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THE SUPREME COURT "PULLED A BRODIE": *SWIFT* AND *ERIE* IN A COMMERCIAL LAW PERSPECTIVE

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ABSTRACT

Erie Railroad v. Tompkins *is a cornerstone of modern American law.* Erie *overturned* Swift v. Tyson*, a case that had stood for nearly a century with minimal objection.* Swift *involved the negotiability of commercial paper and the case held that in disputes heard in federal courts under diversity jurisdiction the court should use traditional common law methods to resolve the case rather than feeling bound by the state court decisions.*

Correspondence between Harvard Law School's Lon Fuller and Yale's Arthur Corbin—arguably the two greatest Contracts Law professors of the mid-Twentieth Century—reveals widespread ridicule and dismay among commercial lawyers and scholars following Erie*. In a letter to Corbin, Fuller quote the great Harvard Constitutional Law scholar Reed Powell as saying the Supreme Court "pulled a brodie" in* Erie*. This article reviews* Erie *from the perspective of commercial law, rather than the public law commentary that has dominated discussion of the* Erie *doctrine since its birth, seeking to understand the depth of contempt for* Erie *among commercial lawyers in terms of its consequences, reasoning, and jurisprudential approach.*

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INTRODUCTION

"I enjoyed reading your article in the All-Yale issue of the Journal. Reed Powell, who is just as doubtful as ever of the Supreme Court's competence, also thinks they probably pulled a brodie in overruling Swift v. Tyson."

— *Letter from Professor Lon L. Fuller, Harvard University Law School to Professor Arthur L. Corbin, Yale University Law School (Mar. 26, 1941).*[1]

"brodie" noun:
2. slang: FALL, FAILURE, BONER, FLOP
"pull a brodie"
Etymology: after Steve Brodie 1901: American who claimed to have jumped off the Brooklyn Bridge in 1886

— *Meriam-Webster Dictionary*[2]

According to Wikipedia, Steve Brodie (1861-1901) "was an American from Manhattan, New York City, who on July 23, 1886,

[1] Reprinted in Scott D. Gerber, Corbin and Fuller's Cases on Contracts *(1942?): The Casebook That Never Was*, 72 FORDHAM L. REV. 595, 610 (2003).
[2] Merriam-Webster Dictionary [https://perma.cc/25HC-QH83].

claimed to have jumped off the Brooklyn Bridge and survived." His story made him a celebrity, leading to a successful career as a performer and saloon owner. Alas, later reports cast doubt on the veracity of his tale, although he did go on to execute successful (and apparently verified) jumps off other bridges. His name, as well as the legend of his initial false boast, has come to have the more ignominious meaning of a "boner" or a "flop" (sometimes spelled "brody").

Like Steve Brodie, *Erie Railroad v. Tompkins*[3] has also gone on to earn legendary status. Unlike Brodie's legacy, however, *Erie*'s authority is largely unquestioned. According to a survey in 2014, *Erie* is the 8th most-cited Supreme Court Administrative Law decision of all time and its hold on the professoriate is even greater, ranking as the 4th most-cited case in Administrative Law secondary sources.[4] Today, the prevailing consensus among the legal profession is that *Erie* was a necessary corrective to the glaring intellectual and policy error of *Swift v. Tyson*.[5]

Yet as the correspondence between Lon Fuller and Arthur Corbin indicates, this was far from the consensus of commercial law scholars at the time *Erie* was decided—indeed, the consensus seemed to be more nearly the opposite, as indicated by reference to the great Harvard constitutional law professor Reed Powell who "also th[ought]" the Supreme Court did a faceplant in *Erie*.

This article revisits *Erie* and *Swift* yet again, this time through the lens of a commercial law perspective, rather than a public law (administrative law, federal courts) perspective that continues to represent the overwhelming mode of analysis of *Erie*. The time is ripe for a reconsideration of the *Erie* and *Swift* dispute, as the growth of global commerce and the Internet create new challenges for how we

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[3] Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

[4] *See* Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, YALE J. ON REG., NOTICE & COMMENT (Oct. 9, 2014) [https://perma.cc/NZ5U-7X7T].

[5] Swift v. Tyson, 41 U.S. 1 (1842). There are notable exceptions, of course. *See* Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPPERDINE L. REV. 129 (2011). Sherry's critique is focused on the error of *Erie* from a public law perspective rather than a private law perspective. *Id.* at 150 (noting that *Erie*'s "warped view of constitutional structure and the role of the judiciary has infected almost every corner of our public-law jurisprudence"). An exception is Professor Charles Heckman, in which he argues that the Federal Judiciary Act of 1789 carved out a sort of legal "exceptionalism" for commercial law disputes. Charles A. Heckman, *The Relationship of* Swift v. Tyson *to the Status of Commercial Law in the Nineteenth Century and the Federal System*, 17 AM. J. OF LEGAL HIST. 246 (1973).

should address contracting in the virtual age. Assuming Fuller accurately portrayed the opinion of the commercial law bar at the time of *Erie*, why were those lawyers so convinced that *Erie* was a brodie?

Revisiting the conflict between commercial lawyers and public lawyers also illuminates a century-long debate in the approach to law between private lawyers and public lawyers, between the private-ordering and spontaneous evolution focus of common law on one hand and the top-down, positivist approach of public law that has come to dominate legal thinking in the *Erie* era.

In a series of articles published roughly two decades ago, I explored the jurisprudential foundations of *Swift* and particularly the "law finding" approach of the traditional common law, versus the "law making" approach of modern positivism, and criticized the logic of *Erie*.[6] More recently, Professor Stephen Sachs has repeated and elaborated on some of these arguments about "finding law" and has exposed *Erie*'s fallacies.[7] Professor Richard Epstein's article in this volume of the *NYU Journal of Law & Liberty* further addresses this newly-revitalized debate through the lens of natural law.[8]

This article revisits this longstanding debate by re-examining Justice Story's *actual* reasoning in *Swift* in the specific context in which the case was decided—the negotiability of Bills of Exchange—rather than the cartoonish characterization of *Swift* provided by Justice Brandeis in *Erie* and Justice Holmes's earlier claims about its reasoning.

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[6] *See* Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. L. REV. 1551 (2003); A.C. Pritchard and Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Decision-Making*, 77 N. C. L. REV. 409 (1999); A.C. Pritchard and Todd J. Zywicki, *Constitutions and Spontaneous Orders: A Response to McGinnis's "In Praise of Decentralized Traditions and Their Preconditions*, 77 N. C. L. REV. 537 (1999); *see also* Todd J. Zywicki and Anthony B. Sanders, *Posner, Hayek, and the Economic Analysis of Law*, 93 IOWA L. REV. 559 (2008).

[7] *See* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019). More recently, Sachs has elaborated on his call to overturn *Erie*. *See* Stephen E. Sachs, *Life After* Erie, Lecture Delivered Nov. 1, 2023, on the occasion of appointment as Antonin Scalia Professor of Law [https://perma.cc/5DCF-AYYR].

[8] *See* Richard A. Epstein, *The Constitutional Return to Natural Law: Finding the Common Thread Between the Privileges or Immunities of the Fourteenth Amendment and the General Law Principles of* Swift v. Tyson, __ N.Y.U. J.L. & LIBERTY __ (forthcoming 2024).

I. ERIE AND SWIFT

Erie arose when Tompkins was injured when he was struck by an open door on a passing freight train owned by the Erie Railroad Company while he was walking along a footpath on a dark night. Erie argued that it was not liable because under Pennsylvania law, as established by the state's highest court, Tompkins should be treated as a trespasser and thus the railroad was not liable. Tompkins responded that "no such rule" had been established by the decision of the Pennsylvania courts and that since there was no state statute on point, "the railroad's duty and liability is to be determined in federal courts as a matter of general law."

The trial court rejected the claim that the applicable law precluded recovery and the jury returned a verdict in Tompkins's favor for $30,000, which was subsequently affirmed by the Circuit Court of Appeals.[9] The Court of Appeals refused to consider Erie's claim that it was bound by the decisions of the Pennsylvania Supreme Court (which the plaintiff contested) and instead applied principles of general law. The defendant conceded that the "great weight of authority in other states" was contrary to the claimed doctrine of Pennsylvania and that in the absence of a local statute "the federal courts are free… to exercise their independent judgment as to what the law is."

On appeal to the Supreme Court, Justice Brandeis reversed the lower courts and held that federal courts were required to decide the case according to the applicable state law. While the accuracy of the courts' recitation of the facts is open to question,[10] the actual facts of what happened that night on the railroad tracks has been overtaken by *Erie*'s holding and particularly its reasoning. Drawing extensively on Justice Holmes's prior denunciations of *Swift*, Justice Brandeis used the opportunity to overrule *Swift*. Declaring the logic of *Swift* to be a "fallacy," Brandeis accepted Holmes's characterization that its doctrine "rests upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it

[9] Tomkins v. Erie R. Co., 90 F.2d 603 (2d Cir. 1937). The case was heard in the Southern District of New York and appealed to the Second Circuit.

[10] For a detailed history of the case itself, including raising some questions about the accuracy of the courts' factual recitations, *see* Brian L. Frye, *The Ballad of Harry James Tompkins*, 52 AKRON L. REV. 531 (2018).

unless and until changed by statute.'"[11] Instead, Brandeis accepted Holmes's jurisprudential assertion that "law… does not exist without some definite authority behind it." He continued quoting Holmes, "The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word." As a result, the Court reversed and remanded to consider the case under Pennsylvania authority. Moreover, *Erie* is typically viewed not only as a repudiation of *Swift*'s specific holding but the jurisprudential philosophy underlying it, replacing its supposedly mystical jurisprudence of the common law as a "brooding omnipresence in the sky" with the modern doctrine of legal positivism.

Swift, of course, said nothing of the kind. No "brooding omnipresence" or "transcendental body of law" makes an appearance in Justice Story's decision. Instead, it is merely the resolution of an ordinary contractual dispute between two parties with respect to whether a *bona fide* transferee of negotiable paper in good faith, without notice of any defects and for valid consideration, can recover payment on the bill even if the initial holder cannot. The general rule was well-established by universal and longstanding practice that such note was valid. New York, however, had caselaw that suggested that the transfer of the note to satisfy a preexisting debt was not in the usual course of trade or for consideration, and thus was not fully negotiable.

The dispute in *Swift* dealt with a bill of exchange indorsed by Swift against Tyson on a bill of exchange dated at Portland, Maine in May 1836, payable six months later, in partial payment of some lands sold by a third party to a company in New York. Unfortunately, the land transaction for which the bill was provided turned out to be fraudulent, resulting in the lawsuit. The defendant argued that enforcement of the contract should be governed by New York law, "as expounded by its courts, as well upon general principles,"[12] and that under the law of New York, as expounded by its courts, a pre-existing debt does not constitute valuable consideration to negotiable instruments. To the extent this was an accurate statement of New York law, it would be contrary to long-established and near-universal principles of commercial law regarding negotiability.

[11] *Erie*, 304 U.S. at 79.

[12] *Swift v. Tyson*, 41 U.S. 1, 11 (1842).

After reviewing New York caselaw, Story concluded that it was unsettled on that particular issue. More relevant to Story, however, is whether federal courts would be bound if, in fact, New York courts had fully settled the doctrine contrary to "the principles established in the general commercial law." As Story observes, "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."[13] Given this fact, to the extent the court resolves the case by looking to the well-established general principles and customs of commercial law, to the decisions of other jurisdictions, and to pragmatic considerations regarding the adoption of one rule as opposed to the other, his process of decision *is exactly the same as New York courts* would use in resolving the case. Story states that while the Court has always been bound by state law when applying statutes to matters of fixed local concern (such as real estate), when it comes to matters of general common law, federal courts have approached such a case the same way a state court would, by application of the techniques of common law judging. He observes that the federal courts were never considered obliged under section 34 of the Judiciary Act of 1789 to treat the decisions of a particular state's courts as binding precedent, "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."[14]

The decisions of local tribunals should thus be weighed as persuasive authority in deciding particular cases, but they are not binding authority on a federal court.[15] But where there is a prevailing rule that is near-universal in its application, that is of ancient and consistent application, and that is also unambiguously superior in

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[13] *Id.* at 18.

[14] *Id.* at 19.

[15] Notably, as will be discussed below, common law courts may choose to treat certain decisions as binding authority for prudential reasons when there are competing rules of equal reasonableness when it is important to have some established and predictable rule rather than uncertainty. Consider, for example, the so-called "Mailbox Rule" in Contract Law, in which it is likely more important to have one consistent rule as to the timing and act of acceptance where either rule is likely equally reasonable.

reasoning to the alternative, then the court should not feel itself bound by the decisions of a local tribunal. More to the point, a federal court should consider itself no more bound by the decisions of a local tribunal than the judges of that tribunal themselves, who are always free to reconsider their decisions in light of prevailing changes in experience or refinement of reasoning. As Story observes, "[t]he law respecting negotiable instruments may be truly declared in the languages of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, to be in a great measure, not the law of a single country only but of the commercial world."[16]

Moreover, Story notes that since the time of Mansfield, "there is not a single case to be found in England, in which it has ever been held by the court, that a pre-existing debt was not a valuable consideration, sufficient to protect the holder, within the meaning of the general rule," although there has been some *dicta* to the contrary. The same rule has generally applied in American courts as well. Given the near-universal nature of the practice as well as the disastrous consequences that would result for the stability and efficiency of commercial law transactions, the Court was unwilling to be bound by the unsettled law of New York. As Story observes, affirming the bedrock principle of negotiability "is for the benefit and convenience of the commercial world, to give as wide an extent as practicable to the credit and circulation of negotiable paper," and that to hold the opposite would be to "strike a fatal blow" at the vast number of bank transactions ("[p]robably, more than one-half of all bank transaction in our country, as well as those of other countries") which rely on the negotiability of commercial paper.[17]

More relevant, however, is Justice Story's analysis of the fundamental difference in the nature of statute law and common law.

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[16] *Id.* (internal citation omitted). For discussion of Lord Mansfield revolutionary and seminal contributions to the development and improvement of modern commercial law primarily through the incorporation of the doctrines of the law merchant into the common law, *see* Zywicki, *Rise and Fall*, *supra* note 6, at 1599—1601. *Luke v. Lyde*, 2 Burr. 882 (1759), was a dispute over the disposition of maritime insurance proceeds when a cargo of fish and the crew was captured by a French ship, which was in turn recaptured by an English privateer a few days later. In resolving the dispute, Mansfield relies on a sources such as law merchant treatises, ancient law of the sea, and a variety of foreign sources. For a fascinating discussion of the similarities between Story and Mansfield's views of law, including the relationship between local law and general law, *see* William R. Leslie, *Similarities in Lord Mansfield's and Joseph Story's View of Fundamental Law*, 1 AM. J. OF LEG. HIST. 278 (1957).

[17] *Swift*, 41 U.S. at 20.

As will be elaborated below, statutes and their particular terms are binding because of their authoritative nature of promulgation: the words of the statute are "the law." Common "law," by contrast, is the set of *principles* and *concepts* that make up the law, *not* the specific verbal formulations provided by particular judges or courts. Story writes, "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 re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect."[18]

Nothing in Justice Story's opinion relies on a "brooding omnipresence in the sky," natural law, or any other such matter. Instead, Justice Story says the task of the federal judge is identical to that of a state judge or any other common law judge, to look at the traditional sources of common law judging and to find in the experience and principles of the common law, in this case the doctrine of the negotiability of commercial paper, to reach a resolution.

II. CORBIN, FULLER, AND THE SUPREME COURT'S *ERIE* BRODIE

A. Corbin

In two extraordinarily pointed articles written shortly after the *Erie* decision, Arthur Corbin launched biting criticism of the Supreme Court's reasoning and particularly its blatant mischaracterization of the intellectual foundations of *Swift*.[19]

In 1938, shortly after the case was decided, Corbin penned a short comment to an extended analysis of the *Erie* decision by Yale law professor Harry Shulman (who later served as Dean of Yale Law School).[20] Corbin's article is remarkable for its sarcastic tone and ridicule of the logic of Brandeis's opinion. He announces his contempt in the essay's opening lines, "'There is no federal general common law.' True, beyond doubt, in the sense that there is no

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[18] *Swift*, 41 U.S. at 18 (emphasis added).

[19] *See* Arthur L. Corbin, *The Common Law of the United States*, 47 YALE L.J. 1351 (1937—38); Arthur L. Corbin, *The Laws of the Several States*, 50 YALE L.J. 762 (1941).

[20] Corbin's comment was signed only by his initials. I was made aware of Corbin's authorship by Jack Goldsmith and Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998).

system of universal general rules and principles, no 'brooding omnipresence in the sky.' In view of the action of the court in overruling *Swift v. Tyson*, it may now be pertinent to ask whether there is a 'Pennsylvania general common law.' Is there an omnipresence brooding over the state of Pennsylvania?"[21]

The thrust of Corbin's critique is Brandeis's facile and inaccurate description of the nature of the common law process. As Corbin observes, if it is unconstitutional for the United States Supreme Court to look outside the opinions of the judges of the Pennsylvania courts in deciding a dispute, would it also be unconstitutional for a *Pennsylvania* judge to look outside of Pennsylvania caselaw to consider the general principle of commercial law, the law of other jurisdictions, or to consider the practical consequences of their decisions? Would it be acceptable for the Pennsylvania Supreme Court to overturn or distinguish precedent based on developments in the law or changes in economic or social conditions? If so, why would that be permissible for the Pennsylvania Supreme Court to do but not the United States Supreme Court? As Corbin writes, "[i]f the answer to the foregoing questions [i.e., a Pennsylvania judge may look to persuasive sources from which a federal judge may not] is 'yes,' the federal judges are, for the first time in one hundred and fifty years, limited in a way in which the Pennsylvania judges are not themselves limited."[22]

In overturning *Swift*, Corbin emphasizes that *Erie* substituted a farcical and wholly inaccurate description of the nature of the common law process as opposed to the nuanced and traditional approach used by Story. Corbin reveals his understanding of and affinity for Story's traditional and evolutionary approach to the development of the common law:

> The common law of Pennsylvania, like its statutory and constitutional law, is an evolutionary and variable product. In the main, it is the creative work of the judges, dealing with the living stream of dispute and conflict, searching in each new litigation case for a reasonable and workable guide to a solution. This guide is a rule of law, a generalization drawn from life history, one that is so well drawn from that history

[21] Corbin, *Common Law*, *supra* note 19, at 1351.
[22] *Id.* at 1352.

> that it will successfully meet the pragmatic test of explanatory rationalization. The judge's work in constructing this generalization instantly becomes a part of the history that will be used by the judges in succeeding cases; it is one new step in the evolution of the law. Every new case has some new factors that require original consideration by the court. In some degree, every new case is a case "of first impression."
>
> In dealing with each new controversy, the Pennsylvania judge must search for the applicable law, not merely in earlier Pennsylvania cases, not merely in the varying custom of Philadelphia or Pittsburgh or Bryn Mawr. He looks for enlightening direction to the decisions and doctrines and custom of England, old and new, of other states and countries, or other courts federal or state or foreign. He is not hidebound by any antecedent doctrine, itself man-made by some judge or jurist like himself. Of course, he weights all such doctrines with constructive and respectful care, and passes his independent judgment as to which form of worded rule will best serve for the solution of his immediate problem. He is far from certain of finding this worded rule in the opinions of Pennsylvania courts alone.[23]

Particularly ironic, Corbin notes, is that the disposition of the case in *Erie* was to remand to the lower federal court to apply Pennsylvania law. But as noted, the issue of the railroad's negligence was unsettled under Pennsylvania law and the doctrine urged by Erie was contrary to the great weight of authority of other jurisdictions. So how would the Pennsylvania courts comply with the Supreme Court's mandate on remand? "On the new trial in the District Court, the applicable 'Pennsylvania' law will be discovered *by the same process and from the same broad general sources as before*. If, on appeal, the new decision is considered by the Supreme Court, it will use the same process and the same sources."[24]

Corbin elaborated on these themes in a follow-up article, "The Laws of the Several States." Much of the article concerns itself with further developing his critique of *Erie*, and in particular, its absurd

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[23] *Id.*
[24] *Id.* (emphasis added).

description of the nature of the common law process and judicial decision-making. As he observes, the fundamental anomaly of the *Erie* decision is that it requires federal courts to do what no state court is obliged to do—to mechanically "look for" and apply the law "within the confines of one state" and that once finding it, "must not disapprove it as unsound or incorrect, but must apply it to the case before them even though they are sure that it is contrary to the common law inherited by use from England, to the decisions of other states, or to supposed principles of general jurisprudence and justice."[25]

As Corbin observes, the common law is not a "brooding omnipresence" over the United States, Pennsylvania, or any other territorial locale, ever-fixed and unchanging. The common law is an evolutionary process of testing and revision subject to the demands of experience and reasoned analysis and revision.[26] As Corbin notes, "the common law does not consist of a number of eternal and universal rules or principles or doctrines, not man-made and not subject to be changed by man. But this is true without regard to the territorial acreage over which an omnipresence broods. No such omnipresence broods over the whole forty-eight states and District of Columbia. No more does on brood over the state of Pennsylvania, or over the state of Idaho with its shorter history."[27]

Instead, the principles and doctrines of the common law "are merely statements asserting uniformities of human action, based upon the past and influencing the future." The value of common law rules is in their utility in coordinating human affairs and providing guidance for future action, and when doctrines become obsolete or unworkable, the genius of the common law is in its ability to update and reinvent itself to meet new needs. "But in every case alike they are man-made, they are not omnipresent, and they are not in the sky."[28]

The doctrine of *Swift* itself illustrates the point. Few doctrines proved as robust and durable as *Swift* or as beneficial in its consequences for the nation. As Corbin writes: "Observe the rule in *Swift v. Tyson*. It was clearly stated by Mr. Justice Story, a great judge

[25] Corbin, *Several States*, *supra* note 19, at 764.

[26] Corbin, *Several States*, *supra* note 19, at 765; *see also* Pritchard and Zywicki, *Finding*, *supra* note 6.

[27] Corbin, *Several States*, *supra* note 19, at 765.

[28] *Id.*

and scholar. It was declared to be the law by a unanimous court of nine justices. It was respected for a hundred years. It was applied in hundreds of cases. But no Justice of our present Supreme Court is now so humble as to do it honor."[29] In fact, this was the thrust of Justice Butler's dissenting opinion in *Erie*.[30] *Swift*, he argued, had proven the test of time. Although there had been some criticism along the way, Holmes's position represented a small minority of the Court over *Swift*'s lifespan. Over that period the Court had established a workable set of precedents to draw lines, albeit imperfect, as to when the federal courts would be bound by state and local authority and when the federal courts could act as typical common law courts. Moreover, if Congress had thought *Swift*'s long-established interpretation of Section 34 of the Judiciary Act was incorrect, it could have easily clarified it but had never done so.

To the extent the *Swift* rule created some uncertainty or unpredictability in some cases, such is the nature of law itself, not just the common law. As Corbin stresses, *Erie* itself has posed profound challenges of uncertainty and unpredictability. Indeed, in the term after *Erie*, the Supreme Court found itself returning to the recognition of "general federal common law" in a host of different contexts, with apparently little concern that doing so was reincarnating the "brooding omnipresence in the sky" that was thought to have been extinguished in *Erie*. By recognizing the use of general federal common law (just in particular contexts), federal courts were to decide cases exactly as Justice Story said they should do in *Swift*—by looking to the principles and practices of the common law to create a workable body of law. State court systems routinely have conflicting precedents among different circuits within the state, disagreement among the judges on a panel, or changes in legal doctrine over time. But it is through this generation of conflict and reconciliation that the common law operated. "We may not like such conflict; but it is an inevitable part of our judicial process, or of any other. It is by such variation as this that the evolutionary growth of law is possible. Each litigant, whether in the federal or the state courts, has a right that his case shall be a part of this evolution—a live cell in the tree of justice."[31]

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[29] *Id.* at 772.
[30] *Erie R. Co. v. Thompkins*, 304 U.S. 64, 80 (1938) (Butler, J., dissenting).
[31] Corbin, *Several States*, *supra* note 19, at 776.

Corbin notes that it was Holmes himself who said that what he meant by "law" was a "prediction of what the courts will do in fact."[32] If that is so, then what provides a better guide for a party to predict the enforceability of a bill of exchange created in Maine and provided as consideration for a preexisting debt as part a transaction in New York: the unclear and potentially idiosyncratic New York common law rule on one hand, or the general rule of law prevailing throughout the rest of the country, world, and time immemorial on the other? Moreover, Corbin notes that allowing a state court to reconsider precedents and look to sources other than state court pronouncements creates peculiar anomalies, such as the case of *Fidelity Union Trust Co. v. Field*, where the Supreme Court felt bound by a questionable interpretation of a New Jersey statute by a mid-level Vice-Chancellor in the state court system. Whereas *other* New Jersey courts could refuse to follow the Vice-Chancellor's ruling as ill-reasoned and reach a different conclusion, the Supreme Court pronounced that it was bound by that case ruling. As a result, the plaintiff in the case who was not a party to the earlier precedent-setting case, could be hauled into court by the defendant and then find her hands tied by being unable to question the precedent itself.

As Corbin notes, "Ethel Field has been deprived of all opportunity to question the validity of the Vice-Chancellor's opinion, rendered in a case to which she was not a party. Had she been before that Vice-Chancellor himself she could have questioned it. In any other court of New Jersey, she could have questioned it; and she could have appealed to the Court of Errors and Appeals. But in the federal courts it is inviolate. Be it remembered that under our Constitution she can be dragged into the federal court wholly against her will. She must submit her fortune so the decision of a court that can read but must not reason."[33] It is difficult to see the logic in this implication of *Erie*, much less that this absurdity is mandated by the Constitution.[34]

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[32] *Id.* at 775, n.15. To which Corbin adds, Holmes's test is, "What [the courts] *will do*, not what they *have said*." *Id.*

[33] *Id.* at 768.

[34] Even questions as seemingly simple as which law to apply when a party seeks an equitable remedy for breach of contract, such as specific performance, *see* EDWARD YORIO AND STEVEN THEL, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS (2d ed., 2011), at ch. 22, or whether to grant a preliminary injunction, *see* David E. Shipley, *The Preliminary Injunction Standard in Diversity: A Typical Unguided*

B. Fuller

If Lon Fuller ever expressly opined on *Swift* or *Erie* beyond his communication with Corbin, I have not located it. However, his mention of *Erie* in the correspondence was raised in response to Corbin's article on *Erie* discussed above, "The Laws of the Several States," upon which Fuller comments "I enjoyed reading your article in the All-Yale issue of the Journal." As that context and his mention of Powell's criticism implies, it seems evident that he agrees with Corbin's assessment of *Erie*. It is also possible to discern what Fuller likely would think about *Erie* from his larger body of jurisprudential thought and view of the common law process.

Fuller famously defined law as "the enterprise of subjecting human conduct to the governance of rules." [35] Notably, he specifically stated that such laws "have nothing to do with any 'brooding omnipresence in the skies.'"[36] These laws "remain entirely terrestrial in origin and application." The laws he refers to "are like the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it."[37]

In his essay, *Freedom—A Suggested Analysis*, Fuller elaborates on what it means to undertake the "enterprise of subjecting human conduct to the governance of rules."[38] The purpose of law in a liberal society, he argues, is to provide individuals with a protected range of actions by which they can pursue their disparate ends through social interactions. To make this possible, it is necessary to construct legal and social rules that provide social order and a framework for voluntary interaction.

Fuller notes, however, that to seek to identify the presence of an order does *not* mean that there is a need for an order to be created by the will of any individual, such as a lawgiver. Instead, Fuller observes:

Erie *Choice*, 50 GA. L. REV. 1169 (2016), raise thorny questions about how to apply *Erie*, and one the Supreme Court largely waves away in *Guaranty Trust Co. v. York*, 326 U.S. 99, 102 (1945).

[35] LON L. FULLER, THE MORALITY OF LAW 96 (revised edition, 1969).

[36] *Id.*

[37] *Id.*

[38] Lon L. Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305 (1955); *see also* Dan Priel, *Lon Fuller's Political Jurisprudence of Freedom*, 10 JERUSALEM REV. OF LEGAL STUDS. 18 (2014).

> [S]ome of the most important and complex systems of order we know have come into existence, not by a single action of creation, but through the cumulative effect of countless purposive directions of human effort. Examples of such systems are language, economic markets, scientific theory, *the common law*, and, on a homelier plane, a footpath through a woodland. These are sometimes referred to as cases of 'spontaneous order,' but this expression is objectionable in implying that they have come into existence without purposive human effort. In fact, as I have noted, they are produced by the coming together of countless individual purposive acts."[39]

Fuller thus sees law as an *enterprise*, a never-ending process of internal evolution and improvement to better carry out the purposes for which law is intended, not a fixed set of static rules. Perfection in pursuit of these ends will never be accomplished, in part because the standard of perfection will be constantly changing because society and individuals' needs will be constantly changing.[40]

Legal positivism, by contrast, sees law as being "like a piece of inert matter—it is there or not there."[41] As a result of stripping the concept of law of any moral meaning or social purpose, positivists are led into bizarre conclusions such as "the 'laws' enacted by the Nazis in their closing years, considered as laws and in abstraction from their evil aims, were just as much laws as those England and Switzerland."[42] And, on the other side of the coin, it is implied that the rules and customs of the law merchant, which successfully governed commerce throughout Europe for centuries during the Middle Ages, somehow should not be considered "law" because it was enforced by decentralized private means lacking an authoritative sovereign issuance.

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[39] Fuller, *Freedom*, *supra* note 38, at 1322 (emphasis added). Fuller's description of the common law as embodying a spontaneous order system of law-making anticipates the further development of that concept by Bruno Leoni and F.A. Hayek, as discussed below.

[40] *See* FULLER, MORALITY, *supra* note 35, at 123.

[41] *Id.*

[42] *Id.*

In *The Anatomy of the Law*, Fuller notes, "[t]he historical fact is that in the building of the common law" the central obsessions of legal positivists—i.e., "Who has the authority to issue these commands? To whom are they addressed?"—"have not been given a central place in legal reasoning."[43] And his description of the common law process of judging is reminiscent of Story and Corbin's. He writes, "[t]he judges of the common law have always drawn their general rules of law from a variety of sources and with a rather free disregard for political boundaries."[44] He continues, "[j]udges who thus habitually borrow legal wisdom back and forth across political boundaries are apt to talk as if they were all working together in bringing to adequate expression a preexisting thing called 'The Law.' Plainly this usage will not be readily accepted by those who insist on preserving a sharp distinction between law after it has been made by proper authority and the intellectual ingredients that went into its making."[45] Although legal positivists ridicule this idea that common law is not "made" by judges as a "childish fiction," Fuller notes, "[y]et it is plain that this 'childish fiction' has greatly facilitated communication and commerce among the nations of the common law."[46]

From this discussion, it is safe to assume that Fuller shared Corbin (and Story's) view of the common law as an evolutionary system of private ordering. Like Corbin (and Story), Fuller's approach to the issue seems to be focused on the production of rules that will facilitate private ordering through reasonable and predictable rules, not the execution of the command of some identifiable sovereign authority. It seems evident that Fuller would share Story and Corbin's view that this was best done through a mixed system of recognizing local law where it is clearly embodied in statute, local practice when wedded to particularly local concerns

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[43] LON L. FULLER, THE ANATOMY OF THE LAW 153 (1968).

[44] *Id.* at 153-54.

[45] *Id.* at 154.

[46] *Id.* at 154. Fuller attributes the characterization of the idea that common law is "discovered" or "declared," not "made" by judges, as a "childish fiction" to John Austin in his book *Lectures on Jurisprudence*. *See* 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE: OR THE PHILOSOPHY OF POSITIVE LAW 634 (Robert Campbell ed., 5th ed. 1911) (criticizing "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges").

(such as land use), and the operation of the traditional common law process for the determination of other structures of private law rights.

C. *Swift* and the Development of American Commercial Law

The depth of Corbin and Fuller's scorn for *Erie*, along with Reed Powell's ridicule, suggests widespread disapproval of *Erie* at the time of its issuance. But the depth of their scorn suggests something beyond a mere academic dispute about the proper reading of the history of the Judiciary Act of 1789. What might explain the intense response of these two commercial law titans to the court's decision in *Erie*? I believe it had to do with the particular illiteracy that Brandeis's opinion shows toward the understanding of the consequences of *Erie* for the development of commercial law as well as the dramatic change in the jurisprudential foundations of the common law generally and commercial law specifically ushered in by *Erie*.

As Justice Story noted in *Swift*, the negotiability of commercial paper has been a backbone of the global commerce system for centuries. Indeed, Nathan Rosenberg and L.E. Birdzell in their magnificent book *How the West Grew Rich: The Economic Transformation of the Industrial World* identify the role of bills of exchange as one of the most crucial developments in the Middle Ages that created the institutional foundation for the commercial revolution in Europe. Early on, bills of exchange were used as a vehicle for extending credit to merchants by buying bills at a discount, thereby effectively paying interest.[47] The wide circulation of bills of exchange as a form of currency also enabled merchants to avoid carrying large amounts of gold and other money that exposed them to risk of theft, especially when traveling over long distances in foreign lands. Bills of exchange, by contrast, could be easily concealed and more difficult for thieves to use than coins. Indeed, the entire purpose of treating bills of exchange as substitutes for coins in Middle Age commerce would have been defeated had their universal

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[47] NATHAN ROSENBERG & L.E. BIRDZELL, HOW THE WEST GREW RICH: THE ECONOMICS TRANSFORMATION OF THE INDUSTRIAL WORLD 117 (1986). Rosenberg and Birdzell also point to other seemingly minor changes in commercial practice such as double-entry bookkeeping and insurance (particularly maritime insurance) as key contributors to the economic growth of the Western world.

negotiability been subject to the various nationalities of the merchants carrying them or the idiosyncratic rules of particular jurisdictions in which they were being presented.

Bills of exchange served a similar function as a money substitute. In the early United States a recurrent problem was an absence of gold, silver, and other precious metals that could serve as coinage. Bills of exchange served as a mechanism for settling accounts, particularly among traveling merchants or in less-populated areas of the country. Little wonder then that Story, writing in the mid-nineteenth century, focused on the devastating real-world consequences that could result from failing to protect the universal negotiability of commercial paper.

Moreover, it is generally accepted that the quality of federal judges and the commercial law doctrines they developed in the federal courts under the *Swift* regime was far superior to that of state courts and state judges.[48] Professors Randolph Bridwell and Ralph Whitten argue that because the commercial law doctrine developed by the federal courts was more consistent with prevailing universal commercial norms, it also generally protected parties' expectations better than did idiosyncratic, parochial, and biased state laws.[49] This was because with respect to commercial transactions involving interstate commerce, sophisticated parties generally expected that any disputes would be heard in federal court applying federal common law principles.[50] In particular, federal judges looked to a variety of sources, including English law, law merchant principles and customs, and the authority of other state courts to reach decisions that tended to cohere with the parties' expectations.[51] *Erie*, by contrast, represents the dark underside of both of these beneficent elements of diversity jurisdiction: by imposing state law on out-of-state parties, *Erie* maximizes both the application of biased home state rules (and thus the future incentives to provide more of the same) as well as the opportunities for post-contractual opportunism

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[48] *See* RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM 5 (1977); *see also* Zywicki, *Rise and Fall*, *supra* note 6, at 1615.

[49] *See* BRIDWELL & WHITTEN, *supra* note 48, at 5.

[50] *See* Zywicki, *Rise and Fall*, *supra* note 6, at 1616. As Zywicki notes, this tacit understanding also distinguishes the contractual transaction at issue in *Swift* from the later tort claim in *Erie*.

[51] *See* Zywicki, *Rise and Fall*, *supra* note 6, at 1617.

by private parties who are able to apply a rule contrary to that of the parties' expectations at the time of contracting.[52]

Moreover, a central purpose of the Constitution providing diversity jurisdiction to the federal courts was to provide a body of uniform national law removed from the parochial interests of states seeking to discriminate against out-of-state interests in collecting debts and enforcing contracts.[53] As Professor Mark Tushnet commented in an article in 1969, "*Swift* gave federal courts the power to develop the common law in isolation from the confusion and ideological partisanship of the state judicial systems."[54] Recognizing this, Justice Story observed in a different case involving marine insurance, that where a dispute arises between citizens of a state or in controversies respecting territorial interests, the state's rule applies. "But," Story adds, "in controversies affecting citizens of other states, and in no degree arising from local regulations, as for instance, foreign contracts of a commercial nature, I think that it can hardly be maintained, that the laws of a state, to which they have no reference however narrow, injudicious and inconvenient they may be, are to be the exclusive guides for judicial decision. Such a construction would defeat nearly all of the objects for which the constitution has provided a national court."[55]

This fear that *Erie* would unravel the sophisticated and national system of commercial law that had developed under *Swift*'s protective gaze is the likely motivation between Fuller and Corbin's concern about the Supreme Court's "brodie." Recognizing the need

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[52] *See* MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 135 (2012). As Gasaway and Parrish observe, "under *Swift* general common law provided a baseline of substantive law" for cases involving citizens of different states. This was because unless the parties consented to remaining in state court, the defendant could always remove to federal court if the plaintiff did not file there. That default expectation that the case would be heard in federal court under federal law is just as valid as a default assumption to the contrary. Robert R. Gasaway & Ashley C. Parrish, *In Praise of* Erie—*And Its Eventual Demise*, 10 J. OF L., ECON. & POLICY 225, 238 (2013). That assumption would not necessarily be the case in cases between strangers (such as torts cases) which are unlike contractual and commercial law cases. Similarly, for cases involving real property, the opposite presumption existed—that the parties' expectations would be that any disputes would be resolved under the law state in which the property was physically located. For a general discussion of the importance of the distinctions between *ex ante* and *ex post* choice of forum (and law), see Todd J. Zywicki, *Is Forum-Shopping Corrupting America's Bankruptcy Courts?* 94 GEO. L.J. 1141 (2006).

[53] *See* TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM 150–51 (1981).

[54] Mark Tushnet, Swift v. Tyson *Exhumed*, 79 YALE L.J. 284, 297 (1969).

[55] Van Reimsdyk v. Kane, 28 F. Cas. 1062, 1065 (C.C.D.R.I. 1812).

for uniform, modern, and flexible rules to govern interstate commercial transactions, within a few years after *Erie* the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) began the first efforts to draft a Uniform Commercial Code. Article 3, dealing with negotiable instruments, was drafted in 1940 and Article 2, regarding Sales, began drafting in 1945. The enactment of Uniform Commercial Codes in a consistent manner by state legislatures proved useful in reducing *Erie*'s disruptive effect on commercial transactions and reinforcing parties' expectations.

III. *ERIE*'S POLITICAL AND JURISPRUDENTIAL LEGACY

Beyond the specific concerns expressed by Corbin and Fuller, there are other reasons why commercial law scholars would be exercised by the Supreme Court's ruling in *Erie*. The first is that *Erie* unleashed political forces antithetical to market order and the common law foundations it rests upon. The second is the jurisprudential legacy of *Erie*, which created a profound and fundamental change in our understanding of law generally, and a corrupting and unfortunate change in thinking about the common law and private law specifically.

A. Erie's Political Legacy

As Justice Butler noted in his *Erie* dissent, until the years shortly before *Erie*, there was little discontent on the Supreme Court regarding *Swift*. For fifty years after *Swift* was decided there was not even a question raised about *Swift*'s wisdom, much less its constitutionality.[56] *Swift* itself noted that the issue in the case had "been several times before this court" including as early as 1817 in *Coolidge v. Payson*, in which Chief Justice Marshall's opinion was based solely on English authorities and made reference to no state

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[56] *Erie R.R. v. Tompkins*, 304 U.S. 64, 84 (1938) (Butler, J. dissenting). Butler notes that even then it was a lone justice expressing questions about *Swift*, and doing so in the context of the application of *Swift* to a dispute that arose in a tort case, *see* Baltimore & Ohio R. Co. v. Baugh, 149 U.S. 368 (1893) (Field, J. dissenting), a context that is arguably distinguishable from the commercial law context of *Swift*. *See* discussion at *supra* note 52. Contemporary commentators characterized *Erie* as a "surprise decision" since the question of whether to overrule *Swift* was not raised by the parties. *See* Wm. F. Doyle, *From* Swift v. Tyson *to* Erie R.R. v. Tomkins [sic] – *Ninety-Six Weeks of Supreme Court History*, 15 DEN. L. REV. 307, 307 (1938).

cases.[57] When Holmes began his attacks on *Swift* in 1910, he only commanded a small minority of the court and even then some of his dissents were joined by those who disagreed with the majority's application of *Swift* to the facts of a given case, not to *Swift* itself.

What happened in the era immediately preceding *Erie* that led to this rapid turn against the doctrine? Given the longstanding support at the Court for *Swift* and the vast body of caselaw that had built up around it to systematize its concepts, it is unlikely that the doctrine itself suddenly became unworkable.[58] A more likely explanation is politics, particularly the onset of the New Deal.

The early resistance of the Supreme Court to the programs of the New Deal is well known. In 1937 the famous "switch in time that saved nine" occurred in the case of *West Coast Hotel v. Parrish* in which the Supreme Court signaled its withdrawal from efforts to block the New Deal.[59]

Erie, decided one year later, can be seen as part of this New Deal judicial revolution. As noted, a primary purpose of the Constitution's provision for federal diversity jurisdiction was to protect commerce from the vagaries and predations of state and local special interests and biased judges and to create a modern, uniform, and efficient system of commercial law rules to govern the national market. In fact, the entire purpose of providing access to federal courts for diversity cases was to facilitate a benevolent type of forum-shopping and competition among different court systems, much like the polycentric and competing court systems of the historic English common law and law merchant courts of the Middle Ages.[60] To Progressives such as Brandeis, however, the ability of corporations to remove cases to federal court was seen as a flaw, not a feature of

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[57] *See* 15 U.S. 66 (1817). Both *Swift* and *Coolidge* ground their analysis in Judge Mansfield's reasoning in *Pillans and Rose v. Van Mierop and Hopkins*, 3 Burr. 1664, 97 Eng. Rep. 1035 (1765). *Swift* also cites to Story's own opinion in *Townsley v. Sumrall*, 27 U.S. 170 (1829), decided a few years after *Coolidge* in which the Court likewise cites no state cases.

[58] Brandeis's claims about the unworkability of *Swift* and its failure to create uniformity in the federal court system have been strongly questioned and it appears that the law was more uniform in some areas than others. *See* Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869 (1931). In fact, as Fuller and others have observed, the existence of multiple competing systems of law within a particular jurisdiction has been the norm throughout Western legal history. *See* discussion *infra* at notes 113-114 and accompanying text.

[59] 300 U.S. 379 (1937).

[60] *See* Zywicki, *Rise and Fall*, *supra* note 6.

the system. Brandeis's obsession with political control over corporations meant that he *wanted* to trap corporations in state courts rather than allowing them to escape into federal court where they could receive fair treatment under a sophisticated set of rules.[61]

In particular, even though Roosevelt's appointees effectively controlled the Supreme Court, that was not the case in the rest of the federal judiciary. The lower courts were the product of three successive Republican administrations (Harding, Coolidge, and Hoover) and were hostile to progressive state laws that interfered with common law principles of freedom of contract.[62] In the era following *Lochner v. New York* these lower federal court judges leaned on traditional principles of the common law as developed in the federal courts to mitigate the impact of these state regulations to the extent they infringed on interstate commerce.[63]

For Roosevelt's appointees it thus became urgent to restrict the ability of private parties to escape these state regulations by seeking the common law of the federal courts. New Dealers sought to do this initially by arguing for legislation that would restrict or repeal diversity jurisdiction. Failing that, the holding in *Erie* eliminated much of the incentive to sue in or remove to federal court by eliminating the option of less-biased law to go with a less-biased forum.[64] Prior to joining the Court in 1939, Harvard law professor and New Dealer Felix Frankfurter was an outspoken critic of the use of diversity jurisdiction by corporations to escape unfavorable state law.[65] Brandeis shared Frankfurter's views regarding diversity jurisdiction and desire to eliminate it by legislation. According to Braverman, "[a]s early as 1925, Frankfurter and Brandeis were plotting the curtailment of diversity jurisdiction," to such a great

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[61] *See id.* at 1614.

[62] *See* Maxwell Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 375 (1995).

[63] Zywicki, *Rise and Fall*, *supra* note 6, at 1614.

[64] *See* William A. Braverman, Note, *Janus Was Not a God of Justice: Realignment of Parties in Diversity Jurisdiction*, 68 N.Y.U. L. REV. 1072, 1096 (1993). An irony of the *Erie* case is that it was the individual plaintiff seeking the application of federal common law, not the corporation. Understanding this aspect of the New Dealers' political objective helps to answer a puzzle pointed out by Kurt Lash regarding the perceived centrality of *Erie* to the New Deal jurisprudential revolution, namely that *Erie* "had nothing to do with nationalism, redistribution, or any other part of the New Deal political agenda." Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 471 (2001).

[65] *See* Braverman, *supra* note 64, at 1096-1100.

extent that Frankfurter used his position at Harvard to "assign research papers, often at Brandeis's suggestion, to his more talented students on various aspects of federal court jurisdiction." [66] Frankfurter later enlisted Henry J. Friendly, the recently graduated president of the Harvard Law Review and law clerk to Justice Brandeis, to conduct historical research regarding the diversity provisions of the Judiciary Act of 1789 with the aim of trying to narrow or eliminate it. Friendly served as Brandeis's law clerk the year *Black & White Taxicab* was decided by the Supreme Court in 1928. He later wrote of the experience, "[h]aving served as his law clerk the year [Black & White Taxicab] came before the Court, I have little doubt he was waiting for an opportunity to give *Swift v. Tyson* the happy dispatch he thought it deserved."[67]

Justice Benjamin Cardozo did not participate in the *Erie* case because of a recent heart attack and died just a few months later. Cardozo heard and granted Tompkins's initial request for a stay at his summer home in New York and historical evidence suggests that he was an eager supporter of overturning *Swift*. Although appointed by Hoover to the United States Supreme Court in 1932, Cardozo was a committed New Dealer and supporter of economic regulation, forming a bloc of liberal Justices known as the "Three Musketeers," along with Brandeis and Justice Harlan Fiske Stone. Given Cardozo's renown as a common law judge and admiration for the common law, a reasonable inference is that Cardozo shared Brandeis and Frankfurter's views on the matter as a political rather than jurisprudential question. Consistent with this intuition, Professor John Goldberg contends that although Cardozo supported *Erie*'s holding, he did not share Brandeis's contempt for the common law process and disagreed with Brandeis's embrace of legal positivism.

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[66] *Id.* at 1097 (citations omitted).

[67] *See* Legal Information Institute, *Art III.S2.C1.18.6 State Law in Diversity Cases and the Erie Doctrine* at n.13 (quoting HENRY FRIENDLY, BENCHMARKS 20 (1967)), [https://perma.cc/ER37-A5UN]. Ironically, Friendly has come to be recognized as one of the great common law judges as a result of his sophisticated and influential analysis of the many commercial law disputes that came before him as a judge on the Second Circuit, *see*, *e.g.*, Bloor v. Falstaff, 601 F.2d 609 (1979), and even sitting by designation on the Southern District of New York, *see* Frigaliment Importing Co. v. B.N.S. International Sales Corp., 190 F. Supp. 116 (1960).

[68] Frankfurter, of course, was appointed to Cardozo's vacant seat on the Court in 1939.[69]

Subsequent generations of lawyers have largely accepted Holmes's and Brandeis's assertions that *Erie* was justified in order to stop rampant "bad" forum-shopping. But the evidence of the validity of that claim is highly contested. And as Goldberg notes, *Erie* has created its own uncertainties and inconsistencies in the law and arguably led to a broader expansion of federal judicial power in other ways.[70]

Through the switch in time that saved nine, the Supreme Court signaled its retreat from efforts to restrain the federal government's exercise of power to regulate economic activity. *Erie* can be seen as the other side of that coin, effectively increasing the authority of states to regulate economic activity by limiting the ability of economic actors to escape the reach of state power by relocating to federal court. This political dynamic perhaps also explains Brandeis's arguably irrelevant rooting of *Erie* in legal positivist language: unlike Story's traditional common law method that rooted the authority of law in its reasonableness, Brandeis sought to curtail the federal judiciary's consideration of the "reasonableness" of these state regulations (many of which, of course, were exercises of pure political power and interest group influence rather than any rational

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[68] *See* John C. P. Goldberg, *Benjamin Cardozo and the Death of the Common Law*, 34 TOURO L. REV. 147, 147 (2018). Goldberg also argues that *Erie* has had the unintended consequence of destroying the vitality of common law reasoning in the judiciary. "It is in part because our highest court took itself out of the business of making law in contract, property, tort, and certain other subject areas that Cardozo's beloved common law has fallen on hard times, and that even state-court judges have increasingly lost their feel for how to reason about it. Today, there is no member of a state judiciary who rivals Cardozo in stature. Mainly this is a testament to his extraordinary gifts. But it also reflects the waning of the common law in the United States, and a concomitant loss of the sense of what it means to be a great common law judge." *Id.*

[69] *See Benjamin N. Cardozo*, OYEZ, [https://perma.cc/23GF-5983]. In *Guaranty Trust*, 326 U.S. at 102, Frankfurter would reprise the characterization of *Swift* as based on the idea that "[l]aw was conceived of a 'brooding omnipresence' of Reason, of which decisions were merely evidence, and not themselves the controlling formulations."

[70] As Goldberg describes it, "[I]nsofar as it was meant to block sophisticated corporate actors from repairing to the federal courts to protect their interests against unfriendly state common law, *Erie* has arguably exacerbated a problem that was on its way to being ameliorated by other means." Goldberg, *supra* note 68, at 151.

justification) and instead to defer solely to their authority.[71] In short, Corbin, Fuller, and the commercial law bar were right to be concerned about the impact of the Court's *Erie* brodie on the future development of commercial law and free enterprise.

B. *Erie*'s Jurisprudential Legacy

Perhaps more far-reaching and consequential than the political impact *Erie* had on the commercial law system is its impact on the intellectual foundations of the common law generally, and its negative influence on the development of *private* law more specifically. As Corbin's heated commentary accurately reflects, Story's opinion in *Swift* conjured no "brooding omnipresence in the sky" but simply reflected a powerful application of the traditional method of common law reasoning to decide an ordinary commercial law dispute involving the negotiability of a bill of exchange. Brandeis's opinion not only rejects but mocks this traditional idea of the common law as an evolutionary, experience-based system. The consequences of rejecting the federal courts' ability to do common law has had direct consequences for the development of common law and commercial law, and strengthened the incentives and ability of special interests to use the legal system as a means to enrich themselves and to advance their ideological agendas.[72]

The vision of the common law laid out by Story, Corbin, and Fuller as a spontaneous order that arose from the application of general principles to specific patterns of law was the prevailing understanding of the nature of the common law process for centuries before the revolution of legal positivism. A general theme overarches the traditional understanding of the common law—that the purpose of law is to enable private actors to coordinate their affairs and plan for the future by enabling them to predict how others will act. Thus, the primary purpose of the law is to vindicate parties' reasonable expectations so that they can more efficiently pursue their own private goals. The endorsement of legal positivism by Brandeis in *Erie*, therefore, reflects more than a change in doctrine. Instead, it

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[71] *See* Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1019–21 (1994) (discussing the special interest roots of much progressive legislation).

[72] *See* Zywicki, *Rise and Fall*, *supra* note 6, at 1554–60; Pritchard & Zywicki, *supra* note 6, at 494–501.

illustrates a profound reversal in the traditional understanding of the role of law in a free society, from a system of rules designed to facilitate the bottom-up pursuit of one's private goals in life to a top-down view of law as a vehicle for social control and pursuit of end-state objectives.

The evolutionary, spontaneous order vision of the common law articulated by Story, Corbin, and Fuller is how the common law was traditionally understood. While common law judges would often also refer to natural law, the common law was grounded in real-life experience and the resolution of concrete disputes. More specifically, Brandeis's mocking of the "brooding omnipresence in the sky" suggests that there were (and are) only two ways to think about law: natural law and legal positivism.[73] Story's vision, however, embodies a third, distinct school of thought, the "historical school" that dominated traditional legal thought for centuries prior to the modern age.[74] Common law in that sense was rooted in community experience and expectations and expressed through the "artificial reason" of common law judges that molded these discrete disputes and community expectations into a coherent and generalized body of doctrine.

This is the sense in which common law judges sought to "find" or "discover" law, not to consciously "make" or "create" it.[75] To "find" law was not to discover it in some mystical ether, as implied by Brandeis, but in the evolving doctrines and concepts of the

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[73] Professor Lawrence Solum has pointed out to me in conversation that Holmes and Brandeis's conception of legal positivism that finds voice in *Erie* was rooted in the "sovereign command" theory of law of John Austin, one of the early scholars of legal positivism, as opposed to those of more modern theorists of legal positivism such as H.L.A. Hart. The degree to which these criticisms, or others, might apply to alternative formulations of legal positivism other than the "command theory" that underlies *Erie* is not explored here.

[74] In the formative era of the common law, however, the historical and natural law approaches to law tended to converge on similar principles of private ordering and clear rights allocations. *See* Eric R. Claeys, *Sparks Cases in Contemporary Law and Economics Scholarship*, *in* RESEARCH HANDBOOK ON AUSTRIAN LAW AND ECONOMICS (Todd J. Zywicki & Peter J. Boettke eds., 2017). In the more recent era, the implications of these approaches have tended to diverge, likely as a result of the influence of legal positivism on common law thinking and positivism's emphasis on practical and expedient consequences of particular legal rules rather than as a vehicle for private ordering and social coordination. *See* discussion *infra* at notes 127–129; *see also* Todd Zywicki, *Posner Meets Hayek: The Elements of an Austrian Law & Economics Research Program*, __ ASIAN J. OF L. & ECON. __ (forthcoming 2024).

[75] *See* Pritchard & Zywicki, *Finding*, *supra* note 6, at 458.

common law for which each case was both a reflection of the doctrine but then contributed to the further evolution of the doctrine going forward. As Corbin observed, in each litigated case, one searches "for a reasonable and workable guide to a solution."[76] He continued, "[t]his guide is a rule of law, a generalization drawn from life history, one that is so well drawn from that history that it will successfully meet the pragmatic test of explanatory rationalization." In turn, "[t]he judge's work in constructing this generalization instantly becomes a part of the history that will be used by the judges in succeeding cases; it is one new step in the evolution of the law." In a similar vein, Fuller observed, "over much of its history the common law has been largely engaged in working out the implications conceptions that were generally held in the society of the time."[77] This vision of common law as something to be "found" or "discovered" in community expectations as refined through the process of judicial reasoning was well-accepted in Story's time and for most of the history of the common law itself.[78] In addition, that view of the common law (shared by Blackstone among others) was the animating view of the Founders at the time of the Constitution and the contemporaneous drafters of the Judiciary Act.

Perhaps the leading modern advocates for the traditional understanding of the common law are F.A. Hayek and Bruno Leoni.[79] A full disquisition on the proper understanding of the common law is beyond the scope of this article. I have provided extended discussions elsewhere.[80] A summary discussion of the relevant elements will have to suffice here to illustrate the value of Story's approach to the law and the mischief that has been occasioned by Brandeis's crude positivist formulation.

Hayek argues that under the approach of the common law judge, the approach of the judge was not to carry out the will of some authority, but to determine:

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[76] Corbin, *The Common Law*, *supra* note 19, at 1352.

[77] FULLER, *supra* note 35, at 50.

[78] *See* SIR CARLTON KEMP ALLEN, LAW IN THE MAKING 126–29 (7th ed. 1964); Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1655 (1994).

[79] Hayek's views on the common law appear to have been spurred by familiarity with Leoni's work. *See* Todd J. Zywicki, *Bruno Leoni's Legacy and Continued Relevance*, 30 J. PRIV. ENTER. 131 (2015).

[80] *See* sources cited *supra* at note 6.

> [W]hat private persons have 'legitimate' reasons to expect, where 'legitimate' refers to the kind of expectations on which generally his actions in that society have been based. The aim of the rules must be to facilitate that matching or tallying of the expectations on which the plans of the individuals depend for their success.[81]

In short, to the extent that the common law can be said to have a purpose, that purpose is to serve as a tool for private individuals to pursue their individual goals successfully through a matching of expectations and carrying those plans through to success. In general, it is only because most people share a sense of justice and legitimate expectations that it is possible for them to live together cooperatively. On the other hand, it sometimes will be unclear which parties' expectations were legitimate in a given situation. Moreover, in an evolving society, what constitutes legitimate expectations may change over time, leading to interpersonal conflict.

To resolve such conflicts as they arise, judges will be needed to step in and resolve such conflicts and to determine which parties' expectations were legitimate. In so doing the judge articulates a rationale for which party should prevail and lays down a rule. "The development of such rules will evidently involve a continuous interaction between the rules of law and expectations: while new rules will be laid down to protect existing expectations, every new rule will also tend to create new expectations."[82]

As part of this process of dispute resolution and development of abstract rules, the judge will attempt to *articulate* the logic of the rule in words. But the process of *articulating* the underlying principle in words should not be confused with the verbal statement by the judge as *being* the rule itself. The articulated version of the rule is merely an approximation of the underlying rule. As Hayek observes:

> The unarticulated rules will therefore usually contain both more and less than what the verbal formula succeeds in expressing. On the other hand, articulation will often become necessary because the "intuitive" knowledge may not give a

[81] *See* F.A. HAYEK, 1 LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER 127 (Jeremy Shearmur ed., 2021).
[82] *Id.* at 132.

> clear answer to a particular question. The process of articulation will thus sometimes in effect, though not in intention, produce new rules. But the articulated rules will thereby not wholly replace the unarticulated ones, but will operate, and be intelligible, only within a framework of yet unarticulated rules.
>
> While the process of articulation of pre-existing rules will thus often lead to alterations in the body of such rules, this will have little effect on the belief that those formulating the rules do no more, and have no power to do more, than to find and express already existing rules, a task in which fallible humans will often go wrong, but in the performance of which they have no free choice. The task will be regarded as one of discovering something which exists, not as one of creating something new, even though the result of such efforts may be the creation of something that has not existed before.[83]

For legislation, by contrast, the rules *as articulated* in writing and enacted through the constitutional process of bicameralism and presentment are "the law." There are no concepts or principles that lie behind legislation (or regulation) for which the words of the law are mere efforts at articulation. The specific articulations are the law.

These differences highlight the fundamental difference between the process of common law reasoning (as traditionally understood) and legislation. Under the common law, the "law" is the underlying concepts and set of principles for which verbal articulations were merely approximations of the essence of those principles. It is the principle itself that matters for the common law, not the precise verbal articulation in the language of the opinion, and the principle is to be understood with reference to the purpose of the common law as a mechanism for private ordering and furthering interpersonal coordination. Statutory law, by contrast, is *textual* in nature, not conceptual—the words of the statute as enacted *are* the law. Most statutes do not have "purposes," they are collections of words.[84] As

[83] *Id.* at 105; *see also* Zywicki & Sanders, *supra* note 6, at 577–79.

[84] Some possible exceptions such as the Sherman Antitrust Act or various consumer protection statutes that refer to "unfair" practices and that thus contemplate some degree of common law elaboration are notable for their novelty, thereby

Fuller observes in *The Anatomy of the Law*, "[i]n a judicial decision under the common law, the *rule* applied to the case and the *reason* or justification for that rule are both stated in the opinion of the judge and are often intertwined to such a point that it is difficult to distinguish between them. A Statute, on the other hand, normally contains no argumentative or justificatory statement; it simply asserts; this is forbidden, this is required, this is authorized."[85]

The flaw of legal positivism is that it conflates these distinct processes of common law and statutory modes of reasoning. Legal positivism treats the opinions of judges as if they can be distilled into particular commands, as can a statute or regulation, rather than an effort to provide verbal articulation to an underlying principle. Hence, the error in Brandeis's reasoning, pointed out by Corbin, is that the "law" of a state court can be treated as an "authoritative" pronouncement, despite the fact that the common law is constantly evolving and developing around the margins. Under the *Erie* framework, however, state courts are permitted to continue to entertain the common law process of reasoning while federal judges incongruously are required to treat state law as a static, deterministic body of orders.

This distinction between viewing common law as an evolving spontaneous order versus a set of static positivist commands is well-illustrated by their differing attitudes with respect to precedent. Today, it is conventional for lawyers to use the terms "precedent" and *stare decisis* interchangeably.[86] But the conflation of precedent with *stare decisis* betrays a profound intellectual confusion (or, perhaps, intentional sleight-of-hand) introduced into legal reasoning through the influence of legal positivism and there conceals an important historical and intellectual distinction between precedent as understood for the first millennium of the common law on one hand and the relatively recent innovation of *stare decisis* on the other.

Stare decisis in conventional usage refers to the idea that a single court's decision is binding on inferior or subsequent courts solely

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illustrating that most legislation lacks this intent to follow a common law process. *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986).

[85] FULLER, ANATOMY, *supra* note 43, at 142.

[86] For example, *Black's Law Dictionary* (10th ed., 2014) defines "stare decisis" as "the doctrine of precedent, under which court must follow earlier judicial decisions when the same points arise again in litigation.").

because of its authoritative issuance, not because of the persuasiveness of its reasoning. In short, one case decision by an authoritative court effectively "makes" the law and is to be followed by subsequent courts.

But this approach to precedent, treating a single case as authoritative without regard to the quality of its reasoning, is a recent, novel engraftment onto the common law as a result of the influence of legal positivism.[87] For the first several centuries of the common law, judges looked to earlier precedents to inform their decision-making but prior decisions generally were not treated as binding. Instead, judges looked to the *reasoning* of earlier decisions and a line of well-reasoned cases decided similarly on similar facts by a number of judges applying independent analysis was seen as having greater persuasive authority than a single case standing alone. Indeed, it is this characteristic of the common law—that it had a system of precedent *without* the distorting straightjacket of *stare decisis*—that partly accounts for the efficient nature of the common law. As state judges continue to do today, judges and lawyers also referred to the opinions of treatises, judges from other courts, and experience in arguing their case.

The origins of the common law are conventionally dated to the Norman Conquest (1066) or at the latest to the Twelfth and Thirteenth Centuries.[88] Early treatises on the common law cited few cases and those cases that were cited were treated as illustrative of common law principles, not authoritative statements.[89] Indeed, for much of the history of the common law, case results were recorded only on plea rolls, which were literally rolls of dusty parchment sewn together, weighing hundreds of pounds and inscribed with unorganized, handwritten case outcomes.[90] The purpose of the plea rolls was simply to record case outcomes (particularly debts owed to the King), not the reasoning of the judgments. Those recorded

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[87] *See* Zywicki, *Rise and Fall*, *supra* note 6, at 1565–81 (discussing precedent under common law and its distinction from *stare decisis*).

[88] *See* JOHN HUDSON, THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA (1996); R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW (2d ed. 1988); Sir Frederick Pollock, *English Law Before the Norman Conquest*, 14 L.Q.L REV. 291 (1898), *reprinted in* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 88 (Association of American Law Schools ed., 1968).

[89] *See* Zywicki, *Rise and Fall*, *supra* note 6, at 1567–68.

[90] *See* 2 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 185 (4th ed. 1936).

judgments were of little use to lawyers and very few lawyers had access to the plea rolls even if they wanted to use them. Because the printing press wasn't even invented until centuries after the common law began, it wouldn't even have been technically feasible to produce generally available case reports until centuries after the birth of the common law. In the absence of definitive case reports of the results and reasoning of cases, private lawyers and judges published private collections (called Year Books) of cases, which were haphazard, fragmentary, and frequently contradictory.[91] Yet the Year Books included information omitted by the Plea Rolls and vice-versa, so it was only by combining both sources that "anything like a complete report of the case may be obtained."[92] Coke's *Reports*, the first relatively comprehensive collection of cases that could be cited as authority, was finally published in the Seventeenth Century. It was during this period as well that the distinction between "holding" and "dicta" emerged while the "doctrine" of precedent, even in a very weak form, did not emerge until the Eighteenth Century. Where a stronger form of precedent emerged that resembled *stare decisis*, it was predominantly in procedural matters, where there was minimal argument about the substantive correctness of alternative rules (such as whether one should have 10 or 15 days to respond to a motion) and more important that there be a clear, settled rule.

As late as the Eighteenth Century, for example, Matthew Hale observed that the decisions of courts "do not make a Law properly so-called."[93] Those decisions, however, "[h]ave a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of the Kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former times, and though such Decisions are less than a Law, yet they are a greater evidence thereof than the Opinion of any private Persons, as such, whatsoever."[94] Writing in *Jones v. Randall* (1774), Lord Mansfield commented:

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[91] *See* Zywicki, *Rise and Fall*, *supra* note 6, at 1569–72 (discussing evolution of publishing of precedent).

[92] Van Vechten Veeder, *The English Reports, 1292-1865*, 15 HARV. L. REV. 1, 3 (1901). Van Vechten Veeder provides an extensive, and occasionally humorous, discussion of the state of court reporting for most of the history of the common law. *See id.*; Van Vechten Veeder, *The English Reports, 1292-1865*, 15 HARV. L. REV. 109 (1901) (Part II).

[93] MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 68 (1713).

[94] *Id.*

> The law of England would be a strange science if indeed it were decided upon precedents only. Precedents serve to illustrate principles and to give them a fixed certainty. But the law of England, which is exclusive of positive law, enacted by statute depends upon principles, and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or the other of them.[95]

Later the great legal historian William Holdsworth stated, "[t]he law does not consist of particular cases, but of general principles, which are illustrated and explained by those cases."[96] Similar statements spanning multiple centuries can be provided, as I have done elsewhere.[97]

It was only in the Nineteenth Century that the doctrine of *stare decisis* began to emerge under the influence of legal positivism.[98] It is this desiccated and static form of precedent to which Brandeis appeals in *Erie* by suggesting that a case decision by an authoritative entity (such as a Supreme Court) represents "the law" in the same sense as a legislative enactment.[99] This static version of precedent, however, was plainly inconsistent with the historical understanding of the term under common law and the general understanding of precedent at the time of the Founding and the Judiciary Act of 1789. In light of this history, it is highly unlikely that the Framers of the Constitution or the Congress that enacted the Judiciary Act could have intended this belief that "law" required applying the holding of

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[95] 1 Cowp. 37 (1774); *see also* Fisher v. Prince, 3 Burr. 1363 (1762) ("The reason and spirit of cases make law, not the letter of particular precedents.").

[96] Sir William Holdsworth, *Case Law*, *in* ESSAYS IN LAW & HISTORY 147, 158 (A.L. Goodhart & H.G. Hanbury eds., 1946).

[97] *See* Zywicki, *Rise and Fall*, *supra* note 6, at 1569-75; *see also* ALLEN, *supra* note 78, at 187–235 (describing evolution of concept of precedent over time in English common law).

[98] *See* Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 449 (1996).

[99] Bruno Leoni observes, however, that the concept of a "supreme court" whose decisions are binding on all lower courts as a result of their authoritative position in a court hierarchy is itself a relatively novel accession to the common law process. Even where a supreme court is present, Leoni notes that its activities differ in many ways from that of a legislature. *See* BRUNO LEONI, FREEDOM AND THE LAW 130-32 (1961).

an authoritative state court regardless of the quality of its reasoning. Moreover, as a necessary condition before *stare decisis* could function as an operative principle was the existence of comprehensive, authoritative, complete, and accurate case reports which didn't exist in most states until sometime in the Nineteenth century—several decades after the Judiciary Act of 1789 was enacted.[100]

The absurd anachronism of the *Erie* majority's view that the intent of the Judiciary Act was to bind federal judges to the "authoritative" pronouncements of state courts is highlighted by the fact that at that time it would not have even been possible for federal judges to discern most state's common "law" because there was no definitive source whereby that could be ascertained. Decisions of American courts were not even published until the last decade of the Eighteenth Century.[101] Even then, the reports were scattered, non-comprehensive, non-authoritative collections by private lawyers and others.[102] Judges were not even required to write opinions as opposed to delivering them orally until the late-Eighteenth and early-Nineteenth centuries.[103] As any modern lawyer who has perused a volume of case reports from that era will quickly recognize, cases were reported in an idiosyncratic fashion, often reporting only the judge's opinion but providing the reporter's own summary of facts and, sometimes, the lawyer's arguments. It was not until the Nineteenth Century, decades after the Judiciary Act, that states authorized the appointment of official court reporters, tasked

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[100] *See* JOHN H. LANGBEIN, RENEE LETTOW LERNER, & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 824–29 (2009). In fact, only about half of the decisions of the United States Supreme Court during its first decade of existence were reported and the accuracy and comprehensiveness of those cases that were reported is doubtful. *Id.* at 829-31. Many of the decisions were handed down orally rather than in writing, leaving it to the Supreme Court's first hired reported Alexander Dallas to rely on his memory or imperfect transcriptions of the Justice's comments. Ironically, it was not until Justice Story was appointed to the Supreme Court in 1811 that an effort was made to professionalize and regularize the reporting of cases, leading to the replacement of William Cranch by Henry Wheaton in 1816. *Id.* at 831.

[101] *See* Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. OF LEG. HIST. 48 (1981).

[102] *See id.*

[103] In 1785 Connecticut adopted a statute that required judges to provide written justification for their rulings and other states followed gradually. In Pennsylvania, for example, judges were not required to render all of their opinions in writing until 1845 when the state authorized an official state reporter of opinions. *See id.* at 55.

with the obligation "to attend the courts and publish judicial opinions."[104]

A major reason for the ad hoc and unsystematic reporting of American cases was the continued reliance on English cases in American law. To the extent that early lawyers and judges sought to develop a distinctive body of "American" law following independence, it was seen as a project of developing *American* law, not a hodgepodge of specific laws of each of the several new states (as would be implied by Brandeis's reasoning). "This meant that lawyers developed an interest in the decisions of other states, whose law now supplemented the law of England and the law of their own jurisdiction as a source of decisional rules."[105] Early Nineteenth Century case digests thus included the decisions of several jurisdictions, giving rise to the volumes of "regional reporters" familiar to pre-Internet legal researchers. As Surrency notes, "[c]oncern for the law of other states also led to frequent judicial citation of out-of-state cases; indeed, an examination of opinions written during the Nineteenth Century shows a tendency to cite out-of-state cases frequently—a tendency that has completely reversed itself in this century."[106]

On this point, it is manifestly clear that Story and Corbin were much closer to both the centuries-long historical understanding of precedent, as well as that of the Framers, than the view of Holmes and Brandeis. Under this view, "[c]ases themselves did not make law but illustrated the principles of the law."[107] A consistent pattern of well-reasoned cases, approved by scholarly commentators and producing beneficial social outcomes, would be owed great persuasive deference. Even then, however, a settled pattern of cases was still thought susceptible to reconsideration in the light of reasoned argument or relevant social and economic changes.

Thus, Story's interpretation of the Judiciary Act such that the term "laws" was not intended to force the federal judiciary to mechanically follow the decisions of local tribunals is far more plausible than Brandeis's anachronistic construction. To repeat a key passage from *Swift*, Story writes:

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[104] *Id.*
[105] *Id.* at 54.
[106] *Id.*
[107] Zywicki, *Rise and Fall*, *supra* note 6, at 1574.

> 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.[108]

In short, he says there is no reason to think the Framers intended the federal judiciary to do anything different from state judges, especially on matters such as commercial law:

> 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.[109]

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[108] *Swift*, 41 U.S. at 18 (emphasis added).
[109] *Swift*, 41 U.S. at 18-19.

Nor is there anything unusual about Corbin's critique of Brandeis's radical transformation of the doctrine of commercial law precedent into a wooden search for authoritative issuance, strangely applying only to federal judges (who could be bound by the decision of a single state judge) but not to state judges who could continue to apply the traditional common law process of reasoning. When a judge makes a decision that implicates an individual's rights:

> It must use its judicial brains, not a pair of scissors and a paste pot. Our judicial process is not mere syllogistic deduction, except at its worst. At its best, it is the wise and experienced use of many sources in combination—statutes, judicial opinions, treatises, prevailing mores, custom, business practices; it is history and economics and sociology, and logic both inductive and deductive.[110]

He notes that under the absurd doctrine of *Erie* "a litigant, by the accident of diversity of citizenship [will] be deprived of the advantages of this judicial process." In creating diversity jurisdiction, it is difficult to believe the Framers intended that those who find themselves in federal court would be subject to the mechanical process of dispute resolution suggested by *Erie*.

To be sure, under *Swift*, it was possible that the rules that developed in federal and state court could differ and that, as a result, case outcomes could differ. But as I have discussed extensively elsewhere, the presence of multiple overlapping court systems was a defining characteristic of the common law for most of its history and was a primary reason for the beneficial evolution of the common law over time.[111] This system of competing courts provided a mechanism for experimentation and the evolution of the common law as well as mitigating the opportunity for rent-seeking through strategic litigation.[112] The idea that there could be overlapping court systems

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[110] Corbin, *Several States*, *supra* note 19, at 775.

[111] *See* Zywicki, *Rise and Fall*, *supra* note 6; Edward Peter Stringham & Todd J. Zywicki, *Rivalry and Superior Dispatch: An Analysis of Competing Courts in Medieval and Early Modern England*, 147 PUB. CHOICE 497 (2011); *see also* Zywicki, *Forum-Shopping*, *supra* note 52.

[112] *See* Zywicki, *Rise and Fall*, *supra* note 6; *see also* Corbin, *Several States*, *supra* note 19, at 776 ("If the federal judges use the customary judicial process in determining and applying state law with respect to the litigating parties before them it is quite possible

that could result in different results in state versus federal court is puzzling to modern legal analysis, but as a result of the long history of a polycentric court system of multiple overlapping jurisdictions in the Western world, this notion was entirely familiar and unobjectionable.[113] Mansfield's dramatic modernization of English commercial law through incorporation of the ancient doctrines and practices of the law merchant provides perhaps the most powerful and relevant example.

In fact, in *The Morality of Law*, Fuller notes that the view of law he articulates raises the possibility that there could be more than one legal system governing the same population in a geographic area.[114] But he further notes that "such multiple systems do exist and have in history been more common than unitary systems."[115] He notes that this can give rise to practical difficulties, but, "[h]istorically dual and triple systems have functioned without serious friction, and when conflict has arisen it has often been solved by some kind of voluntary accommodation."[116] Of particular relevance to the current discussion is Fuller's telling illustration of the point, "[t]his happened in England when the common law courts began to absorb into their own system many of the rules developed by the courts of the law merchant, though the end of this development was that the merchants' courts were finally supplanted by those of the common law."[117]

It can also be seen how *Erie*'s embrace of positivist jurisprudence reinforced the political and ideological agenda of the New Deal Justices. By substituting power and authority for judicial reasoning, Brandeis effectively destroyed the system of competing courts that had proven so conducive to the evolution of American commercial law.[118]

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that conflict may exist between a federal decision and a state decision. . . . We may not like such conflict; but it is an inevitable part of our judicial process, or of any other. It is by such variation as this that the evolutionary growth of law is possible.").

[113] *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 10 (1983) ("Perhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems.")

[114] *See* FULLER, MORALITY, *supra* note 35, at 123.

[115] *Id.*

[116] *Id.* at 124.

[117] *Id.*

[118] *See* Zywicki, *Rise and Fall*, *supra* note 6, at 1613-21.

F.A. Hayek observed in *Law, Legislation, and Liberty*, that legal positivism essentially eliminated active consideration of the evolutionary (or historical) theory of law simply by ignoring it.[119] Hayek notes that the positivists, like Brandeis in *Erie*, essentially mushed together a variety of distinct modes of analysis under the general heading of "natural law," including both traditional natural law reasoning ("a brooding omnipresence in the sky") with the evolutionary and experience-based mode of common law reasoning advocated by Story, Corbin, and Fuller. As Hayek writes:

> One of the chief sources of confusion in the field is that all theories which oppose legal positivism are alike labelled and lumped together under the misleading name of "natural law," though some of them have nothing in common with each other except their opposition to legal positivism. This false dichotomy is now insisted upon mainly by the positivists, because their constructivist approach allows only that the law should be either the product of the design of a human or the product of the design of a superhuman intelligence. But, as we have seen, the term "natural" was used earlier to assert that law was the product not of any rational design but of a process of evolution and natural selection, an unintended product whose function we can learn to understand, but whose present significance may be wholly different from the intention of its creators.[120]

Hayek notes that the evolutionary, or spontaneous order, theory of law he advocates does not "stand in any sense between legal positivism and most natural law theories," but is a distinct mode of analysis.[121] It rejects both the "rationalist theories" of natural law as the "construct of a super-natural force" as well as the positivist theory of law "as the deliberate construct of any human mind."

Hayek suggests that it is not merely a coincidence that those who embraced legal positivism in the Twentieth Century were European socialists and their American brethren, such as Brandeis and the New Dealers. While positivism *claimed* to be purely scientific and non-

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[119] *See* F.A. HAYEK, 2 LAW, LEGISLATION, AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 253 (Jeremy Shearmur ed., 2021).

[120] *Id.* at 253-54.

[121] *Id.* at 255.

normative in analysis, Hayek argued that positivism was (and is) inherently ideological and that the attractiveness of its doctrines to the attainment of socialist policy goals was primarily political.[122] Legal positivism, Hayek notes, is largely a set of semantic definitions that provide little value to understanding the social purpose of law as it exists in the real world, as a result it is a substantively empty vessel that can seemingly be filled with any desired content. For example, the concept of a society governed by the rule of law is one of the great inventions of the modern mind and the backbone of the free society, yet positivists are unable to say anything meaningful about the rule of law or why it matters. Indeed, legal positivism is not even capable of providing a useful distinction between a society of constitutionally limited government characterized by the rule of law and a totalitarian order of unlimited government. Despite its pretenses to analytical precision, therefore, legal positivism obscures rather than clarifies our understanding of the essence of law and its function in an overall order of rules.

Paralleling Corbin's critique of *Erie*, Hayek observes that legal positivism is completely useless when it "matters most, i.e. in the case of the judge who has to ascertain what rule he is to apply to a particular case."[123] Merely because a legislature or the United States Supreme Court confers on a state court "the force of law" does not tell a federal (or any other) judge "what the law is which he ought to enforce."[124] The judge must apply his analytical training and experience to resolve the dispute and articulate a principled rule of decision that meets the "internal requirements of a system" that no single judge or legislature has ever designed from whole cloth but is an order constructed by many judges and commentators seeking to do likewise over time. As Story and Corbin note, this is exactly what a state law judge does when deciding a case. The mere fact that a sovereign legislature provides the state law judge with the legal authority to decide a case and articulate a rule of decision is

[122] *Id.* at 240-50. Hayek's discussion of Kelsen's "pure theory of law" in Volume 2 of *Law, Legislation, and Liberty* is one of the longest sections in the book, suggesting the importance Hayek placed on this debate. Daniel Nientiedt provides an excellent discussion of the evolution of Hayek's attitude toward legal positivism and his growing awareness over time of its importance to the destruction of the liberal order. *See* Daniel Nientiedt, *Hayek's Treatment of Legal Positivism*, 51 EUROPEAN J. OF LAW & ECON. 563 (2021).

[123] HAYEK, MIRAGE, *supra* note 118, at 244.

[124] *Id.*

analytically sterile in terms of answering the relevant question of law, namely what that principle, rule, and outcome should be in a given case.

At best, then, legal positivism is useless as a tool to understand law. More likely, it is nefarious in its effect, and according to Hayek, its intent, which is to remove all restraints on the power of the state:

> The insistence that the term "law" must be used only in that particular sense, and that no further distinctions between different kinds of law are relevant for a legal "science" has, however, a definite purpose: this purpose is to discredit a certain conception which has for long guided legislation and the decisions of courts, and to whose influence we owe the growth of the spontaneous order of a free society. This is the conception that coercion is legitimate only if it is applied to the enforcement of universal rules of just conduct equally applicable to all citizens. *The aim of legal positivism is to make coercion in the service of particular purposes or any special interests as legitimate as its use in preserving the foundations of a spontaneous order*.[125]

He elaborates on this argument a few pages later:

> The insistence that the word "law" must always be used and interpreted in the sense given to it by the legal positivists, and especially that the difference between the functions of the two kinds of rules actually laid down by legislatures are irrelevant for legal science, has thus a definite purpose. It is to remove all limitations on the power of the legislator that would result from the assumption that he is entitled to make law only in a sense which substantively limits the content of what he can make into law….
>
> Legal positivism is in this respect simply the ideology of socialism—if we may use the name of the most influential and respectable form of constructivism to stand for all its various forms—and of the omnipotence of the legislative power. It is an ideology born out of the desire to achieve complete control

[125] *Id.* at 243 (emphasis added).

> over the social order, and the belief that it is in our power to determine deliberately in any manner we like, every aspect of this social order.[126]

Hayek observes that in the Western, liberal world, the concept of "law" has come to be "inseparable" from the ideas of individual freedom and private property. By deeming legislative power to be unlimited and unconstrained by any degree of morality or generally-applicable notions of justice, legal positivism effectively subsumes individual freedom to the "collective freedom of the community, i.e., democracy."[127] To the extent Hayek is correct that legal positivism is actually the spearpoint of an ideological theory of unlimited government power (and it seems to explain *Erie*), it explains the close relationship between the political agenda of the New Deal Justices on one hand and their embrace of legal positivism (and blatant misrepresentations of *Swift*'s reasoning and legacy) on the other. The embrace of legal positivism in *Erie* does not eliminate the reality of an overarching ideological worldview that animates the legal system, it simply replaces the traditional notion of common law as a spontaneous order system that serves to promote individual freedom and private ordering with an ideological structure premised on force. As Hayek observes:

> Yet, since every cultural order can be maintained only by an ideology, Kelsen succeeds only in replacing one ideology with another that postulates that all orders maintained by force are orders of the same kind, deserving the description (and dignity) of an order of law, the term which before was used to describe a particular kind of order valued because it secured individual freedom.[128]

The reformulation of American law around the ideology of unlimited government power, legal positivism, and democratic supremacy had dire implications for the traditions of individual

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[126] *Id.* at 246.

[127] *Id.* at 247. Hayek quotes Hans Kelsen's comment, "[D]emocray, by its very nature, means freedom." *Id.* at 247 n.76 (quoting HANS KELSEN, WHAT IS JUSTICE? 21 (1957)).

[128] *Id.* at 248.

liberty, private property, and constitutionally-limited government. Under positivism the measure of law is expediency and power, rather than principle.[129] As a result of this jurisprudential revolution, the legal system was able to provide little resistance in defense of individual liberty in cases such as *Buck v. Bell* (authored by Justice Holmes) or *Korematsu v. United States*, much less protection for private property and freedom of contract.

More generally, the legal order contemplated by *Swift* is one which requires judges to maintain a conceptual distinction between the realm of public law on one hand, which relates to the organization of government and its functions, and private law on the other, which serves to facilitate private ordering and individual liberty. Justice Scalia has justly complained of the inappropriate tendency of judges to apply methods of common law reasoning to the task of statutory and constitutional judging.[130] But the converse is true as well—treating the verbiage and holding of common law judicial decisions as wooden, static commands that ignore the underlying principles that animate those rulings. *Erie* thus conflates and misapplies the concepts of public law to private law cases.[131] This trend has been exacerbated by the tendency of the study of jurisprudence to be dominated by scholars of a public law background and orientation, rather than private law. Moreover, since *Erie*, the U.S. Supreme Court and federal courts generally effectively serve as public law courts, dominated by questions of public law, legislation, regulation, constitutional interpretation, and criminal law. In turn, this has led the federal judiciary to be dominated by lawyers drawn overwhelmingly from public law backgrounds (such as the Department of Justice, public defender's offices, state government, and the like) rather than the private lawyers of past generations.

Public law fields such as Constitutional Law and Administrative Law dominate the pages of law reviews and professorial attention. When *Swift* and *Erie* are covered in law school classes it is in public law oriented classes such as Civil Procedure, Federal Courts, and Constitutional Law, rather than through the lens of private law. Even

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[129] *See* HAYEK, RULES, *supra* note 80, at 79-96.

[130] *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Law*, *in* A MATTER OF INTERPRETATION 3 (1997).

[131] *See* HAYEK, RULES, *supra* note 80, at 164-167.

many state law judges today are influenced by these trends and aspire to a seat on the federal judiciary—moving from the state judiciary to a federal judgeship is typically seen as a promotion in status, even moving from a state supreme court to a lower federal court. Indeed, Fuller himself perhaps best exemplifies the point—as a prominent contracts law scholar, he is one of the last of the jurisprudential thinkers drawn from study of private law and who fully understood the texture of the common law and its role in facilitating private ordering in society.

Story himself was a towering figure in the world of commercial law, publishing massive treatises in important commercial law fields such as Bailments (1832), Agency (1839), Partnerships (1841), Promissory Notes (1843), and perhaps most relevant, a 630 page treatise (exclusive of the Index) on Bills of Exchange in 1843.[132] In that book, Story surveys the vast history of bills of exchange and the laws governing them, with an extensive discussion of foreign jurisprudence on the matter.[133] But he singles out "the elaborate judgments of the tribunals of England," as the source to which Americans "must look for the most copious, exact, and minute instruction upon this important subject, and for thorough practical adaptations of general principles to the varied exigencies of human life, and the due administration of civil justice."[134] It is from these English sources (and the customs of the law merchant from which they were derived) that the American system of commercial jurisprudence has been constructed. It would be an understatement to observe that it is difficult to imagine any Supreme Court Justice today or in recent memory who could write a learned treatise on Bills of Exchange that spans their development and the law governing them from the Ancient World, through the Mediterranean Sea during the Middle Ages, to the modern world. Story's summary of his findings will not be surprising in light of his opinion in *Swift*:

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[132] *See* JOSEPH STORY, BILLS OF EXCHANGE: FOREIGN AND INLAND (2d ed. 1846). He also published treatises on the Constitution (1833), Equity (1835), and Equity Pleading (1838).

[133] In the Preface to *Bills of Exchange* he explains that he was going to cover Bills of Exchange and Promissory Notes in one treatise but recognized that they were sufficiently distinct to require separate volumes, especially given the extensive discussion of foreign jurisprudence of bills of exchange that he thought necessary to cover in that book. *See id.* at vii-ix.

[134] *Id.* at ix.

> And here it may, in this connexion, be again suggested (what, indeed, has already been alluded to), that the jurisprudence, which regulates Bills of Exchange, can hardly be deemed to consist of the mere municipal regulations of any one country. It may, with far more propriety, be deemed to be founded upon, and to embody, the usages of merchants in different commercial countries, and the general principles, *ex aequo et bono*, as to the rights, duties, and obligations, of the parties, deducible from those usages, and from the principles of natural law applicable thereto.[135]

Professor Goldberg (not coincidentally, a prominent private law scholar of tort law) notes that "state-court judges have increasingly lost their feel for how to reason about" the common law.[136] But his condemnation should not be limited to state-court judges or judges generally; for most *law professors* have also increasingly lost their feel for how to reason about the common law, even including I'm afraid, many of my commercial law brethren. Under the influence of public law dominance of the curriculum the legal profession as a whole has accepted *Erie*'s positivism, and as a result vanishingly few law professors today can even comprehend *Swift*'s logic or the legal theory that animates it.

IV. CONCLUSION

Steve Brodie became both famous and infamous for jumping off bridges. Almost a century ago, the Supreme Court also jumped off a bridge, rejecting nearly a century of caselaw that was built over hundreds of cases had provided a foundation for the emergence of a national common market in the United States and helped turn the

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[135] *Id.* at 26-27. In his concluding paragraph of the book, Story notes that England was a laggard in the adoption of the doctrines of negotiable instruments, derived from "the custom of merchants, and the flexible character of the Civil Law," because of the rigidity of the common law to such innovations. But that since England had finally adopted the doctrine, it had continued its development to the "incalculable advantage of foreign trade and domestic intercourse, and public and private credit." *Id.* at 629. Story, of course, had in mind Lord Mansfield's incorporation of the doctrines and practices of the law merchant into English common law in the Eighteenth Century. *See* S. Todd Lowry, *Lord Mansfield and the Law Merchant: Law and Economics in the Eighteenth Century*, 7 J. OF ECONOMIC ISSUES 605 (1973); *see also* Nathan Isaacs, *The Merchant and His Law*, 23 J. POL. ECON. (1915).

[136] Goldberg, *supra* note 7, at 147.

United States into one of the world's leading economic powers. Even more, the Supreme Court rejected the jurisprudential premises of centuries of the common law and commercial law that provided the foundation for the commercial revolution in the Western world and individual liberty. The ripples from the Supreme Court's splash have reached virtually every corner of American legal, political, and economic life.

Corbin and Fuller's disdain for *Erie*'s reasoning and implications for commercial law seem archaic to modern post-*Erie* commentators. But it is *Erie*'s anachronistic approach to law rather than *Swift*'s view that begs for explanation. Justice Story's approach to common law was uniformly accepted for centuries and raised little objection until the dawn of the New Deal and the need for a new jurisprudence to justify its political agenda. Legal positivism filled that need. Since that time, *Swift*'s logic had continued to recede still further from modern consciousness.

Recent debates over *Erie* and the ancient concepts that the role of common law judges is to "find law" rather than "mak[e]" it provides an opportunity to not only understand the nature of the common law process but the role of law in society. Private commercial law scholars such as Corbin and Fuller saw the immense jurisprudential and practical disaster that sat at the heart of *Erie*. But even Harvard's famed constitutional law professor Reed Powell saw the opinion as an unforced "brodie" by the court when it jumped off the metaphorical bridge of legal positivism and dismissed the traditional common law reasoning process as a "fallacy."