"Do Not Pass Go. Do Not Collect $200":

State Monopolies on the Common Law

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution…[and] to Controversies…between Citizens of different States."[1]

Cory "Sacrifice Praxeological Coherence at the Altar of Logical Coherence" Boyer

Jacob Sheldon Feiser[†]

A.T. Sodini

[1] U.S. CONST. art. III, § 2, cl. 1.

Abstract[*]

The Constitution grants federal jurisdiction to all cases and controversies between citizens of different states. This is legally referred to as diversity jurisdiction for federal and state courts. During the Great Depression, the method by which diversity jurisdiction substantively played out in federal courts changed to prevent federal courts from exercising the general common law through what is called the Erie *doctrine. Previous to this shift, federal courts were able to develop their own common law doctrines parallel to state courts under the* Swift *doctrine. We analyze the economic consequences of this shift, focusing on transaction costs, litigative expectations, and incentive structures. Utilizing Austrian-guided analysis of polycentric legal systems, we contend that this doctrinal change irreparably destabilized legal expectations and ensured legal uncertainty in diversity cases. The doctrinal shift further increased the potency of special interests in the judicial process. Ultimately, we argue that the current legal regime is both praxeologically incoherent and economically inefficient relative to its predecessor.*

Table of Contents

I. "ADVANCE TO GO"....3
II. HOUSE RULES....4
III. "ADVANCE TOKEN TO NEAREST RAILROAD"....9
A. "YOU HAVE BEEN ELECTED CHAIRMAN OF THE BOARD. PAY EACH PLAYER $50"....10
B. "FREE PARKING"....14
C. "GO BACK THREE SPACES"....17
IV. "GO TO JAIL. GO DIRECTLY TO JAIL. DO NOT PASS GO. DO NOT COLLECT $200"....18

[*] *Acknowledgements*: We would like to gratefully thank Lisa S. Blatt for sparking our curiosity towards federal common law. We also thank Andrew Markley for his thorough review and understanding of our paper. We extend this thanks to the orange juice that Jacob Sheldon Feiser rediscovered in his fridge, which provided sustenance for late-night writing. Thanks is expressed to Shawn Ritenour for providing joyous motivation through humor to our research process. We generally offer thanks to Caleb Nelson, for providing an impeccable guide to understanding *Erie*. We gratefully thank Caleb Fuller for allowing us to pursue this research. **Thanks is ungenerously rescinded from the group of freshmen choosing to watch the excellent *Avatar: The Last Airbender* outside our office as we were trying to work on this paper after 2:00 AM.**

I. "ADVANCE TO GO"

Since 1787, the federal constitutional order has accounted for the litigious nature of the American people. So long as the parties at suit are citizens of diverse states, the federal order provides venue of "diversity jurisdiction" for cases with an amount in controversy above a certain monetary threshold.[2] Early in the development of American jurisprudence, the *Swift* doctrine arose as a means for federal courts to exercise a uniform common law across state lines; after a full reign of 96 years, the Depression-era Court overturned the *Swift* precedent and replaced it with the *Erie* doctrine, abolishing federal general common law[3] in the name of protecting consumers from predatory corporate forum shopping.[4] This juridical revolution imposed a design of vertical uniformity between state and federal courts, rather than horizontal uniformity in federal districts and between state comities.[5] Each district court under the *Erie* doctrine defers to the applicable caselaw of the state in which it resides for diversity cases. The federal common law, that system begotten from the efficient customs of time, received its death knell through the mere judicial process of *Erie*.[6] Although the *Erie* doctrine purported to rectify issues of abuse of diversity jurisdiction, the abolition of federal common law and the *Swift*

---

[2] 28 U.S.C. § 1332(a). The current threshold for amounts in controversy lies at a sum greater than $75,000.

[3] *I.e.*, as opposed to that federal common law which is particular to specific constitutional issues, *e.g.*, admiralty law. Henceforth referred to as federal common law. *See* U.S. CONST. art. III, § 2, cl. 1. Unlike other common-law jurisdictions, however, the United States has no federal criminal common law. *See generally* United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812).

[4] Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. Rev. 921, 964 n.132 (2013). ("For Justice Brandeis and other critics of Swift, the leading example of manipulative forum shopping was *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co*.") *But see* Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision Ever*, 39 PEPP. L. REV. 129, 138 (2011) ("Similarly, the poster-child for corporate abuse of diversity jurisdiction - the *Black & White Taxicab* case lambasted in *Erie* - may well have been the only example of such abuse.") (footnotes omitted).

[5] *See Figure 1* in APPENDIX A.

[6] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (per Brandeis, J.).

doctrine overturned the stability of legal expectations, maximizing the capacity for judicial special interests and causing disuniformity in the American legal system.

II. HOUSE RULES

In *Swift v. Tyson*,[7] the Supreme Court ruled that federal courts in diversity cases are bound to apply state statutory law, but are free to develop a federal common law; Justice Story maintained that commercial law, and common law more broadly, existed beyond the scope of mere state control, and as such, a federal common law could be developed to satisfy certain principles of justice – because commerce and economic activity exceeds any one institution's purview, national law surrounding such should at least account for the *ius gentium*, as markets naturally transcend national borders. In practice, federal courts could develop a system of common law designed to facilitate commerce in diversity suits without having to apply the idiosyncrasies of each state's commercial apparatus and regulations. The broad scope of general law meant that giving various states control over general law would lead only to disuniformity and uncertainty for a vast swathe of the country's population – thus, federal deference in areas of general law provided stable expectations for "big ticket" legal cases arising from diversity suits.

States at this time had two sorts of law, "local" and "general" law.[8] With the structure of federalism still healthy and present in the 19th century, "aspects of each state's 'local' law were also regarded as binding in federal court….Justice Story took for granted that not only [positive

[7] Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (per Story, J.).

[8] This division is not substantive, but instead formal. A state's "local" law contained both statutory and common law relevant to localities and jurisdictions within a state, whereas a state's "general" law (constituted by common law) governed "questions of a more general nature," (*Swift*, 41 U.S. at 18.) such as commercial interaction between the states, or trade and importation laws. *See* Ernest A. Young, *A General Defense of* Erie Railroad Co. v. Tompkins, 10 J. L., ECON., & POL'Y 17, 30 (2013) ("[General law] was often thought to be customary law, which differs not only from statute law but also from common law as modern lawyers conceive it….it was neither state nor federal in nature.") *Cf.* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1515 (1984) ("Marine insurance cases provide the most successful example of the federal courts' application of the general common law during [the early 19th century].").

laws] but also 'local customs having the force of laws' supplied rules of decision for federal courts."[9] Federal courts, even the Supreme Court, thus followed a state's "local" law on local issues. Although this was not the reasoning behind such procedure, the *Swift* regime maintained that in issues of state law, local issues could be efficiently decided based upon both statutory and common law; parties engaging in legal transactions developed procedural expectations so that regardless of the substantive outcome, the "rules of the game" could be followed. In many ways, this regime was a "market division of law." State courts specialized in local issues of law which could be efficiently decided without developing systematic incongruities, whereas federal courts in diversity jurisdiction could specialize in general issues to prevent systematic incongruities. In local issues, state courts had priority through the *lex loci* principle,[10] and in general issues, federal common law was supreme. This "market division of law" allowed federal courts to specialize in the application of federal common law without needing to specialize in state law. This specialization is borne from the comparative advantages held by the complementary jurisdictions. As Hayek notes, a coercive monopoly on the matters of law fails to adequately account for the needed expertise and knowledge pertaining to local customs and traditions. Just as this is true for a federal monopoly, so, too, does the need for expertise and knowledge hold in the contrapositive for state courts – the competing jurisdictions economize juridical resources according to the "market division of law."

> [T]here is beyond question a body of very important but unorganized knowledge which cannot possibly be called scientific in the sense of knowledge of general rules: the knowledge of the particular circumstances of time and place. It is with respect to this that practically every individual has some advantage over all others because he possesses unique information of which beneficial use might be made…. We need to remember only how much we have to learn in any occupation after we have completed our theoretical training, how big a part of our working life we spend learning particular jobs, and how

[9] Nelson, *supra* note 4, at 925-926.
[10] *Lex loci* is the legal principle in which particular rights arising out of a jurisdiction govern the legal procedures for parties at suit. Literally, "law of the locality."

> valuable an asset in all walks of life is knowledge of people, of local conditions, and special circumstances.[11]

In diversity jurisdiction under the *Swift* regime, state and federal courts were functionally competitive, as either party at suit could move to the federal courts; while this system was not a total competition of *curiae*, state courts nonetheless had to compete against the non-monetary incentives offered by the federal courts – e.g., the appearance of impartiality – in diversity cases to retain the suit in their jurisdiction, and both jurisdictions vied for fees associated with bringing a case before a bench.

This "market division of law" expresses a polycentric legal system. Pioneered by Elinor and Vincent Ostrom,[12] polycentricity refers to an analytical approach to the structure of legal systems. Such an approach denies the prototypical nature of legal systems arising from the nation-state:

> Legal polycentrism is the view that law and defense are, in relevant respects, no different from other goods and services normally supplied by the market, and that, in view of the generally acknowledged superior allocative properties of the market, freely competing protection and arbitration agencies would provide these goods at a much higher level of quality than territorial monopolies of force do.[13]

Polycentricity demands a competitive legal system analogous to market competition. In turn, this allows for the development of particular legal institutions out of the spontaneous generation of norms, customs, and traditions. An essential feature of the polycentric system is custom as a substantive force allowing general legal institutions a procedural element of enforcement on

---

[11] F. A. HAYEK, *The Use of Knowledge in Society*, *in* WHAT ADAM SMITH KNEW 151, 153-154 (James R. Ottenson ed., 2014) (1945).

[12] For a broader discussion on polycentricity in economic systems, *see generally* Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641 (2010). For a genealogical framing of polycentricity, *see generally* Paul D. Aligica & Vlad Tarko, *Polycentricity: From Polanyi to Ostrom, and Beyond*, 25 GOVERNANCE: AN INTERNATIONAL JOURNAL OF POLICY, ADMINISTRATION, AND INSTITUTIONS 237 (2012).

[13] Jakub Bożydar Wiśniewski, *Legal Polycentrism, the Circularity Problem, and the Regression Theorem of Institutional Development*, 17 Q. J. AUSTRIAN ECON. 510, 510-511 (2014).

these local norms. But the nature of polycentricity does not demand a dichotomy between public and private law; rather, all it requires is a systemic layering of competing legal agents in the enforcement process.

> Polycentric orders are systems of multiple, overlapping decision-making units that operate autonomously within a shared system of rules. For example, criminal law enforcement is a product of joint activity by federal agencies, state and local governments, court systems, police forces, private security companies, community organizations, and individual actors.[14]

A type of polycentric legal system thus provides a theoretical scaffolding upon which the dichotomy of "general" and "local" laws can coexist. State and federal courts each possessed a comparative advantage within the market of law and would compete on interpretation and production of the law. The beneficial elements of the free market including "specialization, division of labor, economic calculation, … greater incentive compatibility, and other efficiency- and welfare-enhancing features"[15] are thus conferred to the market of law via a polycentric legal system. The *Swift* decision, in creating a naturally-occurring type of polycentric system, allowed federal and state courts to specialize in the production and interpretation of general and local law according to their comparative advantages.

It is important to note, however, that a polycentric legal system does not necessarily yield to a dominance of private law, instead promoting any system which utilizes a multifaceted layering of competition within the legal framework. Under a sole system of localized state laws, disparate "rules of the game" would present conflict between parties engaging in interstate commerce. Instead, the federal common law facilitated trade across borders by adopting a generalizable set of rules specific to commercial activity. The common law emerged via

---

[14] Peter J.Boettke, Jayme S. Lemke, & Liya Palagashvili, *Polycentricity, Self-governance, and the Art & Science of Association*, 15 REV. AUSTRIAN ECON. 311, 314 (2014).
[15] Wiśniewski, *supra* note 13, at 514.

spontaneous order to not merely create laws governing commerce, but rather discover "those practices which proved to be the most efficient at facilitating commercial interaction," and "supplant[] those which were less efficient."[16] Over time, these commercial guidelines illuminated by the common law established "uniform rules and uniform application of those rules."[17] The uniformity present under a stable commercial law serves as a prerequisite for the development of a consistent volume of trade among business enterprises.[18] *Swift* served as a way for federal courts to provide uniform expectations in variable market junctures, such as the issuance of negotiable instruments. The federal common law allowed the circulation of these financial instruments, such as commercial paper, with minimal fear of "any peculiar local rules" that they would otherwise fall under.[19] During the antebellum period, at least, state supreme courts tended to conform their own holdings to the Supreme Court's, especially on issues of negotiable instruments.[20] This stability improved economic actors' ability to issue and exchange negotiable instruments across state lines as the costs of obtaining information concerning relevant government regulation was marginalized.

The *Swift* regime did more than merely anticipate an evolving economic apparatus in a burgeoning republic, however; whether by design or merely by happenstance, the ruling from Justice Story provided not only a stable framework for commercial law to arise out of, but also provided security for commercial and property rights. A common criticism of *Swift*, verbalized

---

[16] Bruce L. Benson *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644, 648 (1989).
[17] *Id.*
[18] *Id.*
[19] H. Parker Sharp & Joseph B. Brennan, *The Application of the Doctrine of* Swift v. Tyson *Since 1900*, 4 IND. L.J. 367, 371 (1929).
[20] J. Benton Hurst, Note, *De Facto Supremacy: Supreme Court Control of State Commercial Law*, 98 VA. L. REV. 691, 705 (2012); *see also* Arthur John Keefe et al.. *Weary* Erie, 34 CORNELL L.Q. 494, 504 (1949) (examining cases up to the end of the 19th Century and finding that the Supreme Court's rulings on issues of general law "did promote uniformity to a substantial degree" among the states).

through Justice Brandeis, was that federal common law favored corporate interests above all others, even individual rights:

> And, without even change of residence, a corporate citizen of the State could avail itself of the federal rule by reincorporating under the laws of another State, as was done in the *Taxicab* case. The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction.[21]

Yet in cases under the *Swift* regime, cases where *Erie*-anticipator Oliver Wendall Holmes dissented against that doctrine, "the Court upheld the rights of landowners…under general federal law despite state law to the contrary."[22] Furthermore, besides *Taxicab* being anomalous, it does not represent a molestation of rules; rather, the federal common law provided those individuals and corporations both with reasonable expectations and securities to their property rights through a uniform application of uniform rules. Thus, the doctrine of *Swift v. Tyson* served to reduce various transaction costs of interstate economic activity and advanced the efficient growth of the American commercial apparatus.

III. "ADVANCE TOKEN TO NEAREST RAILROAD"

Despite the stability offered by the *Swift* doctrine, the Depression-era Court nonetheless found the continuation and growth of the regime untenable for the American republic. Justice Brandeis levied three critiques to overturn *Swift*: the holding misinterpreted the relevant statute, it was unconstitutional, and it led to practical difficulties and incongruities in the legal system.[23] Brandeis specifically cited several practical problems arising from the *Swift* decision. First, he

---

[21] *Erie*, 304 U.S. at 76-77. *But see ante* note 4.
[22] Sherry, *supra* note 4, at 138. *See* Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910) (holding that a coal company was liable to the landowner for ecological damage, in contravention of a state supreme court ruling); Muhlker v. N.Y. & Harlem Railroad Co., 197 U.S. 544 (1905) (holding that a railway company owed compensation to a neighboring property owner for use of access, despite a state statute granting unencumbered use to the railway).
[23] *Erie*, 304 U.S. at 71-80. This last argument shall be the focus of our present analysis. While worth examining, the other issues raised are non-economic in analysis, and therefore are beyond the scope of this paper.

wrote that no bright-line rule existed to distinguish "between the province of general law and that of local law," leading to a "well of uncertainties."[24] Moreover, Brandeis contended that the system of horizontal uniformity conceived by *Swift* led to broad vertical disuniformity between the decisions of state and federal courts, "produc[ing] both inefficiencies and injustices."[25] And so the outré *Erie* doctrine was born, whereby federal courts exercising diversity jurisdiction are bound by both state statute and state common law – the legislators and judges of a state exercise nearly full control upon the federal courts through the vertical uniformity pioneered by Justice Brandeis.

A. "YOU HAVE BEEN ELECTED CHAIRMAN OF THE BOARD. PAY EACH PLAYER $50"

Although the history behind the Supreme Court's docket might suggest that the *Erie* decision arose out of special interests,[26] there is more evidence to suggest the opposite. In the decade prologue to *Erie*, certain political manifestations attempted to abrogate *Swift* by legislation through Congress three times – this was before the idea of judicial supremacy – and failed each time.[27] If various Congresses, composed of legislators far more susceptible to special

---

[24] *Id.*, at 74. For example of a post-*Erie* case, *see* James v. Meow Media, 300 F.3d 683 (6th Cir. 2002) (the circuit court attempted to follow Kentucky common law, which was insufficiently developed for the case at suit, ironically compelling the federal court to assume the evolution of Kentucky common law and logically derive a new doctrine).
[25] Nelson, *supra* note 4, at 965.
[26] Special interests in this judicial sense means that certain groups will attempt to secure a particular ruling which results in their benefit (monetary or otherwise); various parties may hold different agendas when seeking specific outcomes. Many cases in the Court's history have arisen out of such conditions. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (holding that a state cannot tax the federal government and that Congress has the power to charter a national bank); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that there is a constitutionally-protected right to privacy); Roe v. Wade, 410 U.S. 113 (1973) (holding that abortion was guaranteed through the right to privacy) (*overruled by* Dobbs v. Jackson Women's Health Organization 142 S. Ct. 2228, 213 L. Ed. 2d (2022)); Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that there is no constitutional right to homosexual acts) (*overruled by* Lawrence v. Texas, 539 U.S. 558 (2003)); District of Columbia v. Heller, 554 U.S. 570 (2008) (holding that the Second Amendment guarantees the private ownership of firearms); *etc*. This practice of searching for plaintiffs, however, is nothing unusual in the legal world. Even if special interests were involved in bringing a suit, such does not diminish from the importance of a court's decision or the reality of the case or controversy itself. A holding and its legacy must be judged on its merits, not the controversy that bore it.
[27] Sherry, *supra* note 4, at 137. Legislation challenging the *Swift* regime at the state-level had been suggested, but never proposed. *Cf. Erie*, 304 U.S. at 77 n.21.

interests than federal judges, could not overturn *Swift* on three separate occasions, or that a piece of state legislation was never attempted, suggests that special interests were not a significant part of overturning *Swift*. Indeed, during arguments, the Erie Railroad Company structured its arguments around the *Swift* doctrine and recognized its status as settled law. Nowhere in the case was the call made to overturn the *Swift* regime. Instead, "[t]he change was made on the initiative of a majority of the Court itself, without even demand by a litigant or argument of the point at the bar."[28] The political ideology and jurisprudence of the Depression-era Court was the primary (perhaps sole) motivator in overturning *Swift* – no matter how pernicious the decision may be, it was made in a genuine and sincere expression of legal disposition. Nonetheless, the absence of special interests in cause behind *Erie* does not abrogate the necessary presence of special interests arising out of diversity jurisdiction under the present *Erie* regime.

Under the *Swift* doctrine, federal courts in diversity suits provided a comparatively stable commercial law which incentivized interstate parties to choose federal jurisdiction over state. However, *Erie*, in fracturing the established specialization between the two courts, diminished the substantive benefits of filing under a federal court. Every state now elects their judicature, requiring judges to campaign and encouraging interest groups to donate to their reelections. Elected officials must grapple with the prospect of being elected and retaining their position, and so they have an incentive to please short-minded interests in exchange for support. These judges, in raising funds for campaigns, will inevitably be influenced by parties with a keen interest in receiving a beneficial ruling or decision. That many state judges run on a party ticket further

[28] Robert H. Jackson, *The Rise and Fall of* Swift v. Tyson, 24 AM. BAR ASS'N J., Aug. 1938, at 609, 609. Indeed, the same point is made by the dissenting opinion in the case. "No constitutional question was suggested or argued below or here. And as a general rule, this Court will not consider any question not raised below and presented by the petition." *Erie*, 304 U.S. at 82 (per Butler, J.). Nonetheless, the positivistic ideology of the Court's growing progressive wing demanded the overturning of the *Swift* doctrine.

jeopardizes their appearance of impartiality. Americans have very little faith that judges can truly be impartial on the bench when they receive campaign donations.[29] The real expectations of the public for the judiciary then shift away from the objective because of the incentives for partiality.

Even if a state judge delivered biased opinions due to donations by special interest groups or lawyers seeking favorable decisions, the federal court was able to interpret common law in a (somewhat) neutral manner under the *Swift* doctrine. Because of *Erie*, federal district courts were instead forced to rely upon the state of operation for common law doctrines; therefore, any actors who seek legal privilege or benefit can do so more easily through the state systems, even if their case were to be moved into federal courts. By hampering the federal judiciary's relative resistance to special interests, *Erie* is a cause of increased special interest involvement in the judicial process and has opened the door to criticisms of the legal system's ability to remain impartial. This is clearly demonstrated by trends in donations to state supreme court candidates in recent years, as the total volume of donations in these judicial elections increased from $83.3 million throughout the 1990s to $206.9 million during the 2000s, accounting for inflation.[30]

That the *Erie* decision would unleash the torrent of special interests via mere judicial process, however, is an incomplete picture of the consequences. After the deconstruction of the

---

[29] Cody Cutting, *The Human Costs of Special Interest Influence on State Courts*, BRENNAN CENTER FOR JUSTICE (Feb. 17, 2015), https://www.brennancenter.org/our-work/analysis-opinion/human-costs-special-interest-influence-state-courts [https://perma.cc/UB4S-BPFA].

[30] Joanna Shepherd & Michael S. Kang, *Partisan Justice: How Campaign Money Politicizes Judicial Decision-making in Election Cases*, AM. CONST. SOC'Y (2015), https://www.acslaw.org/analysis/reports/partisan-justice/ [https://perma.cc/5SDW-2PS5]. *See generally* Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411 (2016). *See Figure 2a* and *2b* in APPENDIX B. Although the data comes from recent years, rather than in the decades following *Erie*, the effects of the *Erie* doctrine on special interest donations to state court elections were only fully felt in more recent decades. No official campaign contribution data before 1971 is available; additionally, the ABA rescinded the provision in their ethics code which prevented judicial candidates from expressing views on political and legal issues in 2002. *See generally* Republican Party of Minnesota v. White, 536 U.S. 765 (2002). Campaign finance laws have also been recently loosened. *See generally* Citizens United v. Federal Elections Commission, 558 U.S. 310 (2010). The inherent problems of *Erie* with respect to judicial special interests are more realized in the present because of these institutional changes in the legal environment. Nonetheless, other shortcomings of *Erie* are far more evident earlier on.

Swift regime, many states supplemented their common-law *corpus* with model legislation on commercial activity. The Uniform Commercial Code (UCC) was adopted by the state of Pennsylvania in 1953 (25 years after *Erie*), and every other state (excepting Louisiana) followed suit over the next 20 years.[31] This law is not federal law, and instead is ubiquitous across the states; at a *prima facie* glance, this appears to ameliorate many of the problems which sole-*Erie* system would beget. Notwithstanding the thoroughness of the model legislation in replacing state common law, it remains legislation – cold and lettered, without the vicarious adaptability of common law. In order for the model legislation to adapt to modern commercial practices, it must once again go through the legislative process. Without the evolutionary ordering of common law, this model legislation instead becomes subservient to the whims of individual state legislatures, and further, individual state legislators. Requiring legislation where the common law previously filled in the gaps opens the door to special interests within the legislative as well as the judicial functions of government. *Erie* by no means expected to cement the power of the commercial lobby, yet nonetheless, by allowing commercial doctrine to drift into the sphere of the legislature, the ability of special interests to accommodate the law to their benefit remains without systemic check.[32]

---

[31] UNIFORM LAW COMMISSION, *Uniform Commercial Code*, https://www.uniformlaws.org/acts/ucc#:~:text=Pennsylvania%20became%20the%20first%20state,over%20the%20next%20twenty%20years. [https://perma.cc/5WQR-R9Y8] (Last visited Jan. 31, 2024). Certain states, *e.g.*, Texas, have not accepted each provision within the model legislation, however. This lack of total uniformity demonstrates that legislation cannot replicate the horizontal uniformity of *Swift*.

[32] A further discussion analyzing the Uniform Commercial Code in a post-*Erie* system, although relevant, remains beyond the scope of this paper. It is also worth considering the quarter-century of absquatulation between the fall of *Swift* and the advent of the UCC, but this, too, is beyond the scope of our research. We would like to again thank Andrew Markley for pointing out this area of research to us.

B. "FREE PARKING"

Brandeis's view regarding the lack of a distinct boundary between general and local law seemingly addresses a valid concern. With no clear demarcation, the lines between general and local law are blurred, eliminating the very stability and uniformity touted by *Swift*. This shallow reading of *Swift*, however, ignores the clear basis by which the doctrine demarcated general law. "*Swift*…declar[ed] that commercial law was, by definition, general law."[33] As the doctrine grew, other legal fields may have lacked that clear distinction – yet the doctrine of *Swift* was predicated on a bright-line rule pure. Bright-line rules which categorically separate legal fields inherently promote the praxeological coherence for stable legal expectations. Had the focus of *Swift* been a logical system from which various legal fields could operate, a distinction between local and general law would necessarily have focused on internal coherency rather than workability. Such is a prioritization of logical coherence over praxeological coherence. As Mario Rizzo defines these terms,

> [t]o the extent that a legal system can produce consistent expectations among those governed by the law as well as among those judges who are making initial decisions or taking appeals, it generates a kind of "coherence." Here we are not referring to the logical coherence of the law itself…but to the "coherence" or compatibility of the plans of the relevant actors in the legal system. We call the latter "praxeological coherence" and the former "logical coherence."[34]

That no party bothered to challenge the *Swift* doctrine in *Erie*, however, suggests that there was an implicitly understood distinction, if not express, for other areas of law beyond commercial law, like torts. Taking Brandeis's critique at face value, his concerns ironically led him to a conclusion that promotes logical coherence at the expense of praxeological coherence.

---

[33] Fletcher, *supra* note 8, at 1576.
[34] Mario J. Rizzo, *Which Kind of Legal Order? Logical Coherence and Praxeological Coherence*, 9 J. ÉCONOMISTES & ÉTUDES HUMAINES 497, 502 (1999).

Stopping up the polycentric inundation that *Swift* provided through a federal common law harbingered a more heavily dirigiste approach to American legal institutions. In the defeat of the *Swift* doctrine through the ersatz *Erie* decision, Brandeis prorogued a fully developed taxonomy of differentiation for competing legal agents, replacing the polycentricity of *Swift* with monocentric *Erie*. This flavor of monocentricity meant there was no layering or competition of legal systems through diversity jurisdiction. Instead, because there was no federal common law and the federal courts were compelled to apply state common law irrespective of commercial custom, the single geography of a state now suffered from a singular common law.[35] This shift to a monocentric legal system suppressed the very benefits conferred by the previous polycentric system.[36] Under *Swift*'s polycentricity, persons could seek out more efficient rulings without the onerous task of geographical relocation; however, under *Erie*, in order to achieve this efficiency, potentially costly interstate transport is necessary in addition to increased transaction costs through renewed litigation.

> [T]he effects of the bad law are less severe in a polycentric legal system. First of all, the effects of the bad law are confined to a relatively small community... But more significantly, the possibility of secession and migration... means that individuals do not have to act unilaterally in an effort to change the law.[37]

Furthermore, *Erie*'s monocentricity eliminated the capacity to evaluate the decisions made by state courts in diversity cases. It was not simply that there was no longer a mechanism of competition, although this detriment was certainly obvious; rather, the additional disability of no readily available standard of comparison made *Erie* a doctrinal monolith without account. "In the absence of alternatives, it may not be possible to evaluate the 'goodness' or 'badness' of a

---

[35] *Cf.* BRUCE L. BENSON, *Law and Economics*, *in* THE ELGAR COMPANION TO PUBLIC CHOICE 547, 554 (William F. Shughart II & Laura Razzolini eds., 2001).
[36] Wiśniewski, *supra* note 13, at 514.
[37] BENSON, *supra* note 35, at 554.

particular rule."[38] Now that the only point of appraisal for the jurisprudence of state courts would be separate states, providing a prophylactic barrier to the discovery of efficient general law, migration would be necessary to find any relevant substitutes. Yet this issue of migration in search of efficient general law would be marred by the uncertainty of developments in these various state jurisdictions. "[E]ven if an all-inclusive legal system is not used to redistribute wealth, it can have undesirable effects in a dynamically uncertain world,"[39] and the *Erie* decision not only put the ball in the court of diverse state courts, but the doctrine ensured that local law within the natural purview of these courts would prospectively vitiate any attempt at general law.

The doctrine of *Erie* purportedly rectifies the divide between general and local law, but this is contingent on the fact that there was any issue in the first place. The common law by nature is an evolutionary process by which more efficient rulings displace less efficient rulings. The federal common law established by *Swift* flourished in advancing and streamlining commercial law, and empirical evidence reveals that there was little, if any, systematic incongruity present under *Swift* that comports with Brandeis's reasoning.[40] The doctrine of *Swift* proved far superior in virtually every manner in aligning litigants' expectations through its application of commercial law, promoting a praxeological coherence. Brandeis's concern simply did not hold under the *Swift* regime and the uniformity and stability under *Swift* ultimately provided a greater advantage relative to any supposed improvements under *Erie*.

---

[38] *Id.*
[39] *Id.*
[40] *See, e.g.*, Lane v. Vick, 44 U.S. (4 How.) 464 (1845); Foxcroft v. Mallett, 45 U.S. (4 How.) 353 (1846); Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847); Watson v. Tarpley, 59 U.S. (18 How.) 517 (1855); Chicago City v. Robbins, 67 U.S. (2 Black) 418 (1862); Mercer County v. Hackett, 68 U.S. (1 Wall.) 83 (1863); Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863); *etc*. *See also ante* note 20.

C. "GO BACK THREE SPACES"

Despite Brandeis's complaints about the disuniformity supposedly brought about by the *Swift* doctrine, the *Erie* decision failed to meaningfully rectify any stated issues under *Swift* and introduced its own brand of disuniformity. *Swift* created a horizontally uniform federal jurisprudence by consolidating the common law interpretations of federal courts at the supposed expense of vertical uniformity between federal courts and those states in which they resided. By contrast, *Erie* coupled the common law interpretations of federal courts to that of their respective state courts, establishing vertical uniformity within each state at the expense of horizontal uniformity across all federal courts. Practically, this means that corporations under *Erie* now must be far more particular to the state they are headquartered and incorporated in, such that they are sensitive to the shifting local law. Appealing to a federal court no longer brings a more uniform set of rules across the country for interstate commerce, but merely reinforces a state's idiosyncratic common law doctrines.[41]

There exists no silver bullet solution to disuniformity; rather, the relative trade-offs between the competing systems must be analyzed. Any system of interpretation is "bound to [contain] some sort of disuniformity that makes planning harder ex ante and that creates incentives for forum shopping ex post;"[42] thus, when evaluating these doctrines, the superior one is the one which minimizes, not eliminates, disuniformity. Brandeis argued that *Swift* completely divorced federal courts from state courts on issues of common law; however, this critique is not entirely correct. Under *Swift*, state courts often came to the same conclusions as federal courts on

[41] This issue has manifested in how corporations now structure their contracts in the event of diversity jurisdiction. *E.g.*, arbitration clauses or forum agreements now specify the jurisdiction for which parties must settle disputes, rather than relying on federal courts to provide uniformity. Moving diversity jurisdiction to federal courts now only changes legal procedure, as opposed to legal substance.
[42] Nelson, *supra* note 4, at 968.

issues of common law because "they independently arrived at the same conclusion… they found the Supreme Court's opinions persuasive, or… they opted to defer to those opinions for the sake of uniformity."[43] *Erie*, on the other hand, calcified this preexisting vertical uniformity within each state and completely eliminated *Swift*'s horizontally uniform system of federal common law; thus, Brandeis's criticisms of *Swift* are ironically reflected through his own *Erie* doctrine.

IV. "GO TO JAIL. GO DIRECTLY TO JAIL. DO NOT PASS GO. DO NOT COLLECT $200"

The vestiges of the polycentric legal system and its appurtenance to efficient rulemaking through federal common law divisions became consolidated and centralized through the monocentricity of Justice Brandeis's exercise of raw judicial power. While the Justices saw the abrogation of *Swift* to reduce the power of the federal government, that power vacuum was substantively filled by the far more whimsy and inconsistent state courts.[44] Ultimately, however, this devolution toward monocentric consolidation within diversity jurisdiction "instead result[ed] in jurisdictions becoming 'insensitive and clumsy in meeting the demands of local citizens for the [laws] required in their daily life.'"[45] The *Erie* doctrine, while querulously conceived to remedy the perceived inefficiencies under *Swift*, instead established a state monopoly on the

[43] *Id.*, at 966.
[44] Justice Felix Frankfurter, shortly after the *Erie* decision was announced, wrote to President Roosevelt, expressing blithe surprise at the public disinterest in the case. "I certainly didn't expect to live to see the day when the Court would announce, as they did on Monday, that it itself has usurped power for nearly a hundred years. And think of not a single New York paper - at least none that I saw - having a nose for the significance of such a decision." Letter from Felix Frankfurter to Franklin D. Roosevelt (April 27, 1938), *reprinted in* ROOSEVELT AND FRANKFURTER 456 (M. Freedman ed. 1967.), *as cited in* William R. Castro, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 67 TUL. L. REV. 907, 950 n. 264 (1987). Only after the Supreme Court privately brought the matter to the attention of the papers did the case receive any press. That the case received such little attention from the media once again indicates that the doctrinal revolution was spurred on by the Justices and not special interests.
[45] Boettke, Lemke, & Palagashvili, *supra* note 13, at 314.

common law.[46] Only state courts could now speak to the Anglo-American heritage of the common law.

Under *Swift,* a stable commercial law thrived following the introduction of a market division of law between the general questions in federal diversity suits and local law under state jurisdiction. However, Justice Brandeis severed the specialization of general and local law with the introduction of the *Erie* doctrine. His maladroit attempt at establishing a superior and more consistent system failed to bring about any net positive change in American jurisprudence. Instead, by jeopardizing the uniform apparatus through which commercial law expanded in the United States, diversity jurisdiction, viz. corporate litigation, became far more uncertain, so imposing higher transaction costs on parties via this legal revolution.

By negating any horizontal uniformity and transcending the established vertical uniformity of American courts, *Erie* subverted the orthodoxy of praxeological coherence, which destabilized expectations of parties at suit and increased transaction costs associated with civil procedure. While special interests in the judicial process certainly existed before *Erie*, the dependency it created of federal courts on state common law paved the way for systematic forum shopping. The benefits of *Erie* continue to be lauded by the legal community, but the costs remain too high to justify the doctrinal shift. Rather than defend a uniform federal common law, Justice Brandeis overturned precedent which the U.S. commercial apparatus relied upon. As Cicero noted, "There will not be one law in Rome and another in Athens, or one law now and another in the future."[47] Yet the present *Erie* doctrine ensures just that.

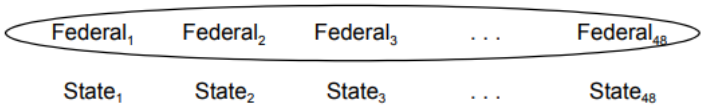
---

[46] *Cf.* Hayek, *supra* note 11, at 154.
[47] CICERO, DE RE PUBLICA; DE LEGIBUS 210 (Clinton Walker Keyes trans., 2014). Our translation (Jacob Sheldon Feiser trans.).

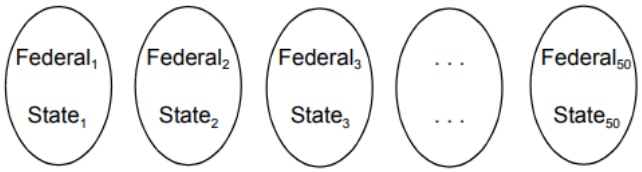
APPENDIX A

Figure 1:

Two stylized diagrams help to convey the different types of uniformity that *Swift* and *Erie* promise. Each column in the diagrams represents the federal and state courts located in a particular state, and the ovals linking different courts reflect the relevant type of uniformity. The horizontal uniformity promoted by *Swift* (with respect to questions of general law that the Federal Supreme Court had definitively addressed) might be represented as follows:

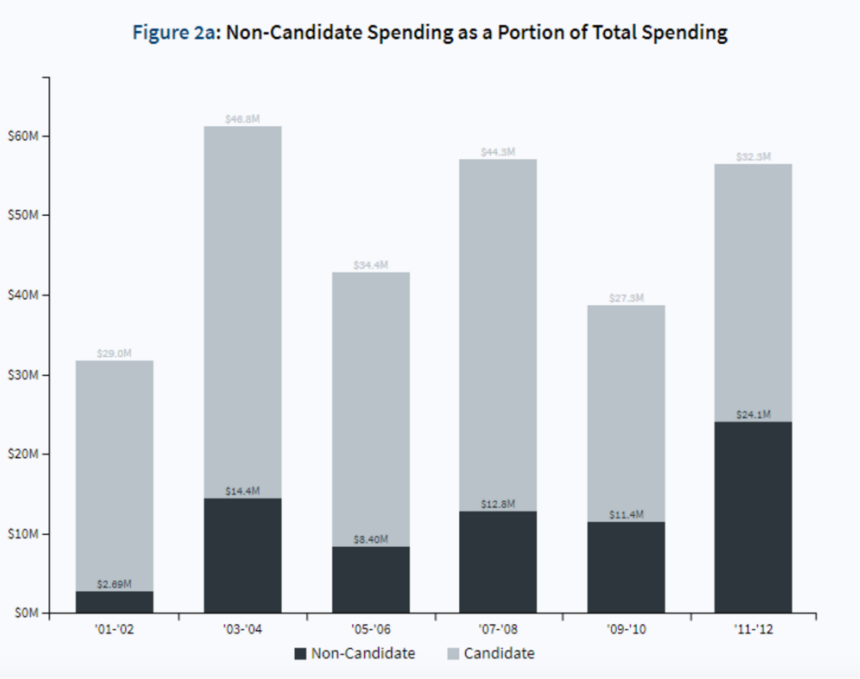


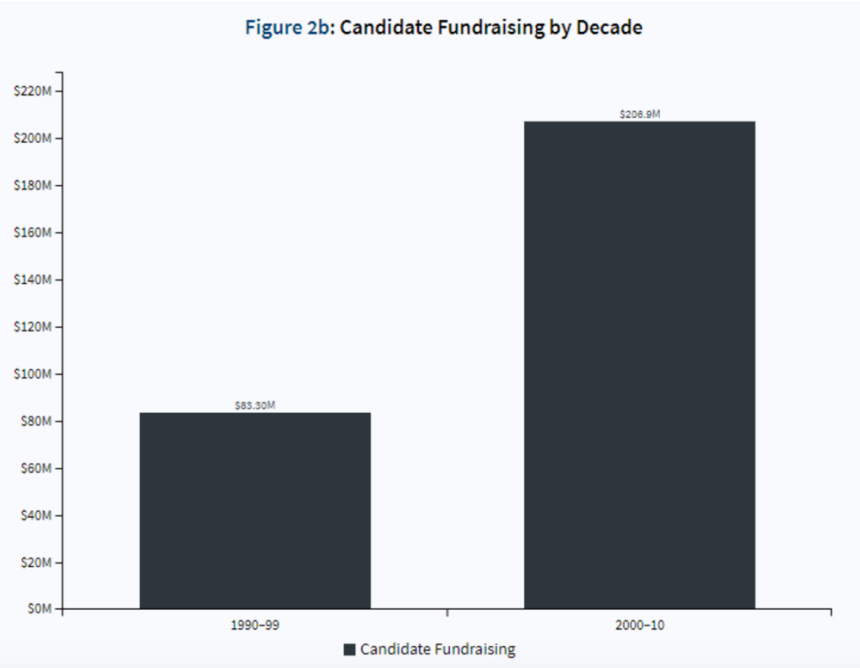
Likewise, the vertical uniformity promoted by *Erie* and *Klaxon* (with respect to questions that the supreme court of each state has definitively addressed) can be represented as follows:



Source: Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. Rev. 921, 967 (2013).

APPENDIX B





Source: Joanna Shepherd & Michael S. Kang, *Partisan Justice: How Campaign Money Politicizes Judicial Decision-making in Election Cases*, AM. CONST. SOC'Y (2015), https://www.acslaw.org/analysis/reports/partisan-justice/ [https://perma.cc/5SDW-2PS5].

Bibliography

BENSON, BRUCE L. *Law and Economics,* i*n* THE ELGAR COMPANION TO PUBLIC CHOICE. Edited by William F. Shughart II and Laura Razzolini. *Edward Elgar Publishing Limited*, 2001.

Benson, Bruce L. *The Spontaneous Evolution of Commercial Law*. 55 S. ECON. J. 644 (1989).

Boettke, Peter J., Jayme S. Lemke, & Liya Palagashvili. *Polycentricity, Self-governance, and the Art & Science of Association*. 15 REV. AUSTRIAN ECON. 311 (2014).

Castro, William R. *The* Erie *Doctrine and the Structure of Constitutional Revolutions*. 67 TUL. L. REV. 907 (1987).

CICERO, M. TULLIUS. DE RE PUBLICA; DE LEGIBUS. Translated by Clinton Walker Keyes. *Loeb Classical Library*, 2014.

Cutting, Cody. *The Human Costs of Special Interest Influence on State Courts*. Brennan Center for Justice (Feb. 17, 2015), https://www.brennancenter.org/our-work/analysis-opinion/human-costs-special-interest-influence-state-courts [https://perma.cc/UB4S-BPFA].

Dye, Sherman C. *Development of the Doctrine of* Erie Railroad v. Tompkins. 5 MO. L. REV. 193 (1940).

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

Fletcher, William A. *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*. 97 HARV. L. REV. 1513 (1986).

Gorrell, James A. & Ithamar D. Weed. Erie Railroad*: Ten Years After*. 9 OHIO ST. L.J. 276 (1948).

Green, Michael Steven. *The Twin Aims of* Erie. 88 NOTRE DAME L. REV. 1865 (2013).

HAYEK, F. A. *The Use of Knowledge in Society*, *in* WHAT ADAM SMITH KNEW. Edited by James R. Ottenson. *Encounter Books*, 2014 (1945).

Heckman, Charles A. *The Relationship of* Swift v. Tyson *to the Status of Commercial Law in the Nineteenth Century and the Federal System*. 17 AM. J. LEGAL HIST. 246 (1973).

Hurst, J. Benton. Note, *De Facto Supremacy: Supreme Court Control of State Commercial Law*, 98 VA. L. REV. 691 (2012).

Jackson, Robert H. *"The Rise and Fall of* Swift v. Tyson.*"* 24 AM. BAR ASS'N J. AUG. 1938 at 609.

Kane, Mary Kay. *The Golden Wedding Year:* Erie Railroad Company v. Tompkins *and the Federal Rules*. 63 NOTRE DAME L. REV. 671 (1988).

Merrigan, Edward L. Erie *to* York *to* Ragan -- *A Triple Play on the Federal Rules*. 3 VAND. L. REV. 711 (1950).

Nelson, Caleb. *A Critical Guide to* Erie Railroad Co. v. Tompkins. 54 WM. & MARY L. Rev. 921 (2013).

Rizzo, Mario J. *Which Kind Of Legal Order? Logical Coherence and Praxeological Coherence*. 9 J. ÉCONOMISTES & ÉTUDES HUMAINES 497 (1999).

Sharp, H. Parker & Joseph B. Brennan. *The Application of the Doctrine* of Swift v. Tyson *Since 1900*. 4 IND. L.J. 367 (1929).

Shepherd, Joanna & Michael S. Kang. *Partisan Justice: How Campaign Money Politicizes Judicial Decision-making in Election Cases*. AM. CONST. SOC'Y (2015), https://www.acslaw.org/analysis/reports/partisan-justice/ [https://perma.cc/5SDW-2PS5].

Sherry, Suzanna. *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision Ever*. 39 PEPP. L. REV. 129 (2011).

Steinman, Alan. *What is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*. 84 NOTRE DAME L. REV. 245 (2008).

UNIFORM LAW COMMISSION. Uniform Commercial Code. https://www.uniformlaws.org/acts/ucc#:~:text=Pennsylvania%20became%20the%20first%20state,over%20the%20next%20twenty%20years. [https://perma.cc/5WQR-R9Y8] (Last visited Jan. 31, 2024).

Wiśniewski, Jakub Bożydar. *Legal Polycentrism, the Circularity Problem, and the Regression Theorem of Institutional Development*. 17 Q. J. AUSTRIAN ECON. 510 (2014).

Young, Ernest A. *A General Defense of* Erie Railroad Co. v. Tompkins. 10 J. L. ECON. & POL'Y 17 (2013).

Zlinkoff, Sergei S. Erie v. Tompkins*: In Relation to the Law of Trade-Marks and Unfair Competition*. 42 COLUM. L. REV. 955 (1942).

"I just wanted to write about federal common law … why did it turn into this?" – Jacob S. Feiser on citing progressive sources in a Dr. Fuller paper

"There will not be one law in Rome and another in Athens, or one law now and another in the future." - Gigachad Cicero

"It is not of the mildest constitutional moment when, under the grounds of diversity jurisdiction, a federal court embarks on the interpretation of state legislation and common law" – Professor Jacob S. Feiser

"My orange juice, I forgot that was in there!" – Also Professor Jacob S. Feiser

"A Depression is like that guy who jumped off the Eiffel Tower trying to be Batman – well, he left a depression…in the ground!" – P.Ritty

"We violated Ricardo" – Alex Sodini

"Oh, they'd make bank on me" – Cory Boyer, referring to purchasing stones to stone pedophiles