in the same situations.<sup>58</sup> As for uniformity, the issue depends on whether inter- or intra-state uniformity is at stake, and Brandeis never explained why the latter was more important than the former. Moreover, at least with regard to the substantive commercial law doctrine at issue in *Swift* itself, Felix Frankfurter’s influential claim in 1928 that the states had refused to follow it<sup>59</sup> appears to be largely false.<sup>60</sup>

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

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55. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 349 (1910) (holding that a coal company is liable to landowner for failure to leave sufficient support of the surface land, despite contrary ruling of state supreme court); *Muhlker v. N.Y. & Harlem R.R. Co.*, 197 U.S. 544, 544 (1905) (holding that elevated railway company owed compensation to neighboring property owner for use of light, air, and access, despite state statute granting unencumbered right to railway).

56. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

57. See MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (forthcoming 2012) (manuscript at 14) (documenting that *Black & White Taxicab* was “singular, and hardly warranted the overruling of a century’s worth of precedents”).

58. See, e.g., PURCELL, *supra* note 54, at 162; G. Edward White, *A Customary International Law of Torts*, 41 VAL. U. L. REV. 755, 793–94 (2006).

59. Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 528–29, n.150 (1928).

60. See Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 881–86 n.23 (1931).

law.<sup>61</sup> 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. Forum-shopping of some kind is an inevitable result of our federal system: As one scholar notes, "[S]o long as American common law [is] jurisdiction-specific, and so long as different state courts [adopt] contrasting doctrinal rules, strategic filings by lawyers, and even the choice of residency by individuals and corporations, [are] possible."<sup>62</sup>

Nor did *Erie* eliminate the corporate advantages that Brandeis believed flowed from access to federal common law. For one thing, state legislatures and elected state judges are more vulnerable than their federal counterparts to the pressures exerted by corporate campaign contributions and expenditures.<sup>63</sup> Whatever the situation at any particular point in history, then, the *potential* for corporate advantage is greater under state law than under federal law.

In addition, the advent of the class action as a powerful procedural device to vindicate the rights of consumers, employees, shareholders, and other victims of corporate misdeeds has altered the landscape in a way that tilts the *Erie* doctrine in favor of corporate interests. Because of *Erie*, bringing a nationwide consumer or products liability class action is in many cases impossible even if the victims are spread across the country. In order to bring suit as a class, the plaintiffs must show that common questions predominate.<sup>64</sup> To the extent that members of the plaintiff class are from

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61. Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941), a federal court must apply the choice-of-law doctrines of the state in which it sits. Thus a state court and a federal court in the same state will apply the same law, although it may not be that of the forum state. Notably, horizontal forum-shopping was a problem even before *Erie*, see PURCELL, *supra* note 54, at 149–53, but the availability of a uniform federal law made it less significant than it is today. Horizontal forum-shopping under *Erie* and *Klaxon* may be even more problematic in the context of transnational litigation if state choice-of-law rules require the application of foreign law. See Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. (forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1691799](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691799).

62. White, *supra* note 58, at 796.

63. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2265–67 (2009) (finding likelihood of bias from campaign contribution in judicial elections). Corporate contributions to state legislative races are likely to be more effective than contributions to federal races as a result of both greater geographic compactness and the greater ability of state legislators to focus on single issues of interest to corporations.

64. FED. R. CIV. P. 23(b)(3).

different states, different states' laws will likely govern, and differences among those laws will often prevent class certification.

As Judge Richard Posner stated when denying certification to a nationwide class in a products liability case, "The voices of the quasi-sovereigns that are the states of the United States sing negligence with a different pitch."<sup>65</sup> In reversing the district court's decision to certify the class and to finesse the differences among state laws by instructing the jury on negligence in general, Judge Posner noted:

[The district judge] proposes to have a jury determine the negligence of the defendants under a legal standard that does not actually exist anywhere in the world. One is put in mind of the concept of "general" common law that prevailed in the era of *Swift v. Tyson*. The assumption is that the common law of the 50 states and the District of Columbia, at least so far as bears on a claim of negligence against drug companies, is basically uniform and can be abstracted in a single instruction. . . . If one instruction on negligence will serve to instruct the jury on the legal standard of every state of the United States applicable to a novel claim, implying that the claim despite its controversiality would be decided identically in all 50 states and the District of Columbia, one wonders what the Supreme Court thought it was doing in the *Erie* case when it held that it was *unconstitutional* for federal courts in diversity cases to apply general common law rather than the common law of the state whose law would apply if the case were being tried in state rather than federal court.<sup>66</sup>

Class litigation against national (or international) corporations would thus be much easier under *Swift* than it is under *Erie*. Moreover, because of differences among state choice-of-law doctrines, it is easier in some states than in others to conclude that a single state's law applies—which makes class certification more likely—thus increasing the incentives for both parties to forum-shop.<sup>67</sup>

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65. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1301 (7th Cir. 1995).

66. *Id.* at 1300.

67. *Compare, e.g.*, *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 626 (Okla. 2003) (certifying nationwide breach-of-warranty class action against manufacturer because defendant's home state provides substantive law under "most significant relationship" choice-of-law doctrine), *with, e.g.*, *Gov't Emp. Ins. Co. v. Bloodworth*, No. M2003-02986-COA-R10-CV, 2007 WL 1966022 (Tenn. Ct. App. 2007) (decertifying class action by residents of twenty-six states against insurance company because state of issuance or state in which accident occurred provides substantive law under "most significant relationship" choice-of-law doctrine). *See also* *Phillip Morris Inc. v. Angeletti*, 752 A.2d 200, 230–33 (Md. 2000) (decertifying class action by Maryland residents against tobacco company because Maryland residents' claims might be governed by different states' laws under *lex loci* choice-of-law principle); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 96 (W.D. Mo. 1997) (refusing to certify class action by Missouri resident against tobacco company in part

The lack of uniformity is, if anything, worse under *Erie* than under *Swift*. In the century between the two cases, the federal courts developed cohesive and coherent doctrines in the areas that were determined to require the application of general (rather than local) law. Although each state's law might differ, federal law was uniform. *Erie* eliminated even the possibility of a uniform federal law, without eliminating the heterogeneity of state law. We have thus gone from a regime in which at least one body of uniform law, ultimately policed by a single Court, was often available to one in which uniformity is at the mercy of fifty state courts. Nor does *Erie* always guarantee intra-state uniformity, as federal courts have found ways to ignore state decisions.<sup>68</sup> And even the application of the *Erie* doctrine itself is not uniform: federal courts disagree among themselves about important questions such as whether they should follow state rules of statutory interpretation.<sup>69</sup>

Finally, the *Erie* doctrine, no less than the *Swift* doctrine, requires federal courts to draw impossible lines. Under *Erie*, federal courts apply state substantive law but federal procedural law. As various Justices have recognized since *Erie* itself, however, there is no clear line between substance and procedure.<sup>70</sup> The Justices have repeatedly disagreed with one

because "it is possible that different state's laws will apply to the different claims asserted by a single claimant"). See generally Sean Wlodarczyk, *Variations in Certification: The Need for Federal Intervention in Class-Action Choice of Law* (unpublished manuscript) (on file with author) (canvassing how different states' choice-of-law doctrines affect class certification). Differences among state choice-of-law doctrines also reduce the predictability of legal outcomes. See Erin O'Hara O'Connor & Larry E. Ribstein, *Exit and the American Illness* (Ill. Program in Law, Behavior & Soc. Sci., Working Paper No. LBSS11-08, 2011), available at <http://ssrn.com/abstract=1745141>. For general discussion of the "regulatory mismatch" between nationwide injuries and limitations on jurisdiction, see Richard A. Nagareda, *Aggregate Litigation Across the Atlantic*, 62 VAND. L. REV. 1, 14-19 (2009).

68. Compare *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 114 (Okla. 1962) (damages for breach of contract that provided for land reclamation limited to value of reclaimed land even if reclamation operation would cost more), *Thompson v. Andover Oil Co.*, 691 P.2d 77, 83 (Okla. Civ. App. 1984) (citing *Peevyhouse*), and *Schneberger v. Apache Corp.*, 890 P.2d 847 (Okla. 1994) (citing *Peevyhouse*), with *Rock Island Improvement Co. v. Helmerich & Payne, Inc.*, 698 F.2d 1075, 1077-78 (10th Cir. 1983) (affirming damages for cost of reclamation, under Oklahoma law, even though reclamation would cost more than fifty times the value of the reclaimed land; concluding Oklahoma courts would no longer follow *Peevyhouse*), and *Davis v. Shell Oil*, 795 F. Supp. 381, 385 (W.D. Okla. 1992) (citing *Rock Island*) (damages in Oklahoma not limited to value of land).

69. See Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898 (2011).

70. See, e.g., *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring) ("The line between procedural and substantive law is hazy . . ."); *Guaranty Trust Co. of N.Y. v. New York*, 326 U.S. 99, 108 (1945) ("Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same key-words to very different problems.

another and with various courts of appeals on where the line should be drawn. Even in the 2009 Term—more than seventy years after *Erie*—a divided Court once again reversed a court of appeals’ attempt to draw such a line.<sup>71</sup> There is no more a “satisfactory line of demarcation”<sup>72</sup> between substance and procedure under *Erie* than there was one between general and local law under *Swift*. The Court has simply traded one set of uncertainties for another.

In short, whatever the defects of *Swift*, *Erie* has not eliminated them and may have exacerbated them. Practical considerations do not provide a justification for the Court’s decision in *Erie*.

### 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.<sup>73</sup> 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.”<sup>74</sup> Lest there be any mistake that principles of federalism drove the decision, Justice Brandeis also included a long quotation from Justice Field’s dissent in an 1893 case.<sup>75</sup> Justice Field conceded that he had followed *Swift* in the past, but concluded that he had done so “erroneously.”<sup>76</sup> Despite *Swift*’s pedigree, he argued, “there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States.”<sup>77</sup>

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

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Neither ‘substance’ nor ‘procedure’ represents the same invariants.”); *id.* at 115 (Rutledge, J., dissenting) (“The words ‘substantive’ and ‘procedural’ or ‘remedial’ are not talismanic.”); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting) (“[I]n many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible.”); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) (“Except at the extremes, the terms ‘substance’ and ‘procedure’ precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn.”); *Mistretta v. United States*, 488 U.S. 361, 392 (1989) (calling the distinction between substance and procedure a “logical morass”); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1450 (2010) (Stevens, J., concurring) (quoting Rutledge in *Cohen*, 337 U.S. at 559).

71. See *Shady Grove Orthopedic Assocs.*, 130 S. Ct. at 1448.

72. *Erie*, 304 U.S. at 74.

73. *Id.* at 78.

74. *Id.* at 80.

75. *Id.* at 78–79.

76. *Id.* at 78 (quoting *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

77. *Id.*

join that part of Justice Brandeis's majority opinion, noting that he was "not at all sure whether, in the absence of federal statutory direction, federal courts would be compelled to follow state decisions. There was sufficient doubt about the matter in 1789 to induce the first Congress to legislate."<sup>78</sup> Chief Justice Stone, who joined the majority in *Erie* without comment, wrote a few years later that he thought that it was "not . . . at all clear that Congress could not apply (enact) substantive rules of law to be applied by federal courts."<sup>79</sup> Felix Frankfurter, not yet a Justice himself, criticized the Court's reliance on constitutional principles.<sup>80</sup> The Court itself did not mention the constitutional basis for *Erie* for almost two decades afterward.<sup>81</sup> Similarly, scholars have often struggled with federalism as a basis for *Erie*, questioning it or watering it down; as one scholar notes, the federalism justification for the decision "has been in nearly continuous decline."<sup>82</sup> One commentator suggested that the Constitution is "functionally irrelevant in cases covered by the Rules of Decision and Rules Enabling Acts."<sup>83</sup>

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."<sup>84</sup> The Erie Railroad, like many of the litigants in *Swift*-era cases in which the courts applied federal common law, was engaged in

78. *Id.* at 91 (Reed, J., concurring).

79. Letter from Harlan Fiske Stone to Owen Roberts (Jan. 3, 1941), in ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 480 n.† (1956) [hereinafter MASON]; see also Letter from Harlan Fiske Stone to Louis Brandeis (Mar. 23, 1938), in MASON, *supra*, at 478 ("You say in effect that there is no constitutional power in Congress to require federal courts to apply rules of law inconsistent with those in force in the state, unless Congress is acting under one of the substantive powers granted to the national government . . . . [T]he matter is not, in my mind, entirely free from doubt—the power may be implicit in the judicial sections.")

80. See Letter from Felix Frankfurter to Harlan Stone (Apr. 27, 1938), in PURCELL, *supra* note 54, at 202–03; Letter from Felix Frankfurter to Harlan Fiske Stone (May 9, 1938), in PURCELL, *supra* note 54, at 202–03; Letter from Felix Frankfurter to Stanley Reed (May 14, 1942), in PURCELL, *supra* note 54, at 371 nn.38–39; see also FREYER, *supra* note 50, at 143, 181 n.79.

81. See John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 704 (1974).

82. Craig Green, *Repressing Erie's Myth*, 96 CALIF. L. REV. 595, 616 n.108 (2008).

83. Ely, *supra* note 81, at 706.

84. Green, *supra* note 82, at 615–16 n.108 (giving examples); see also Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 410–11 n.233 (2002) (*Erie* rested on "assumptions of 'dual federalism' . . . that have mostly disappeared from our jurisprudence.").



interstate commerce.<sup>85</sup> Even in 1938, then, Congress would have had power to regulate the railroad's liability.<sup>86</sup> 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.<sup>87</sup>

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."<sup>88</sup> As one scholar notes, "the federalism principle identified by *Erie* . . . has been silently transformed from a general constraint on the powers of the federal government into an attenuated constraint that applies principally to one branch of that government—the federal judiciary."<sup>89</sup> These scholars reason that because states are represented in Congress but not in the federal courts, Congress

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85. One scholar suggests that "as much as 80 percent" of all diversity cases between 1900 and 1938 "involved corporations engaged in interstate enterprise." FREYER, *supra* note 50, at 101–02.

86. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (reversing earlier cases and upholding congressional power to regulate labor relations under the Commerce Clause).

87. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (Congress can limit amount of wheat grown by farmer for his own consumption); *Gonzalez v. Raich*, 545 U.S. 1 (2005) (Congress can prohibit purely intrastate cultivation and possession of marijuana). See also Green, *supra* note 82, at 606–14 (criticizing *Erie*'s federalism analysis); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 14–15 (1985) ("The federalism analysis of *Erie* is subject to the powerful objection that the structure of government presupposed by Justice Brandeis's opinion no longer exists in any recognizable form. . . . [T]oday the federal government has authority to regulate in virtually any area it chooses."); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 766 n.19 (1989) ("[I]n light of the Supreme Court's extremely broad construction of federal constitutional power . . . it might be argued that today *Erie*'s constitutional component is no longer good law.").

88. Paul J. Mishkin, *Some Further Last Words On Erie—The Thread*, 87 HARV. L. REV. 1682, 1682 (1974) (emphasis added); see also Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 11–12 (1975) (*Erie* "recognizes that federal judicial power to displace state law is not coextensive with the scope of dormant congressional power."). One commentator calls this the "new myth" of *Erie*. Green, *supra* note 82. See also Donald L. Doernberg, *Judicial Chameleons in the "New Erie" Canal*, 1990 UTAH L. REV. 759 (identifying separation-of-powers limitations as the new *Erie*). Numerous contemporary scholars subscribe to this new myth. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001); Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513 (2002); Merrill, *supra* note 87; PURCELL, *supra* note 54, at 177; Redish, *supra* note 87.

89. Merrill, *supra* note 87, at 15.

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. Justice Brandeis's majority opinion rested squarely on the lack of *congressional* power over state tort claims, as his extended quotation from Justice Field's earlier dissent illustrates. Both Justice Butler's dissent and Justice Reed's concurrence read the majority opinion as imposing a constitutional limit on congressional authority (and both took issue with that limit).<sup>90</sup> Contemporaneous commentary read it as a constitutional limitation on the federal government as a whole.<sup>91</sup> No commentator even thought to rest the decision on any other constitutional ground until almost four decades later.<sup>92</sup>

Extending our view past the decision in *Erie* bolsters the conclusion that the Court was not thinking in terms of constitutional limits on the judiciary. On the same day that it decided *Erie*, it applied federal common law to resolve a water dispute between two private parties, despite the absence of any relevant federal statute or constitutional provision.<sup>93</sup> It has continued to create and apply federal common law,<sup>94</sup> which suggests that the problem in *Erie* was one of states' rights generally, not judicial power specifically.

The proposition that federal courts have more limited power than the federal 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.<sup>95</sup>

90. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 80–90 (1938) (Butler, J., dissenting); *id.* at 90–91 (Reed, J., concurring).

91. *See, e.g.*, Benno Schmidt, *Substantive Law Applied by the Federal Courts—Effect of Erie R. Co. v. Tompkins*, 16 TEX. L. REV. 512 (1938); *Recent Cases*, 22 MINN. L. REV. 876, 887 (1938).

92. For further criticism of the notion of *Erie* as a separation-of-powers (or judicial federalism) case, see Green, *supra* note 82, at 616–22. For a defense (which I find unpersuasive) of the notion that *Erie* was always a separation-of-powers case, see PURCELL, *supra* note 54, at 203–06.

93. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). *See also* *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (holding that federal common law displaces state law that would have barred recovery).

94. *See generally* Green, *supra* note 82, at 617 (“There is and always has been federal common law.”); MARTIN H. REDISH, SUZANNA SHERRY & JAMES E. PFANDER, *FEDERAL COURTS: CASES, COMMENTS, AND QUESTIONS* 897–990 (7th ed. 2012) (chapter collecting and examining cases on “Federal Common Law”).

95. *See* G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE* 122–27 (1991).

In addition, reading *Erie* as a separation-of-powers decision is conceptually incoherent. If—as the new reading of *Erie* assumes—Congress *could* enact governing law in diversity cases, then disallowing the courts from making federal common law must embody a presumption that the congressional failure to legislate is a deliberate decision to leave the area to state law. But in other arenas in which Congress has the last word, we do not assume that congressional silence always leaves state law in place or disempowers the federal courts. For example, Congress’s failure to exercise its authority under the Commerce Clause does not necessarily result in the application of state law; the courts instead determine for themselves whether the state’s interference with interstate commerce is too great and therefore invalid.<sup>96</sup> Although Congress *could* authorize such interference, we do not infer from congressional silence a desire to let the states—rather than the courts—make the decision in the absence of a federal statute.

Another problem with resting *Erie* on separation-of-powers grounds is that congressional authority for federal courts creating and applying federal common law—even if it displaces state law—is *not* lacking. As I suggested earlier, the Rules of Decision Act should be read as inviting federal courts to do just that, and had been interpreted that way with congressional acquiescence for almost a century. Moreover, it is at least plausible to read the grant of diversity jurisdiction as an authorization to develop federal common law.<sup>97</sup> Thus, to the extent that Congress is permitted to authorize federal common lawmaking, nothing in the *Erie* opinion provides a satisfactory justification for the decision.

Finally, the separation-of-powers rationale is, as the alternate term “judicial federalism” suggests, inextricable from the discredited dual sovereignty theory that underlay Justice Brandeis’s constitutional reasoning. The scholars who reinterpret *Erie* as a separation-of-powers case defend its limitations on federal court authority as a means of safeguarding federalism and states’ rights, not as a way of protecting congressional prerogatives; no one doubts that Congress could have overruled either *Swift* or any application of it and explicitly directed the application of state law. Thus, to the extent that *Erie*’s own broad federalism principles are widely acknowledged as insufficient to support the decision (given other precedents), transforming them into a theory that vests in Congress but not

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96. See, e.g., *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981); *Camps Newfound/Owatanna v. Harrison*, 520 U.S. 564 (1997). See also *Field*, *supra* note 36, at 925 (“[C]ongressional failure to legislate in an area in its competence surely does not invariably or even usually” signal a “congressional judgment that no federal lawmaking should exist.”).

97. See *Field*, *supra* note 36, at 915–19. For a contrary argument, see *Tidmarsh & Murray*, *supra* note 44, at 621–23.

the courts the power to displace state law does not escape that insufficiency.<sup>98</sup>

Considered from a statutory, constitutional, or practical perspective, then, *Erie* is wrong. In the next section, I argue that it was also out of step with the Court's contemporaneous jurisprudence and thus cannot be explained as a product of its time.

### B. *Erie Is Not a Reflection of Its Time*

We are so accustomed to the *Erie* doctrine that we fail to recognize just how radical the decision was. Even in the absence of a century of precedent, *Erie* is counterintuitive: As one scholar noted, anyone looking at the Supremacy Clause would conclude that “picking between federal law and state law would seem to be no choice at all—federal law is supposed to win.”<sup>99</sup> Given the well-established precedent, *Erie* is all the more surprising. Robert Jackson, soon to become a Justice himself, called *Erie* “the most remarkable decision of [the 1938–1940] period and in some respects one of the most remarkable in the Court's history.”<sup>100</sup> And unlike some of the other cases of the period that overruled existing precedent, *Erie*, as Jackson pointed out, “was not impelled by ‘supervening economic events,’ nor was it a part of the program of any political party.”<sup>101</sup> Another contemporaneous commentator described it as “a bolt from the blue.”<sup>102</sup> A more recent commentator labels the decision “breathtaking” in its scope.<sup>103</sup> Another modern scholar calls *Erie* “revolutionary,” noting that it “had nothing to do with nationalism, redistribution, or any other part of the New Deal political

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98. As one scholar notes, federalism and separation-of-powers concerns are “inextricably intertwined” in this context. Redish, *supra* note 87, at 767. The only way to make the separation-of-powers rationale do any work is to read *Erie* as a limit on federal court lawmaking in general, as a way to constrain the courts rather than as a way to protect the states. This reading of *Erie* is pernicious. See *infra* Part III.C.

99. Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on Erie and Gasperini*, 46 U. KAN. L. REV. 751, 751 (1998).

100. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 272 (1941).

101. *Id.* at 273. Jackson also notes that in overruling *Swift*, “the Court in effect has declared that thousands of decisions of federal courts, which are no longer subject to correction, were wrongly decided.” *Id.* at 283.

102. Walter Wheeler Cook, *The Federal Courts and the Conflict of Laws*, 36 ILL. L. REV. NW. U. 493, 493 (1942).

103. MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 746 (2009).

agenda.”<sup>104</sup> This was the Court striking out on its own—the litigants had not even argued that *Swift* should be overruled.

*Erie* was not only unexpected, it was out of step with contemporaneous cases. The 1936 and 1937 Supreme Court Terms are famous as the start of the Court’s about-face on the breadth of federal power: after previously striking down much of the New Deal on federalism grounds, the Court reversed course, upheld major New Deal initiatives, and broadly expanded the reach of federal power.<sup>105</sup> A few years later it relegated the Tenth Amendment’s federalism-based limit to the status of a “truism.”<sup>106</sup> Not long after that, the Court further undermined state sovereignty, and especially the notion of exclusive territoriality,<sup>107</sup> in *International Shoe Co. v. Washington*.<sup>108</sup> That case overruled another venerable case from the dual-sovereignty era, *Pennoyer v. Neff*,<sup>109</sup> and reversed the longstanding principle that each state had exclusive jurisdiction over those within its borders. And the Court delivered the coup de grace in 1947, when it held in *Testa v. Katt*<sup>110</sup> that Congress could require a state court to entertain federal law claims even if those claims ran afoul of state policies. The *Erie* Court’s solicitude for state sovereignty, and its reliance on “pre-New Deal federalism,”<sup>111</sup> is inexplicable in the midst of this march toward federal dominance.

Nor was *Erie* consistent with the judicial modesty that Brandeis himself had unsuccessfully urged in 1936, before the sweeping changes of that Term. In *Ashwander v. Tennessee Valley Authority*,<sup>112</sup> the Court, over Justice Brandeis’s objections, had decided a constitutional question in a suit brought by stockholders against the corporation. Brandeis’s concurrence argued that the Court could have, and should have, dismissed the suit for lack of standing.<sup>113</sup> He based his conclusion on a series of precedents that together directed the Court to avoid constitutional questions whenever possible, recognizing the “great gravity and delicacy” of the Court’s function

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104. Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459, 461 (2001).

105. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). See also Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 *U. PA. L. REV.* 1245, 1258 (1996) (describing *Erie*’s federalism ground as “curious” in light of *Jones & Laughlin*).

106. *Darby*, 312 U.S. at 124.

107. For a discussion of how *Swift* was based on notions of territoriality, see GREVE, *supra* note 57, at 12–13, 19–20.

108. 326 U.S. 310 (1945).

109. 95 U.S. 714 (1877).

110. 330 U.S. 386 (1947).

111. Green, *supra* note 82, at 607.

112. 297 U.S. 288 (1936).

113. *Id.* at 341–55 (Brandeis, J., concurring).

of judicial review.<sup>114</sup> In *Erie*, by contrast, “Brandeis’s Progressive politics overrode all his prudential scruples, as he went out of his way to base the decision on the broadest and most abstract possible Constitutional grounds.”<sup>115</sup>

Finally, as noted earlier, on the same day that it issued the *Erie* decision the Court nevertheless made clear that federal common law still governed in some cases.<sup>116</sup> Scholars have been trying ever since to delineate the scope of federal common law in a way that renders it consistent with *Erie*; as one pair of scholars notes, “federalism and separation of powers concerns leave no room for federal common law to operate.”<sup>117</sup>

Whether we focus on the political or the jurisprudential landscape of *Erie*’s era, then, the case is not only not explainable as a product of its time, but it is also in great tension with its own era. Its survival for almost three-quarters of a century also renders it more fit for contemporary criticism than it would be had it been mooted or overruled within a few decades of its inception. If *Erie* reflected only the sensibilities of its time, it would not be thriving today. I turn in the next section, therefore, to a demonstration of *Erie*’s failures in our own time.

### C. *Erie Is Pernicious*

*Erie* is undoubtedly one of the most significant Supreme Court cases of all time. It has been called “mythic,”<sup>118</sup> “a star of the first magnitude in the legal universe,”<sup>119</sup> an “icon,”<sup>120</sup> and a “modern orthodox[y].”<sup>121</sup> The *Erie*

114. *Id.* at 345–48.

115. Robert W. Gordon, Book Review, 60 J. LEGAL EDUC. 549, 559 (2011). *See also* Susan Bandes, Book Review, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829, 882 (2001) (“The *Erie* case is not usually associated with judicial restraint.”). The only way to view *Erie* as consistent with the tenor of its time is to look solely at its possible effect on the outcome of cases: Brandeis shared with at least some New Dealers an anti-business orientation, and *Erie* might have been bad for corporate litigants. (It may no longer have that effect. *See supra* text accompanying notes 64–67.). Jurisprudentially, however, *Erie* does not fit with other decisions of the era.

116. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

117. Tidmarsh & Murray, *supra* note 44, at 587 n.9.

118. Adam N. Steinman, *What is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 247 (2008). *See also* Ely, *supra* note 81 (on *Erie*’s “irrepressible myth”); Green, *supra* note 82 (on “repressing *Erie*’s myth”).

119. BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 272 n.4 (1977).

120. Green, *supra* note 82, at 595.

121. *Id.*

doctrine is “the most studied principle in American law.”<sup>122</sup> It thus has the potential to do great good or great harm. I contend that it has done more harm than good, and that its most pernicious consequence is its effect on jurisprudence and constitutional theory.<sup>123</sup> Its warped view of constitutional structure and the role of the judiciary has infected almost every corner of our public-law jurisprudence, from constitutional interpretation to international law.

If *Erie* had been confinable to the federalism principles on which it originally rested, it might have done little harm. As I suggested previously, Brandeis’s view of federalism was outdated in 1938 and has since been completely abandoned. The problem is that once federalism disappeared as a possible justification for *Erie*, scholarly commentators found a different theoretical justification—one with long and potentially devastating tentacles. The new justification—*Erie*’s “new myth”—is that federal courts have more limited authority than the federal legislature to displace state law. But as I elaborate in this section, that new myth has lent support to a distorted view of what judges do and what they are supposed to do, in ways that are detrimental to our constitutional democracy.

Viewing *Erie* as a case about the federal *judiciary* has created a revisionist view of its meaning. As one modern revisionist scholar describes it, *Erie* was part of a judicial “New Deal Revolution” that was less about “embracing Rooseveltian Progressivism” than about “reestablishing the legitimacy of judicial review in the modern world.”<sup>124</sup> The Court reestablished legitimacy, according to this scholar, by constructing “a new and more legitimate approach to judicial review,” the “core principle” of which “was the embrace of textual originalism.”<sup>125</sup> Another commentator echoes this revisionist view, suggesting that *Erie* is one of “a series of significant decisions that constrain judicial lawmaking,” because “law[s] ‘made’ by the federal judiciary lack[] . . . constitutional legitimacy.”<sup>126</sup> Yet another scholar similarly suggests that by denying the legitimacy of all judicial “lawmaking” in the absence of a congressional delegation, *Erie* undermined non-originalist judicial review, especially in cases decided under the rubric of substantive due process.<sup>127</sup>

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122. Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 312 (1980).

123. I leave to one side the practical and political difficulties identified in Part III.A.2. (and the torture that the *Erie* doctrine has inflicted on generations of law students), although some might consider them significant.

124. Lash, *supra* note 104, at 462.

125. *Id.* at 464.

126. Clark, *supra* note 88, at 1403.

127. Merrill, *supra* note 87. See especially *id.* at 3 (“[T]he legitimacy of non-originalist judicial review—can profitably be analyzed as [an] issue[] of federal common law.”); *id.* at 6 (federal common law includes “all federal rules of decision not mandated on the face of a federal text”); *id.* at 17 (the thesis of *Erie* as a judicial federalism case “suggests that federal courts may ‘interpret’

Beyond constitutional law, a number of scholars have argued that *Erie* should be read as severely limiting the authority of the federal courts to make federal common law, even in the absence of competing state law, despite the fact that enclaves of federal common law have existed since the day *Erie* was decided.<sup>128</sup> Others have used the new version of *Erie* to cast doubt on the validity of customary international law.<sup>129</sup> One scholar contends that *Erie*'s ban on federal judicial lawmaking means that federal courts should not make what are often called "*Erie* guesses"—predicting how a state court would resolve a dispute when the state law is unclear.<sup>130</sup>

In all of these contexts, *Erie* is used to suggest that the Court itself has long believed that judicial "lawmaking" is of questionable legitimacy and thus must be constrained and confined. *Erie* has been drafted into service in the war against judicial "activism." (Ironically, of course, Brandeis's opinion in *Erie* was itself an instance of judicial lawmaking and judicial activism, overturning a longstanding interpretation of an unchanged federal statute on the basis of a flimsy constitutional argument.) As one scholar notes, the revisionist view of *Erie* "cloak[s] a wide range of antijudicial ideas in *Erie*'s conventional garb."<sup>131</sup> And recourse to *Erie* and its 1789 Judicial Act roots gives these judicial critiques a false pedigree; in fact, the first published occurrence of the term "judicial activism" was in 1947.<sup>132</sup>

*Erie* thus encourages a view of judicial actions as divided into two wholly separate categories: legitimate judicial interpretation and illegitimate

constitutional provisions and congressional legislation, so long as interpretation is understood to mean a search for the specific intentions of the enacting body"); *id.* at 20 ("[T]he separation-of-powers principle has probably eclipsed federalism as the dominant ground for questioning lawmaking by federal courts."); *id.* at 27–32 (analyzing *Swift* and the Rules of Decision Act); *id.* at 59–69, 68 n.293 (citing *Roe v. Wade*, 410 U.S. 113 (1973), and condemning non-originalist judicial review).

128. See, e.g., MARTIN REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 29–46 (1991); CLARK, *supra* note 105, at 1258. This particular use of *Erie* has a long pedigree. See, e.g., PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 61–63 (1970); George D. Brown, *Of Activism and Erie—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617 (1984).

129. See, e.g., Bradley & Goldsmith, *supra* note 88; Meltzer, *supra* note 88. Three Justices appear to agree with this position. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 740–46 (2004) (Scalia, J., concurring).

130. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1495–517 (1997).

131. Green, *supra* note 82, at 598. The continued existence of federal common law, including constitutional common law, suggests that these attacks have been less than successful in reducing judicial activism. In some ways, that makes the effects of this use of *Erie* even more troubling; it has, as I argue below, harmed our jurisprudential discourse, and it has done so without achieving the reforms that its proponents advocate.

132. See Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIF. L. REV. 1441, 1446 (2004).



judicial lawmaking. That stark dichotomy is false as a descriptive matter—interpreting law and creating law slide into one another on a continuum.<sup>133</sup> Common law and constitutional interpretation are not nearly as far apart as these revisionists would have us believe.<sup>134</sup> This view of judicial decision-making narrows our vision of constitutional interpretation, leading jurists across the political spectrum to claim that constitutional adjudication is constrained and uncreative, equivalent to an umpire’s call of balls and strikes.<sup>135</sup>

Describing the world as dichotomous also stunts our jurisprudential discourse. The dichotomy allows critics of any particular decision (or group of decisions) to elide the hard questions about whether the decision is defensible, enabling them instead to reject it as illegitimate per se without serious analysis. And once we begin to believe that the Court is acting illegitimately—rather than simply erroneously—when it reaches a decision with which we disagree, it becomes impossible to carry on a thoughtful dialogue with those on the other side. As more people come to see judicial review as illegitimate, faith in the rule of law diminishes, and adjudication—especially constitutional adjudication—comes to be seen as just politics by another name. Conventional wisdom reflects an extreme version of what Professor White, elsewhere in this symposium, called the modern view of the role of judges: that they are unable to protect individual rights without simply enacting their own preferences into law.<sup>136</sup>

When we thus erase the distinction between law and politics, judicial review—now seen as judges imposing their own political or policy preferences—develops a bad reputation. Everyone, judges included, urges judicial restraint and condemns judicial activism. And everyone wants judicial policy-makers who subscribe to their own brand of politics.

This chain of consequences should sound ominously familiar. We are now enjoying the benefits of *Erie*’s dichotomy in the form of a highly politicized judicial nomination process, and academic calls either to abandon judicial review and substitute popular constitutionalism or to constrain

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133. For other scholars endorsing such a continuum, see, for example, Field, *supra* note 36, at 893–94; Westen & Lehman, *supra* note 122, at 331–36.

134. See DAVID STRAUSS, *THE LIVING CONSTITUTION* (2010) (describing constitutional interpretation as a common law approach). See generally DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* (2009) (describing how judges make decisions, including constitutional decisions).

135. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., nominee) (“Judges are like umpires. Umpires don’t make the rules, they apply them.”); *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 59 (2009) (statement of Hon. Sonia Sotomayor, nominee) (“The task of a judge is not to make law, it is to apply the law.”); *id.* at 79 (job of judges is “like umpires”).

136. G. Edward White, *Determining Notoriety in Supreme Court Decisions*, 39 PEPP. L. REV. 197, 220–21 (2011).

judicial discretion by means of some utopian grand theory of interpretation.<sup>137</sup> The judiciary, it seems, is in danger of losing both its independence and its ability to lead.<sup>138</sup>

#### IV. CONCLUSION: JUDICIAL ACTIVISM AND THE WORST CASES OF ALL TIME

Some readers might agree with everything I have said except the conclusion that *Erie*'s effects are detrimental. If *Erie* is encouraging judicial restraint and discouraging judicial activism, you might say, all the better. In all but cases in which the Constitution's clear language dictates a different result, democratic majorities should prevail over the views of unelected federal judges.

But consider the lesson of the rest of the essays in this symposium before condemning judicial activism. Leave aside *Dred Scott*, which is probably sui generis because it involved issues that ultimately led to the Civil War and because the Court (wrongly but self-consciously) thought it was preventing a national constitutional crisis. Except for *Dred Scott*, every one of the cases chosen by the other symposium participants involves a judicial *failure* to strike down a democratically enacted state or federal law.<sup>139</sup> The Court in each case *deferred* to popular will—and in each case doing so was, as the title of this symposium suggests, a “Supreme Mistake.”

In other words, the errors are worse when the Court lets bad laws stand than when it strikes good laws down. We need more judicial activism, not less. By casting a policy decision as a constitutional mandate, and placing a murky constitutional imprimatur on judicial restraint, *Erie* threatens to deprive us of one of our oldest and most effective tools for avoiding majority tyranny. If *Erie*'s modern defenders have their way, *Erie*'s legacy is likely

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137. On the futility of grand theories, see DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002).

138. See Erwin Chemerinsky, *Losing Faith: America Without Judicial Review*, 98 MICH. L. REV. 1416 (2000); Justin Driver, *Why Law Should Lead*, THE NEW REPUBLIC, Apr. 8, 2010, at 28.

139. To the list in the symposium I might add *Abrams v. United States*, 250 U.S. 616 (1919), and its progeny, which upheld censorship and the punishment of those who advocated unpopular political ideas; after a run of five decades, these cases were thoroughly repudiated in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). I think history will eventually add *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a state ban on consensual homosexual sodomy), which has already been overturned in a case that said it “was not correct when it was decided, and . . . is not correct today.” *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). And just to anticipate one possible objection: We should automatically exclude from the list of “worst cases” any case over which there is a serious division of opinion, which means that cases like *Lochner v. New York*, 198 U.S. 45 (1905) and *Roe v. Wade*, 410 U.S. 113 (1973) (both invalidations of state laws, reviled by two almost completely non-overlapping political camps) cannot serve as counter-examples.

to be more cases like *Plessy*, *Buck*, and *Korematsu*. It is hard to imagine a more troubling future.