ARTICLES

THOUGHTS ON THE VITALITY OF \textit{ERIE}

JOHN B. CORR*

\textbf{Table of Contents}

I. Introduction ........................................... 1088  
II. Background ........................................... 1090  
\hspace{1em} A. \textit{Swift v. Tyson} ................................ 1090  
\hspace{1em} B. The Attack on \textit{Swift} .................. 1091  
III. Questioning the \textit{Erie} Criticisms of \textit{Swift} ............... 1092  
\hspace{1em} A. Construing the Rules of Decision Act .............. 1092  
\hspace{1em} B. \textit{Swift}'s "Failure" to Achieve Uniformity .......... 1095  
\hspace{1em} C. \textit{Swift} Introduced New Uncertainties ............ 1097  
\hspace{2em} 1. Slippery "identifications" of state law .......... 1098  
\hspace{2em} 2. The confusion continues ....................... 1100  
\hspace{1em} D. Did \textit{Swift} Create Inequitable Opportunities for  
\hspace{2em} Forum Shopping? ................................ 1105  
\hspace{2em} 1. The misunderstood taxicab company .......... 1106  
\hspace{2em} 2. Is forum shopping inequitable? ................. 1111  
\hspace{1em} E. \textit{Swift}'s Constitutionality ..................... 1117  
\hspace{2em} 1. Tenth Amendment considerations ................ 1117  
\hspace{2em} 2. Equal protection considerations ................ 1122  
IV. Other Justifications for \textit{Erie} ........................ 1124  
\hspace{1em} A. \textit{Hanna}'s Twin Aims .......................... 1124  
\hspace{1em} B. A New \textit{Swift} in Conservative Hands .......... 1125  
V. Abandoning \textit{Erie} ................................... 1127  
\hspace{1em} A. The Benefits of Hindsight .................... 1127  
\hspace{1em} B. \textit{Erie}'s Shortcomings ........................ 1128

---

* Professor of Law, Washington College of Law, The American University. B.A., M.A., John Carroll University; Ph.D., Kent State University; J.D., Georgetown University. I am grateful to my research assistant, Geraldine Szott Moohr, J.D., Washington College of Law, The American University, for undertaking some of the really boring work associated with this article and letting me do the more interesting stuff.
INTRODUCTION

Our students suspect that we secretly enjoy imposing the difficulty of civil procedure on our classes. Our colleagues portray us as reluctant to challenge the foundations of our specialty. The suspicion is uncharitable, and the portrait is incomplete. Even so, we who study civil procedure may sometimes carry out our work in ways that give credence to such thoughts. Take, for example, the scholarly contribution to the development of the Erie doctrine.

Erie scholarship nowadays follows an established pattern. The rule that federal courts sitting in diversity actions will apply state substantive law is accepted as an axiom, and the debate then shifts to an analysis of the principles that should guide courts in choosing between state and federal procedure in specific situations. Only in-

1. Law review editors who require a cite to authority for this statement demonstrate incontrovertibly that they have suppressed their darkest memories about first year civil procedure.


3. It must be said, however, that the unfortunate image of civil procedure professors as unusually deviant even among law professors is sometimes furthered by our own statements. See Abram Chayes, Some Further Last Words on Erie—The Bead Game, 87 HARV. L. REV. 741, 753 (1974) (“There should be some reason, beyond the (perhaps perverse) delight in the intricacy of the game.”).

4. The doctrine takes its name from the case of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), in which the Supreme Court held that federal district courts would thereafter apply state substantive law, except in questions governed by the Federal Constitution or federal statutes. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). In doing so, the Supreme Court abolished something called "federal general common law," to distinguish it from other forms of federal common law that still exist. Id.; see infra notes 119 and 209 (listing circumstances under which federal courts may establish common law).

frequently is there even a hint that the *Erie* doctrine has outlived its usefulness or that, on balance, it should not have been adopted in the first place.6

The difficulties of mastering the application of *Erie* are well known to those who study it.7 The superficial simplicity of a rule sometimes requiring federal courts to apply state law becomes, on closer examination, a swamp of confusion that can trap everyone from legal neophytes to the most astute of federal judges.8 That a doctrine so uncertain in application should remain in place for half a century might suggest that, its weaknesses notwithstanding, the doctrine contributed importantly to our law—or, at least, that no better alternative to the doctrine existed.9 It is the thesis of this Article that those assumptions now rest on shaky ground. In fact, the experience of the half century since *Erie* has substantially undermined much of the constitutional and policy foundations on which *Erie* rests and has cast doubt on the doctrine’s ability to provide benefits comparable with its costs.

The Article starts by examining the background of *Erie*, beginning with the Supreme Court’s rejection of *Swift v. Tyson*,10 which established the doctrine *Erie* overturned. It discusses the changes *Erie* imposed, along with the explanations the Supreme Court offered for overruling *Swift*. Those explanations are then examined in light of current thinking about constitutional requirements and public policy that may bear on *Erie*. The Article compares costs *Erie* imposes with the benefits it was supposed to produce. The Article concludes that *Erie*, as currently applied, is not mandated constitutionally and that the costs of continued adherence to the doctrine are difficult to justify on policy grounds. The recommendation that follows is simple to state, though difficult to swallow: *Swift* should be viewed as a preferred alternative.

---

6. There was a time when criticism of *Erie* was a bit more common. See Arthur J. Keeffe et al., *Weary Erie*, 34 CORN. L.Q. 494 (1949) (citing growing criticism of *Erie*). The authors detected “faint rumblings of discontent directed at applications and interpretations of the *Erie* doctrine,” but those rumblings never became an earthquake. Id. at 494.
7. See id. at 514 (noting plethora of opinions interpreting *Erie*).
8. See infra text accompanying notes 250-51 (discussing costs of *Erie* including difficulty encountered by students in understanding material).
9. See Keeffe et al., *supra* note 6, at 1 (classifying dependence upon *Erie* as grounded in pure faith).
II. BACKGROUND

A. Swift v. Tyson

Erie was a reaction to a doctrine that had been settled for nearly a century. In Swift, a case initiated in federal court on the basis of diversity jurisdiction, the dispute centered on whether satisfaction of a preexisting debt was consideration sufficient to entitle the holder of a note to the status of holder in due course. The applicable state law (if it was applicable) was that of New York. Justice Story, writing for the Court, rejected one line of New York cases suggesting that cancellation of a preexisting debt was not valuable consideration as understood in the law of negotiable instruments.

Justice Story's motive in rejecting those cases may have had more to do with a desire to enforce uniformity in the negotiable-instrument law of the various states than with principles of federalism, but the consequences of his reach for authority to disregard state commercial law were profound. In a single lengthy paragraph extending over nearly two pages of the opinion, Justice Story concluded that the statute, now known as the Rules of Decision Act, did not require federal courts to follow the common law of the states.

Justice Story's reasoning is especially interesting because it later became a focal point of attacks on the Swift doctrine itself. Justice Story wrote that the Act's command to use the "laws" of the states where not prohibited by federal authority did not require federal courts to apply state common law. Thus the Court adopted the rule that, when federal courts hear diversity cases, they must follow state statutes and the construction given them by local courts, but

14. Id. at 15 (restating defendant's argument that because acceptance occurred in New York, court should treat contract as New York contract, governed by New York laws).
15. Id. at 17-18 (commenting that local tribunals do not furnish conclusive authority to bind Supreme Court).
16. See Freyer, supra note 11, at 36 (concluding that central question in Swift v. Tyson involved commercial law rather than federal-state relationships).
17. At the time Swift was decided, the controlling statute was section 34 of the Federal Judiciary Act of 1789. Today, the modern version of that act, now entitled the Rules of Decision Act, is found at 28 U.S.C. § 1652 (1988).
19. See infra notes 39-46 and accompanying text (discussing criticism of Swift opinion).
20. See Swift, 41 U.S. at 18 ("In the ordinary course 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.").
that they need not feel bound by state judicial decisions that do not interpret legislative acts.21

B. The Attack on Swift

Swift was controlling law for nearly a century; but the Supreme Court struck it down with a single blow.22 Writing for the majority in Erie, Justice Brandeis offered a broad range of reasons for the Court's drastic step:

First, in holding that the Rules of Decision Act authorized federal courts hearing diversity cases to disregard state common law, Swift had misconstrued the Act;23

Second, Swift failed to develop the more uniform state law that its proponents had anticipated;24

Third, Swift created new uncertainties in law because lower courts trying to apply Swift were often unsure whether a given issue should be tried under federal or state law;25

Fourth, by creating the possibility that a federal court hearing a diversity case might apply law different than that which would be applied by a state court hearing the same case in the same state, Swift offered to plaintiffs whose citizenship was diverse from defendants the opportunity to select between the law the federal court would use and the state common law, to the obvious detriment of defendants.26 Thus, as the Court in Erie saw it, diversity jurisdiction, originally intended to protect out-of-state litigants against unfair play in their opponents' home state courts, became an instrument by which diversity plaintiffs could unfairly disadvantage defendants.27 Moreover, Justice Brandeis found, the inequity was magnified by the ease with which a plaintiff seeking the benefit of federal law under Swift could invoke diversity jurisdiction simply by changing the state of residence.28 Similarly, without making a physi-

21. Id. Swift also deferred to state law when the issue involved rights and titles to things with permanent locality, such as real estate, and other immovable and intra-territorial matters. Id.
23. Id., 304 U.S. at 72.
24. Id. at 74 (remarking that state court persistence in postulating upon common law prevented uniformity).
25. Id. (theorizing that demarcation of boundaries between general federal law and local state law is impossible task).
26. See id. at 74-75 (describing possibility of forum shopping as contrary to aims of equal protection).
27. Id. at 74-75. The Court also noted the possibility that a nonresident plaintiff, defeated on a point of law in a state's highest court, could nonetheless win by taking nonsuit and renewing the controversy in federal court. Id. at 75 n.9.
28. Id. at 76.
cal change of residence, a corporate citizen could benefit from the rule by simply reincorporating under the laws of another state.\(^\text{29}\)

Fifth, and according to Justice Brandeis, most important, the majority in \textit{Erie} believed \textit{Swift} was unconstitutional.\(^\text{30}\) The Court noted that, its longevity notwithstanding, the presence of unconstitutionality rather than mere statutory construction compelled abandonment of the \textit{Swift} doctrine.\(^\text{31}\)

Gradually a few other rationales justifying \textit{Erie}'s displacement of \textit{Swift} have grown from the Court's original list of \textit{Swift}'s shortcomings.\(^\text{32}\) Such arguments, if sound, offer additional support for the majority's action in \textit{Erie}, and they must be considered in turn. The first duty of an \textit{Erie} skeptic, however, is to demonstrate why the reasons originally offered for \textit{Erie} are either ill-founded or, at least, out of date. If the Court's original explanations can still be supported, there is little point in questioning the validity of \textit{Erie} by criticizing its more recent justifications. Thus, this Article now examines more closely the criticisms Justice Brandeis offered of \textit{Swift}, and demonstrates the fragility of the \textit{Erie} majority's position. Then the Article examines the more recently developed theories supporting \textit{Erie} and shows how the doctrine should not be sustained on those alternative grounds.

### III. QUESTIONING THE \textit{ERIE} CRITICISMS OF \textit{SWIFT}

#### A. Construing the Rules of Decision Act

In holding that the Rules of Decision Act did not authorize federal courts hearing diversity cases to create common law separate from that of the states, Justice Brandeis expressly relied on the research and conclusions of Charles Warren.\(^\text{33}\) That dependence raises a question not usually addressed in analyses of \textit{Erie}: how reliable was Warren’s research?

The short answer is that, in an important respect, its reliability is essentially unquestioned.\(^\text{34}\) Warren was a scholar of the first magni-
tude, and it would be in bad taste to suggest that his research would reflect anything but a careful and honest approach to his sources. At another level, however, it remains fair to identify the predispositions Warren brought to his work.

Even the best and most honorable historians are still human beings, subject to the same sort of biases and other limitations characteristic of our species. Thus historians may establish total objectivity as a legitimate goal toward which they should strive, but they may not expect to achieve it completely. Instead, their duty is to try to be as fair and honest with their sources as they can be. If, like the rest of us, historians still possess their personal biases, they have an additional duty to disclose them so that their readers can take such predispositions into account.

In that sense, Warren was faithful to his duty. Throughout the article that was so important to the decision in *Erie*, Warren forthrightly argued his own view of the proper relationship between federal and state courts in our judicial system. His discussion and proposals help explain the bias he brought to the issue of the proper authority of federal courts hearing diversity cases to deviate from state common law.

It is an understatement to say that Warren's general view of federalism was that federal courts, below the level of the Supreme Court, should have almost no role to play. For example, consider the other proposals Warren made in the same article in which he argued that federal courts were without authority to deviate from state common law under the Rules of Decision Act.

1. Treating corporations as citizens enables corporations to use diversity jurisdiction to gain unfair legal advantage. "No single factor has given rise to more friction and jealousy between State and Federal Courts, or to more State legislation conflicting with and repugnant to Federal jurisdiction, than has the doctrine of citizenship for corporations. And this diverse citizenship jurisdiction created by the Constitution . . . has resulted in putting foreign corporations in a more favorable situation than domestic corporations, sued in a state." 37

2. Statutes authorizing removal of cases from state to federal

35. See Warren, *New Light*, supra note 33, at 132 (advocating reducing power of federal district courts by allowing state courts to hear cases involving federal statutes).


court should be scaled back dramatically. In particular, Warren advocated repeal of the removal authority established in the Reconstruction Era of American history, reasoning that "there is now [in 1923] little danger that the State Court will not amply protect persons claiming Federal rights." 38

3. Diversity jurisdiction should be reduced or abolished. 39
4. Federal question jurisdiction in the district courts should be drastically reduced and, at the same time, jurisdiction of state courts to hear federal questions should be enlarged. 40

To call Warren conservative is to misunderstand him. He was not advocating a status quo or a return to the federal judicial system as it had existed at any point in his lifetime. 41 In fact, his proposals would have slashed the authority of federal district courts to a stubble not recognizable to students of law living at any time in the century before Warren wrote. He was, in short, a proponent of states' judicial rights who tolerated only the barest authority for federal courts inferior to the Supreme Court. 42 His criticism of *Swift* was only part of a larger mosaic directed toward that end.

Warren's view of the role of federal courts does not impugn the integrity of his research. It should, however, help us understand that in making interpretations and drawing conclusions, Warren would have been an extraordinary scholar indeed if he had not been affected by his profound predispositions against a significant federal judiciary. Thus, it is fair to keep in mind that when Warren reached a conclusion, he may not have weighed evidence tending to controvert his position as strongly as he might have, had his predispositions been in favor of a stronger federal judiciary.

With that in mind, two additional points need to be made. First the *Erie* majority, in the end, did not depend heavily on Warren's analysis of the Act in reaching its conclusion. 43 As Justice Brandeis wrote, "[I]f only a question of statutory construction were involved,

(referring to 1875 bill designed to deny corporations right to initiate suits in federal court or remove suits from state court).

39. *Id.* at 132 (advocating state court hearing of cases involving citizens and non-citizens). Of course, Warren was neither the first nor the last to propose abolition of diversity jurisdiction. *See Freyer, supra* note 11, at 105 (pointing to criticism and legislation designed to abolish diversity jurisdiction following reaffirmation of *Swift* in 1928).
41. *See id.* (proposing changes which would expand state court jurisdiction beyond pre-federalism levels).
42. *Id.* Promoting increased jurisdiction for state courts, Warren proposed that cases which may be considered by the Supreme Court on appeal or writ of error be reduced by a "determined effort to cut off these cases, not at the Supreme Court end but at the District Court end; in other words by turning the stream of cases at their source, out of the District Court conduit, and into and through the state courts." *Id.* (emphasis in original).
43. *See supra* notes 30-31 and accompanying text (attributing abandonment of *Swift* to
we should not be prepared to abandon a doctrine so widely applied throughout nearly a century." 44 Second, there is some indication that Warren's conclusions were not necessarily compelling, even at the time of Erie. 45 Justice Holmes, who relied on Warren's work in an earlier dissent that criticized Swift, concluded only that Warren "probably" established an error of statutory construction in Swift. 46 One scholar's solid proof was only evidence to another, even another similarly inclined. 47

The central question about construction of the Rules of Decision Act, however, is one that can be more simply stated. Even if Warren was right that the Act did not permit federal district courts to create common law separate from that of the states, it does not follow that the district courts need still be disabled from following the path that Swift laid out. As demonstrated later in this Article, there appears to be no constitutional disability limiting the power of Congress to amend the Rules of Decision Act to permit federal courts to create federal common law in the Swift mold. 48

B. Swift's "Failure" to Achieve Uniformity

It has long been accepted that an important goal underlying Swift was the desire of the Supreme Court to ensure a degree of uniformity in state law, at least in commercial transactions. 49 Thus when Justice Brandeis claimed, with ample citations to authority, that Swift had failed to establish uniformity in state law, 50 he was not making a criticism that is easily dismissed. Whether the criticism carries the day, however, is another matter.

Of necessity, the influence Swift was to have on state common law

unconstitutionality); Keefe et al., supra note 6, at 495-96 (discussing finding of Swift's unconstitutionality).

44. Erie, 304 U.S. at 77.


46. Id. It should be noted, however, that Justice Holmes did not propose to abolish Swift. "I should leave Swift v. Tyson undisturbed, ... but I would not allow it to spread the assumed dominion into new fields." Id.

47. Compare Warren, New Light, supra note 33, at 51 (deciding that Swift would have been decided differently in light of later discovered evidence) with Black & White, 276 U.S. at 535 (holding that Warren's evidence probably established error) and Burbank, supra note 36, at 760 n.116 (characterizing Warren's claim as speculation).

48. See infra notes 189-215 and accompanying text (discussing constitutionality of congressional action designed to permit federal courts to establish federal common law).

49. See Freyer, supra note 11, at 19-22 (delineating problems of injustice and partiality in state courts as justifying need for uniformity).

50. See Erie, 304 U.S. at 74 (citing cases with conflicting interpretations of common law).
had to be indirect.\textsuperscript{51} Even if the federal courts did have the right to create common law at odds with that of the states, \textit{Swift} never asserted that state judicial precedent contradicting federal general common law would simply be disregarded.\textsuperscript{52} Justice Story wrote that decisions of the local tribunals should receive "the most deliberate attention and respect" of the Supreme Court.\textsuperscript{53} In that sense, all \textit{Swift} represented was an alternative body of law to which litigants could resort.

Over time, however, \textit{Swift} might reasonably have been expected indirectly to encourage state courts to adopt the views of common law that developed in the federal courts. If the state courts did not acquiesce, some of the cases that might have been brought in state court would instead be initiated in (or removed to) federal court by the party that would be advantaged through application of federal general common law.\textsuperscript{54} It was this indirect influence that was expected to move the state courts toward federal general common law.\textsuperscript{55} At least, that was the theory.

That the practice did not always turn out that way, however, should not have been surprising. Even at the time of \textit{Swift}, state courts already had experience disagreeing with one another; that was the perceived problem \textit{Swift} was intended to reduce. Those differences occurred, notwithstanding the possibility that in at least some cases a plaintiff who could obtain personal or quasi in rem jurisdiction over a defendant in more than one state might seek to forum shop among the states on the basis of which state offered the plaintiff the more favorable law.\textsuperscript{56} The persistence of differences between courts of the various states, which must have known that such differences would encourage forum shopping by some plaintiffs, indicates strongly that the courts would not (and will not) bend readily to a different law simply to avoid disharmony between the available laws. In other words, there were factors to be considered beyond harmonizing the differing state laws into one homogenous

\begin{itemize}
  \item \textsuperscript{51} See Freyer, supra note 11, at 2-4 (noting that \textit{Swift}'s effect on state law was masked by its characterization as question of commercial law).
  \item \textsuperscript{52} See \textit{Swift v. Tyson}, 41 U.S. (16 Pet.) 1, 13 (1842) (declaring local court decisions influential but not binding).
  \item \textsuperscript{53} \textit{Id.}
  \item \textsuperscript{54} Freyer, supra note 11, at 40.
  \item \textsuperscript{55} See \textit{id.} (offering theory that presence of alternatives for diverse parties would promote uniformity).
  \item \textsuperscript{56} See supra notes 26-29 and accompanying text (commenting on opportunities and ease with which to conduct forum shopping). The Supreme Court recently reaffirmed the constitutionality of in personam jurisdiction based solely on service of process on the defendant while the defendant is within the territorial confines of a jurisdiction. \textit{Burnham v. Superior Court}, 495 U.S. 604, 619 (1990). The decision enhances a plaintiff's opportunity to choose a forum based on a determination of which potential forum's law is most favorable to a plaintiff. \textit{Id.}
\end{itemize}
whole. States whose laws differed from one another were prepared to accept those differences as part of the price of developing their own distinct law—each presuming its own variation to be preferable. That is, at least some disharmony was to be expected.

In that circumstance, it is difficult to see how the Court could realistically have justified the *Swift* decision by suggesting its benefit of near total uniformity in state common law. The most the doctrine could have done was to serve as another consideration encouraging the states to reduce disharmony among their laws. According to several scholars who made a rather thorough investigation of *Swift's* impact on state law, the *Swift* rule promoted uniformity subtly, by pressuring state courts to "march in harmony with [their] fellows." Realistically, and in light of the fact that state courts would always be free to disagree among themselves as well as with federally created common law, a subtle effect was all that the Supreme Court should have expected.

C. *Swift* Introduced New Uncertainties

Justice Brandeis offered two foundations for his assessment that increased uncertainties had developed because *Swift* was unable to create a clear distinction between circumstances when federal general common law would displace state common law. The first source was again Charles Warren who remarked that the *Swift* decision, rather than promote uniformity, had created uncertainty as businessmen were unable to predict whether the doctrine would affect their legal disputes. The second source was the Federal Digest through 1937, which Justice Brandeis said "lists nearly 1,000 decisions involving the distinction between questions of general and of local law."

Warren's assertion, of course, should be read in light of his pre-
disposition against an important role for federal courts. Nevertheless, it is difficult to argue with his assumption that a rule whose application is not fully understood loses value in proportion to its uncertainty. The Federal Digest cited by Justice Brandeis provides evidence that Swift did not lay out a "bright line" dividing federal and state law. Swift may well have had a weakness, but that weakness still needs to be seen in a proper context. The proper context for Swift was not available to either Warren or Justice Brandeis. It lies before us now, however, in a comparison of the uncertainty of Swift with the uncertainty of Erie.

1. Slippery "identifications" of state law

There is a basic problem of uncertainty resulting from the application of Erie that was not present under Swift: the question of determining state law. Since Erie, there have been many diversity cases in which the federal court was confident that state law controlled, but uncertain as to what state law was. Nonetheless, under Erie, the federal court was bound to apply state law. Uncertainty is inherent in this situation.

Two devices—abstention and certification—have been developed to help federal courts escape the problem. Neither of those ap-
proaches, however, is used extensively. Much more frequently, federal courts simply try to determine, unaided, the controlling state law. All too often, these ventures of federal judges into state law produce little more than guesswork. Even worse, federal judges may simply substitute their own view of what state law should be, for what it actually is—sort of an underground exercise in the forbidden federal common law. In those cases, Swift has the last laugh: Charles Warren's hypothetical business people, longing for predict-

of certification. In response to a survey, clerks of courts indicated that certification substantially delayed the disposition of a case. John B. Corr & Ira P. Robbins, Interjurisdictional Certification and Choice of Law, 41 Vand. L. Rev. 411, 456 (1988). State judges who responded to the survey tended to disagree with the clerks' assessment. Id. Federal judges who actually handle final disposition of certified cases were more inclined to agree with the clerks. Id. Both groups of judges, however, believed that for many cases the time and expense invested in certification could be justified by the benefit, in difficult cases, of applying the proper state law. Id. at 455-72.

It is important to note, however, that certification is beneficial to the extent that it alleviates some of the costs of Erie. If federal courts were free, as they were under Swift, to fashion federal general common law, there would be little need to weigh the relative merits and costs of certification because there would be little need to have a certification process of any kind.

66. In fact, the Supreme Court has directed that abstention be employed only infrequently in "exceptional circumstances." Meredith v. Winter Haven, 320 U.S. 228, 234 (1943). Certification is used more often than abstention, but still not routinely. Committee on Fed. Courts, Analysis of State Laws Providing for Certification by Federal Courts of Determinative State Issues of Law, 42 Rec. A.B. Cty. N.Y. 101, 102 (1987) (noting that cost of certification suggests that it should be used "sparingly and selectively").

67. See McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 666-67 (3d Cir.) (interpreting question of state law while ignoring previous state court interpretations), cert. denied, 449 U.S. 976 (1980). This often-cited medical malpractice case turned on the construction of Ohio's statute of limitations. A district court in Pennsylvania dismissed the action because existing Ohio precedent held that the statute began to run when the physician-patient relationship ended, not when the patient discovered the injury. Id. at 659. A two-judge majority on the Third Circuit reversed, predicting that Ohio would apply that precedent only to a determination of the date on which the cause of action arose, and would not apply it to a situation in which it was necessary to determine when a statute of limitations was tolled. Id. at 666. In dissent, Judge Higginbotham cut to the heart of the problem with such determinations:

[W]e have been asked here to deliver prematurely a new Ohio statute of limitations doctrine despite the fact that that concept has been expressly rejected, and recently so, by every state and federal court in Ohio. I do not claim that the Ohio Supreme Court's views on when the statute of limitations starts to run in cases such as these are part of the modern or enlightened trends. But if counsel wants to test whether Ohio will have more enlightened views on the statute of limitations issues, it is far better for counsel to litigate those issues in the state courts of Ohio which have the final say on when their recently expressed views will be repudiated. Id. at 672 (Higginbotham, J., dissenting). The Third Circuit may have been more willing to second guess the district court in McKenna because the trial judge sat in Pennsylvania, and presumably knew no more about Ohio law than judges of the Third Circuit (which does not include Ohio). Judge Higginbotham wrote that he was "moved" by the tragedy the plaintiff suffered and was "convinced" that the tolling rule the majority preferred "is a humane and desirable component of medical malpractice law." Id. at 669 (Higginbotham, J., dissenting). Judge Higginbotham's concern for applying anachronistic law would have been alleviated had the court been able to fashion the more enlightened law that all three judges preferred. That course would have been available under Swift, but was theoretically foreclosed by Erie. Presumably a desire to reach a just result in the case before the court explains why the two-judge majority made its rather dubious "prediction" of Ohio's law.
ability in law, must still be searching. If uncertainty was a problem of *Swift*, *Erie* clearly has not been the answer.

2. The confusion continues

Perhaps once, when *Erie* was younger, the uncertainty it engendered might have been explained by the difficulty involved in working out a novel doctrine. If a doctrine is workable, however, a point should be achieved at which it has stabilized sufficiently to afford a degree of predictability in its application. After half a century, that time has not yet come for *Erie*. Three Supreme Court decisions in the last decade reflect the turbulence still afflicting the doctrine.

*Walker v. Armco Steel* brought the Court back again to questions about *Erie*’s effect on the use of federal procedure in diversity cases. *Walker* was a product liability case in which the complaint was filed within the statutory time limit, but not served on the defendant until after the limitations period had run. Under state law, the complaint was not timely unless the defendant was served within the limitations period. The plaintiff, however, argued that the issue was controlled by Rule 3 of the Federal Rules of Civil Procedure, which marks the commencement of an action when the complaint is filed with the court. If Rule 3 had controlled, the plaintiff’s action would have been timely when filed with the district

68. See supra notes 49-62 and accompanying text (examining need for certainty in application of legal doctrine).
69. 446 U.S. 740 (1980).
70. *Walker v. Armco Steel*, 446 U.S. 740, 741 (1980) (discussing application of federal procedure in cases based on diversity jurisdiction). In *Erie*, Justice Brandeis wrote that, “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.” *Erie*, 304 U.S. at 78. Justice Reed’s concurrence helped make clear that the majority did not intend the new doctrine to prohibit the use of federal procedure in diversity cases. *Id.* at 92 (Reed, J., concurring). Developments subsequent to *Erie*, however, made the question of using federal procedure in diversity cases considerably more difficult than the Court in *Erie* may have anticipated.

There are at least three sources of federal civil procedure. The applicability of *Erie* to various rules of procedure depends heavily on the source of the procedure at issue. Some procedure is the product of case law. See Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202-03 (1956) (concerning enforceability of agreement requiring arbitration prior to trial). Determining whether state law or federal procedure controls in such cases now proceeds under an analysis laid out in *Byrd v. Blue Ridge Rural Elec. Cooper.*., 356 U.S. 525, 536-39 (1958).

72. *Id.* at 743.
73. FED. R. CIV. P. 3.
court within the statute of limitations.\textsuperscript{74}

A unanimous Court held that state law controlled.\textsuperscript{75} Under the \textit{Erie} doctrine, as it applied to the Federal Rules of Civil Procedure, Rule 3 could control only if its authors sought to toll state statutes of limitations.\textsuperscript{76} The Court, however, held that "in diversity actions Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations."\textsuperscript{77} The decision seems straightforward enough, at least if the reader is unaware of its background.

On its facts, \textit{Walker} was very similar to \textit{Ragan v. Merchants Transfer & Warehouse Co.},\textsuperscript{78} in which the Court reached the same decision as in \textit{Walker}.\textsuperscript{79} Between \textit{Ragan} and \textit{Walker}, however, the Court decided \textit{Hanna v. Plumer},\textsuperscript{80} laying down an analysis for applying the Federal Rules of Civil Procedure which was seemingly applicable to \textit{Walker}.\textsuperscript{81} In \textit{Hanna}, the Court established that a federal rule was lawful under the Rules Enabling Act\textsuperscript{82} and therefore prevailed in a case involving conflicting state law.\textsuperscript{83} To most observers, this seemed to be the end of \textit{Ragan}.\textsuperscript{84} Thus it was more than a small surprise when the Court, in \textit{Walker}, resurrected \textit{Ragan} with the glib observation that a

\begin{itemize}
\item \textsuperscript{74} \textit{Walker}, 446 U.S. at 743.
\item \textsuperscript{75} \textit{Id.} at 752.
\item \textsuperscript{76} \textit{Id.} at 751-52.
\item \textsuperscript{77} \textit{Id.} at 751 (citing 4 \textsc{Charles A. Wright} \& \textsc{Arthur R. Miller}, \textit{Federal Practice and Procedure} § 1057 (1969)).
\item \textsuperscript{78} 337 U.S. 530 (1949).
\item \textsuperscript{79} \textit{See Walker}, 446 U.S. at 748 (applying state law over federal rule governing commencement of civil action); \textit{Ragan}, 337 U.S. at 532-33 (holding state statute applicable instead of federal law in question involving tolling of statute of limitations in civil action). In \textit{Ragan}, the petitioner brought suit in federal district court on diversity grounds to recover damages for injuries which occurred within two years of the filing of the complaint. \textit{Id.} A summons was issued in accordance with the Federal Rules of Civil Procedure but was not served before the statute of limitations expired. The Court held that the suit was barred by the state statute of limitations, applicable under \textit{Erie}. \textit{Id.} at 533.
\item \textsuperscript{80} 380 U.S. 460 (1965).
\item \textsuperscript{81} \textit{Hanna v. Plumer}, 380 U.S. 460, 472-73 (1965).
\item \textsuperscript{83} \textit{Hanna}, 380 U.S. at 470-72. The discussion of \textit{Hanna} provides an opportunity to discuss an issue that a proposal to reconsider \textit{Erie} may raise. The issue concerns how, in a post-\textit{Erie} era, cases addressing the applicability of federal rules of procedure will be decided. The answer is straightforward. If it is true that federal courts hearing diversity cases can and should create something like federal general common law, it seems to me to follow that Congress and the Supreme Court are acting appropriately when they promulgate rules of procedure governing civil litigation in federal courts. Rejection of \textit{Erie}, therefore, should produce little difference to the outcome if a case like \textit{Hanna} were to arise again. The most significant difference, in fact, would probably be that \textit{Hanna} would reach the same result without enduring the difficult analysis the Supreme Court had to make in the original decision. \textit{Walker} would not change either if the federal rule at issue truly was not relevant to the case.
\item \textsuperscript{84} \textit{See Hanna}, 380 U.S. at 474-78 (Harlan, J., concurring) (noting that \textit{Ragan}, if still applicable, would have rendered different result). There were commentators, however, who predicted the Court would use \textit{Walker} to harmonize \textit{Ragan} and \textit{Hanna}. \textit{See Ely, supra} note 2, at 729-33 (considering differences between \textit{Ragan} and \textit{Hanna}).
\end{itemize}
rule expressly intended to govern the commencement of an action was irrelevant to determining when a statute of limitations was tolled. In a remark apparently designed to make Walker more palatable, Justice Marshall shrunk from saying whether Rule 3 governed the tolling of a statute of limitations in a case arising under federal law.

By so doing, the Court maintained Ragan, and with it the possibility that in circumstances involving federal rules other than Rule 3, Erie would still enable state law to control important procedural issues. The motive for doing so is implicit in Justice Marshall's explanation that applicability of Rule 3 in Walker would create the possibility of forum shopping in future cases as well as an "inequitable administration" of the law. These cases indicate just how "certain" in application Erie has become. If the struggle to harmonize Ragan (Rule 3 inapplicable) with Hanna (federal rules control if they clash with state law) reaches an implausible conclusion, consider what drives the problem—the search, forty years after Erie, for principled, predictable distinctions that explain when federal procedure will apply to diversity cases.

Burlington Northern Railroad v. Woods seemed to retreat from Walker. The company lost a personal injury suit at trial and appealed. When the appeal proved unsuccessful, the plaintiff sought an additional ten percent in damages which state law assessed against unsuccessful appeals of money judgments. Rule 38 of the Federal Rules of Appellate Procedure allows additional damages only if an appeal is determined to be frivolous. This time, Justice Marshall, writing again for a unanimous Court, relied on a Hanna analysis. He concluded that Rule 38 conflicted with the state law, and that Hanna therefore mandated application of the federal rule. Justice Marshall cited Walker only once in Burlington, suggesting that it was consistent with Hanna in finding that a federal rule applies if it conflicts with state law.

85. See Walker, 446 U.S. at 750-51 (describing intended effect of Rule 3).
86. Id. at 751 n.11.
87. Id. at 753.
88. Id.; see infra notes 156-85 and accompanying text (examining equity of forum shopping).
91. Id. at 3.
93. See Burlington, 480 U.S. at 4-6 (discussing Hanna's applicability).
94. Id. at 5-6.
95. Id. at 5.
The facts of Burlington support the Court's conclusion that the state and federal rules directly conflicted. Nonetheless, as a guide for the future, Burlington is not entirely satisfying. As in Walker, the language of the federal rule at issue seemed to suggest conflict with the corresponding state law. As in Walker, there was at least some evidence to support the proposition that the purpose behind the federal rule conflicted with the purpose behind the state law.

A final similarity between Walker and Burlington is that both fact patterns contained some evidence that the federal and state rules at issue might not be in conflict (thus justifying application of the state rule). The major differences between the cases seem to be the existence of Ragan's precedent as it affected Walker (but did not affect Burlington) and the inclination of the Court in Burlington to reach a different judgment.

As one who believes the outcome in Burlington to be correct, I offer criticism of that case with some diffidence. It is difficult, however, to escape the suspicion that the primary cause of different outcomes in Walker and Burlington had little to do with distinguishable facts and more to do with the desire of the Court to breathe new life into Hanna. Perhaps that is an improvement on Walker; but with Walker unrepudiated, and not all that dissimilar on its facts from Burlington, there is no certainty that another Walker will not reemerge in the next Erie decision.

In fact, there is a faint specter of Walker's ghost in Stewart Organization, Inc. v. Ricoh Corp. A contract between the parties provided that a suit arising out of the contract could be brought only in Manhattan. Nevertheless, the plaintiff brought suit in federal district court in Alabama. The defendant then moved to transfer the case to

96. See id. at 7 (finding that discretion allowed in Appellate Rule 38 contradicted mandatory penalty affirmation provision in state statute).
97. See Walker v. Armco Steel, 446 U.S. 740, 750 n.10 (1980) (acknowledging and rejecting argument that Notes of Advisory Committee on Rules contemplated role for Rule 3 in tolling statutes of limitations); Burlington, 480 U.S. at 7 (accepting analysis that both state rule and Appellate Rule 38 addressed same issue in contradictory ways).
98. Compare Walker, 446 U.S. at 751 (finding purpose of Rule 3 not reaching issue governed by state law) with Burlington, 480 U.S. at 7-8 (finding that existence of additional state rule regarding issue governed by Appellate Rule 38 suggests that Rule 38 and state rule at issue do not conflict).
99. Note, however, that Walker discouraged a dawdling plaintiff from choosing the federal court to evade a problem of serving notice on the defendant before the statute of limitations ran. In Burlington, by contrast, there was little likelihood that either party would choose the federal court in advance of trial to avoid the ten percent increment levied on unsuccessful appeals.
100. 487 U.S. 22 (1988).
New York, pursuant to the federal change of venue statute.\textsuperscript{102}

At that point, conflict between state law and federal procedure emerged. Under state law, contractual forum selection clauses were viewed unfavorably.\textsuperscript{103} By contrast, the federal transfer statute permitted a federal court to weigh the forum selection clause in determining whether to grant the motion to transfer.\textsuperscript{104} An 8-to-1 majority of the Supreme Court held that the federal transfer statute controlled.\textsuperscript{105}

Writing for the Court again, Justice Marshall did not dwell on the distinction between a federal rule, promulgated by the Court, and federal legislation enacted by Congress.\textsuperscript{106} Instead, he cited \textit{Burlington} for the standard developed in \textit{Hanna}: if federal law and state law are both on point, then federal law governs in a diversity case.\textsuperscript{107} Of course the catch, once again, was in determining whether a valid federal law conflicted with state law. This time, Justice Marshall made a candid admission that section 1404(a) and the corresponding state law addressing contract clauses on forum selection were not "perfectly coextensive."\textsuperscript{108}

Marshall's acknowledgement, however, is mild compared to Justice Scalia's dissent. Justice Scalia first reasoned that the language of section 1404(a) itself—that transfers were permitted "f[or the convenience of parties and witnesses, in the interests of justice]"\textsuperscript{109}—looked to current and future circumstances, not to any prior contractual agreement among the parties.\textsuperscript{110} To that extent, he concluded, only state law was relevant as to how to treat a prior contractual agreement choosing a forum.\textsuperscript{111} Justice Scalia also pointed out that most issues of contract law have long been recognized to be governed by state law.\textsuperscript{112} It therefore followed that, in matters of contract not clearly in conflict with federal law or preempted by federal statute, state law should govern.\textsuperscript{113} His final argument was that a goal underlying \textit{Erie} was to support uniform

\textsuperscript{103} \textit{Stewart}, 487 U.S. at 24.
\textsuperscript{104} \textit{Id.} at 29-30.
\textsuperscript{105} \textit{Id.} at 23.
\textsuperscript{106} See supra note 70 (discussing origins of federal rules and legislative sources of federal civil procedure).
\textsuperscript{107} \textit{Stewart}, 487 U.S. at 30. Note how this approach would give parties a strong incentive to shop for federal statutory procedure in many circumstances.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} 28 U.S.C. § 1404(a).
\textsuperscript{110} \textit{Stewart}, 487 U.S. at 34 (Scalia, J., dissenting).
\textsuperscript{111} \textit{Id.} at 35 (Scalia, J., dissenting).
\textsuperscript{112} \textit{Id.} at 36 (Scalia, J., dissenting).
\textsuperscript{113} \textit{Id.}
predictable outcomes between state and federal courts in deciding claims, which he found to be missing in Justice Marshall's majority opinion. It may well be that the majority was right and Justice Scalia wrong in *Stewart*. More important, though, is the implication that *Stewart*, *Burlington*, and *Walker* have for the utility of the *Hanna* analysis for federal procedural rules and statutes. Although two of those cases were decided unanimously and the third had only a single dissent, together the three decisions leave a well of uncertainty about the applicability of federal procedural rules and statutes in future diversity cases. After those three decisions, can anyone say with confidence when a federal rule collides sufficiently with a state law so as to justify displacing the state authority? Charles Warren and Justice Brandeis could not have known the magnitude of the uncertainty *Erie* would sow.

**D. Did Swift Create Inequitable Opportunities for Forum Shopping?**

Justice Brandeis' fourth criticism of *Swift* had two parts. Because *Swift* created at least the possibility that federal courts would apply common law different than the law available in state courts, parties who stood to benefit by the application of federal law had an incentive to invoke diversity jurisdiction. If such a party did not already satisfy the requirements for diversity, it might do so by

114. *Id.* at 37 (Scalia, J., dissenting).
115. *See id.* at 38 (Scalia, J., dissenting) (concluding that interpretation of section 1404(a) by majority was broad and ambiguous and would encourage forum shopping due to differences between federal and state law).
118. *See Gregory Gelfand & Howard B. Abrams, Putting Erie on the Right Track*, 49 U. Prrr. L. Rev. 937, 940 (1988) (criticizing failure of Court to provide adequate explanation of underlying rationale in its decisions). The authors characterize the Court's application of the tests derived from *Erie* as "ad hoc jurisprudence" and state that the Court appears to apply whichever test produces the "desired result." *Id.*
119. Notwithstanding *Erie*, there remain areas in which federal courts are free to create federal common law. *See Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366 (1943) (finding that federal common law, not state law, controls obligations of United States on its own commercial paper). Because it is often difficult to determine when federal courts may create such common law, and when they must instead defer to state law, this may seem at first glance to be additional evidence of the uncertainty of the *Erie* doctrine in application. *See* [Jack H. Friedenthal et al., Civil Procedure 232 (1985)](https://www.jstor.org/stable/2245325) (stating that decision to create and apply federal common law is result of highly fact specific analysis). Nevertheless, because such federal common law, where created, displaces all conflicting state law—something neither *Swift* nor *Erie* authorizes—it is clear that the existence of federal common law unrelated to *Erie* is not evidence of *Erie*'s uncertainty. For a further discussion of this sort of federal common law, see [*infra* note 209] (discussing federal common law developed to protect federal interests).
altering its state citizenship.\textsuperscript{121} This advantage seemed particularly unfair to Justice Brandeis because he believed that the option was available only to some litigants.\textsuperscript{122} Thus the Court frowned on forum shopping in the first instance, and rejected its apprehended inequity in the second.\textsuperscript{123}

This criticism of \textit{Swift} had antecedents in the nineteenth century.\textsuperscript{124} It was raised with renewed energy after the Court decided \textit{Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.}\textsuperscript{125}

1. The misunderstood taxicab company

\textit{Black & White} arose out of a contract in which a railroad had awarded a taxicab company exclusive rights to solicit taxi fares at a railroad station in Kentucky.\textsuperscript{126} The chief defendant was a competing taxicab company that was allegedly interfering with the exclusive franchise. Both the railroad and the defendant taxi company were incorporated in Kentucky. The plaintiff initially incorporated in Kentucky, but prior to entering into the contract with the railroad, it dissolved in Kentucky and reincorporated in Tennessee.\textsuperscript{127} Once established as a Tennessee corporation, the plaintiff made the contract with the railroad.\textsuperscript{128}

Reincorporating in Tennessee meant that the plaintiff was now diverse from the other taxicab company, and thus could sue to prevent interference with the exclusive franchise in a federal court.\textsuperscript{129} In fact, the acknowledged reason for reincorporating in Tennessee was to create diversity for purposes of this case.\textsuperscript{130}

Under Kentucky common law the contract at issue was invalid because it was anticompetitive.\textsuperscript{131} No provision of the state constitution or state statute, however, prohibited the practice. Under federal general common law, the contract was enforceable.\textsuperscript{132}

\begin{itemize}
\item \textsuperscript{121} Id. at 76. Justice Brandeis also noted that corporations could invoke diversity without even changing residence simply by reincorporating in another state. \textit{Id.} at 76-77.
\item \textsuperscript{122} See \textit{id.} at 74-75 (criticizing that only nonresidents of state would be able to invoke diversity in this fashion).
\item \textsuperscript{123} \textit{id.}
\item \textsuperscript{124} See \textit{Freyer, supra} note 11, at 85-86 (noting that \textit{Swift} had been criticized in 1880s for encouraging unfair forum shopping).
\item \textsuperscript{125} 276 U.S. 518 (1928).
\item \textsuperscript{126} \textit{Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.}, 276 U.S. 518, 522 (1928).
\item \textsuperscript{127} \textit{id.} at 523-24.
\item \textsuperscript{128} \textit{id.} at 524.
\item \textsuperscript{129} \textit{id.} at 523.
\item \textsuperscript{130} \textit{id.} at 523-24.
\item \textsuperscript{131} \textit{id.} at 526.
\item \textsuperscript{132} \textit{id.} at 526-27.
\end{itemize}
motive for creating diversity and suing in a federal district court in Kentucky seemed obvious: to obtain the application of the pro-plaintiff federal law.

Following *Swift*, the Supreme Court upheld the lower decision to apply federal law. Justice Holmes’ famous dissent argued that *Swift* “has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.” Justice Brandeis, who would write the *Erie* opinion ten years later, was one of two Justices who joined the Holmes dissent.

The *Black & White* decision resulted in enormous criticism and apparently caused Congress to contemplate overturning diversity jurisdiction itself. The ability of the plaintiff corporation to change the applicable law simply by reincorporating in another state was particularly troubling. This inequity was an important factor in Justice Brandeis’ justification for *Erie*. Black & White’s critics, however, misunderstood two points: first, how easily the problem, if it indeed was one, could be rectified; and second, whether the matter was really an important inequity at all.

In the first place, the Court in *Black & White* made it clear that changes of citizenship had to be genuine. A sham reincorporation or a fraudulent change of domicile by a natural person is insufficient to invoke diversity. Moreover, attempts to invoke diversity through maneuvers involving less drastic steps than change of citizenship have long been subject to careful scrutiny, frequently resulting in disallowance of the attempted diversity jurisdiction.

Assuming, as was the case in *Black & White*, that the change of

133. Id. at 530-31.
134. Id. at 533 (Holmes, J., dissenting). Justice Holmes made two additional arguments: first, that Justice Story had misconstrued the Rules of Decision Act as only referring to statutory law; and second, that even under *Swift* the district court should have deferred to state law because the question at issue involved the use of realty. Id. at 535-36 (Holmes, J., dissenting). Some commentators believe Holmes most sharply disagreed with the majority over the realty issue. See Friedenthal et al., supra note 119, at 193 n.20. Holmes himself, however, described that as a “subordinate and narrower” ground for his dissent. *Black & White*, 276 U.S. at 535 (Holmes, J., dissenting).

136. See Freyer, *supra* note 11, at 105 (describing Chief Justice Taft’s use of influence to block proposed legislation).
137. Id. at 109.
138. *Erie*, 304 U.S. at 76-77 (“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.”).
139. *Black & White*, 276 U.S. at 524.
140. See 28 U.S.C. § 1359 (1988) (containing current prohibition on attempts to invoke diversity through improper or collusive assignments of causes of action and stating that federal jurisdiction will be denied in such cases); Kramer v. Caribbean Mills, Inc., 394 U.S. 823,
citizenship is genuine, though motivated solely by a desire to create diversity jurisdiction, the problem is not likely to arise all that frequently. Changing a corporation's place of incorporation is not a decision that corporate leadership will undertake lightly. The decision can have consequences including additional incorporation fees, tax liability, and susceptibility to lawsuit. With such factors in mind, many enterprises are unlikely to conclude that the benefits of diversity jurisdiction in a single case clearly outweigh the costs of incorporation—even if the benefits of reincorporation include application of the Swift doctrine.

Smaller corporations with perhaps less to lose in terms of public image might be more willing to make such changes, but there is another constraint that will often make them move slowly. Even if the stakes in a particular case justify a decision to seek diversity, these corporations will often nonetheless reject reincorporation in another state because that action alone may be insufficient to create diversity. Under the diversity statute as it now exists, corporations are citizens of both the state in which they are incorporated and the state that is their principal place of business. The principal place of business of a corporation is typically defined as either the location of its corporate headquarters or the place in which its major assets can be found. For smaller corporations, the state of principal place of business is often likely to be identical with the original state of incorporation.

Thus, changing the state of incorporation will not always create diversity. A smaller corporation will usually continue to be a citizen of the original state of incorporation, because that is the location of its principal place of business. If Black & White worked an inequity in 1928 by inviting corporations to forum shop by creating diversity through reincorporation, the remedy was readily available. By enacting the current version of 28 U.S.C. § 1332(c)(1) in 1928 instead of 1958, Congress would have frustrated the attempts of smaller

827-28 (1969) (finding assignment of interest lawful under state law, but nevertheless rejecting assignment as improper attempt to invoke diversity jurisdiction).

141. See Larry D. Soderquist & A.A. Sommer, Jr., CORPORATIONS: A PROBLEM APPROACH 49 (2d ed. 1986) (discussing factors considered in deciding location of incorporation).

142. Id.


144. See Egan v. American Airlines, Inc., 324 F.2d 565, 565-66 (2d Cir. 1963) (finding place from which management and business policies emanate to be principal place of business in facts of particular case).

145. See Kelly v. United States Steel Corp., 284 F.2d 850, 854 (3d Cir. 1960) (citing proportion of tangible property and personnel as factors in determining principal place of business).
corporations—the ones most likely to seek diversity through reincorporation—to play the reincorporation/invocation-of-diversity game.

Perhaps it is unreasonable to expect one Congress to recognize a solution implemented thirty years later. But surely it is not unreasonable to require critics of *Black & White* in 1928 to realize that, under then existing choice-of-law rules, the tactic employed by the plaintiff was not the only way, or even the easiest way, that the plaintiff could have achieved its end. As the majority in *Black & White* established at some length, Kentucky was in a minority among the states in holding exclusive franchise agreements invalid.\(^\text{146}\) That fact, combined with choice-of-law analysis as it existed in the states in the 1920s, should have provided the plaintiff with an easy method of achieving enforcement of an exclusive franchise agreement.

In the 1920s, it was universally accepted among the states that the law controlling the validity of a contract was the law of the state in which the contract was made.\(^\text{147}\) Thus, without reincorporating, the *Black & White* plaintiff and the railroad theoretically could have evaded Kentucky’s refusal to enforce an exclusive franchise contract simply by going to a more hospitable state to make the contract. Then, when the plaintiff sought to enforce the contract against the other taxicab company, it could have done so in a Kentucky state court bound, under its own choice-of-law rules, to apply the law of the state in which the contract was made. That was the theory.\(^\text{148}\)

Why, then, did the plaintiff in *Black & White* go to the trouble of reincorporating as a means of obtaining the benefit of *Swift*, when the goal of enforcing the contract could have been accomplished more easily by maneuvering through choice-of-law rules? No certain answer is available, but a reasonable guess can be made. One might assume that the plaintiff did not take the easy route because the plaintiff feared that Kentucky state courts, historically hostile to the kind of contract at issue, might not have been faithful to their own choice-of-law rules.\(^\text{149}\) A Kentucky court could have employed

---

\(^\text{146}\) See *Black & White*, 276 U.S. at 527-28 (citing two Supreme Court cases and decisions in fifteen states finding exclusive franchise contracts valid).

\(^\text{147}\) *Restatement of the Law of Conflict of Laws* § 332 (1934). This approach was "the universal American approach to choice of law" in the years before the First Restatement was published. Lea Brilmayer & James A. Martin, *Conflict of Laws: Cases and Materials* 1 (3d ed. 1990).

\(^\text{148}\) See Gelfand & Abrams, *supra* note 118, at 953 n.52 (stating that *Erie* would not have altered outcome in *Black & White* because of prevailing choice-of-law rules during period applicable to contract disputes).

\(^\text{149}\) See, e.g., Cuba R.R. v. Crosby, 222 U.S. 473, 478 (1912) (citing rule that court must apply law of state where cause of action arises unless contrary to public policy of forum); Atchinson, Topeka & Santa Fe Ry. v. Sowers, 213 U.S. 55, 67-68 (1908) (stating that public
"public policy" to frustrate the application of another state's law.\textsuperscript{150} This technique authorizes a court, faced with the application of a sister state's law that it disfavors, to refuse to apply the other state's law on the ground that it is contrary to the public policy of the forum.\textsuperscript{151}

In theory, the public policy doctrine should have been used most sparingly—otherwise it could have subverted the entire approach to choice of law as it existed in the 1920s.\textsuperscript{152} In practice, however, any plaintiff suing on a foreign cause of action runs at least some risk that public policy will be invoked to defeat application of the foreign law. There is no way to be certain.\textsuperscript{153}

Accordingly, it is entirely possible that the \textit{Black & White} plaintiff reincorporated in Tennessee to ensure that a Kentucky court had no chance to make unprincipled use of public policy to frustrate enforcement of a contract lawful in Tennessee. If that is so, it makes the plaintiff's forum shopping look much less cynical than the critics of \textit{Black & White} believed. In fact, if this scenario or one like it is correct, it means that the only way the plaintiff could have been sure of enforcing in Kentucky a contract lawfully made in Tennessee would have been to reincorporate, sue in diversity, and obtain the benefit of \textit{Swift}.

This discussion should shed more favorable light on the possibilities for forum shopping that \textit{Swift} afforded. In fact, employing \textit{Swift} may have been the only way a plaintiff could be sure to enforce a contract that was valid in the state in which it was made.

\textsuperscript{150} See Cloud v. Hug, 281 S.W.2d 911 (Ky. 1955) (refusing to enforce penalty provision of promissory note executed in Indiana because contrary to public policy of Kentucky).

\textsuperscript{151}\textsuperscript{151} Restatement of the Law of Conflict of Laws § 620 (1934). For a somewhat more extensive discussion of the public policy exception, see Eugene F. Scoles & Peter Hay, Conflict of Laws 72-75 (1982).

\textsuperscript{152} Cf. Craig M. Gertz, Comment, The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depection, 12 Nw. J. Int'l L. & Bus. 163, 185-86 (1991) (analyzing how court intervention through use of public policy doctrine destroys value of choice of law clauses in arbitration agreements). Because the public policy doctrine has the power to upset the expectations of contracting parties, the policy must be strong and well defined to justify its invocation. Id. at 185.

\textsuperscript{153} See Marchlik v. Coronet Ins. Co., 239 N.E.2d 799 (Ill. 1968) (refusing to apply law of Wisconsin in personal injury case arising out of that state). Wisconsin permitted a direct action against the defendants' insurance company, but the Illinois court held that such a cause of action violated the public policy of Illinois. Id. at 802. But see Holzer v. Deutsche Reichsbahn-Gesellschaft, 14 N.E.2d 798, 799-800 (N.Y. 1938) (concerning breach-of-contract action where defendant raised law of Nazi Germany, under which plaintiff's employment had to be terminated because he was Jewish). The plaintiff sought to strike this defense as contrary to the public policy of New York, but the court denied the motion. Id. at 800.
2. Is forum shopping inequitable?

The term "forum shopping" connotes something at least vaguely disreputable.\(^{154}\) Courts, however, condone the careful selection of a forum in many circumstances. For example, if a defendant is faced with an outraged public in a notorious criminal case and cannot depend on getting an impartial jury, most courts and citizens would consider it a matter of basic fairness at least to consider transferring the case to a venue in which public sentiment is less inflamed.\(^{155}\) A defense attorney who failed to consider such an option would be remiss.

The question, then, is not whether forum shopping is inherently bad—clearly it is not. Instead, the question is why it was so bad in \textit{Swift} that \textit{Erie} had to be invoked to strike it down. That question rests upon another: If the forum shopping, encouraged by \textit{Swift} and exemplified by \textit{Black & White}, is sufficiently harmful to justify striking the entire \textit{Swift} doctrine, why does the Supreme Court continue to tolerate and even encourage similar forms of forum shopping that have analogous consequences for the federal system?

Consider, for example, the impact of in personam jurisdiction on forum shopping. Today it is clear that \textit{International Shoe Co. v. Washington}\(^{156}\) substantially enlarged the in personam jurisdiction of state courts.\(^{157}\) Therefore, plaintiffs often have choices among fora that might not have been available prior to \textit{International Shoe}.\(^{158}\) For resourceful attorneys, many considerations will weigh in deciding how to choose among the expanded options, including docket loads, jury demographics, ease of travel for attorneys, clients, and witnesses, and the determination of which court is most likely to apply the law favorable to their side of the case. In other words, there will be many cases where the choice of which law to apply to the issues may


\(^{156}\) 326 U.S. 310 (1945).

\(^{157}\) See Friedenthal et al., \textit{supra} note 119, at 130 (explaining that \textit{International Shoe} jurisdictional standard based on "minimum contacts, fair play, and substantial justice" means that single act or contact can justify court's exercise of jurisdiction over defendant).

determine who wins. By increasing the plaintiff’s opportunities for in personam jurisdiction, *International Shoe* and related cases increased the plaintiff’s opportunities to shop among fora to obtain the best possible choice of law.

If that sounds a lot like the impact of *Swift* in cases like *Black & White*, it is because the similarity is great. *Swift* allowed plaintiffs eligible to sue in diversity to choose between a state court, with its common law, or a federal court, with federal general common law, and thereby to obtain the law more favorable to the plaintiff. By expanding the reach of in personam jurisdiction, *International Shoe* and its progeny afforded plaintiffs a broader selection of state courts from which to choose. In fact, in some cases the choice might be even greater than that which was available under *Swift*.

One difference between *Swift* and *International Shoe*, of course, is that *Swift* has been overturned. But even in that difference, other similarities emerge. *Swift* was overturned and *Erie* was imposed, at least in part, to vindicate the needs of a federal system. *International Shoe* overturned its precedent in order to—you guessed it—vindicate the needs of a federal system “suited to a progressively more mobile society.”

Obviously there is more to it than that. In the first place, *International Shoe* is a jurisdictional decision. It identified the courts in which a plaintiff may sue, with only secondary ramifications for choice of law. *Swift* and *Erie*, in contrast, are explicitly choice-of-law decisions. Thus while *International Shoe* demonstrates that our views of forum shopping are heavily dependent on the circumstances in which the shopping takes place, the Supreme Court merely acquiesced in allowing forum shopping to obtain the salutary result of expanded in personam jurisdiction. But what if the Supreme

---


161. *See supra* notes 27-29 and accompanying text (concerning ease with which plaintiffs could use *Swift* to shop for favorable law between state and federal courts).


163. *See Erie*, 304 U.S. at 78-80 (finding that *Swift* doctrine infringed on rights reserved for states).

164. Friedenthal et al., *supra* note 119, at 123.

165. It is unlikely that the Court missed the implications of *International Shoe* for forum shopping when it decided the case. Certainly the Court noticed the implications in cases that
Court took things several steps further by encouraging forum shopping so that *Erie*—the suppressor of forum shopping—could be maintained? That may sound contradictory, but it is exactly what the Court has recently done.

_Ferens v. John Deere Co._ and an earlier decision, *Van Dusen v. Barrack*, address choice-of-law questions arising out of a federal change of venue statute, 28 U.S.C. § 1404. Section 1404 provides that a district court may change the venue of a case when doing so serves the convenience of parties and witnesses as well as the interest of justice. The Court in *Van Dusen* held that when a defendant obtains a transfer of a diversity case pursuant to section 1404, the state law to be applied in the federal court to which the case is transferred is the same law that the transferring court would have applied. The Court reasoned that, if the defendant can change the applicable state law simply by obtaining a transfer, section 1404 is a "forum-shopping instrument" rather than the simple housekeeping measure Congress intended.

_Ferens_ involved the application of *Van Dusen* to a plaintiff's use of section 1404 to transfer a case. Ferens was injured using farm equipment that the defendant had manufactured. He was from Pennsylvania and the accident occurred in Pennsylvania. The plaintiff brought contract and warranty claims in a federal district court in Pennsylvania. Because Pennsylvania's statute of limitations on tort expired before the suit was filed, however, he brought a tort action in a federal district court in Mississippi. Under Mississippi law, the tort claims were timely.

The plaintiff then moved to transfer the Mississippi case to Pennsylvania, where it could be consolidated with the pending contract claims. The defendant did not object to the transfer. When the

followed. See, e.g., Burger King Corp. v. Rudzewicz, 471 U.S. 462, 481-82 (1985) (analyzing contractual choice-of-law provision relevant to jurisdictional issue); Keeton v. Hustler Magazine, 465 U.S. 770, 773-76 (1984) (applying jurisdictional test in isolation of choice-of-law issue); Hanson v. Denckla, 357 U.S. 235, 254 (1958) (finding choice of law is irrelevant to jurisdictional issue). Moreover, because the Court continues to adopt a broad view of in personam jurisdiction in at least some circumstances, it is clear that, even with the benefit of hindsight, the Court is not terribly concerned with the forum-shopping implications of what it has wrought. See _Burnham v. Superior Court_, 495 U.S. 604, 619 (1990) (holding that service on defendant present within state, irrespective of absence of other contacts with that state, ipso facto establishes good in personam jurisdiction).
plaintiff sought to have the Pennsylvania court apply the Mississippi statute of limitations to the tort claims, however, the defendant objected. Writing for a five-member majority, Justice Kennedy held that a federal court to which an action was transferred must “apply the law of the transferor court, regardless of who initiates the transfer.”

Of particular interest is Kennedy’s determination that *Van Dusen* and *Ferens* are consistent with *Erie*. Kennedy noted that, under *Erie*, the same law applies following venue transfers initiated by defendant or plaintiff, and, therefore, plaintiff’s choice of law is preserved without disadvantaging the defendant. Justice Kennedy did acknowledge that the defendant in *Ferens* would lose the advantage of not having to litigate the tort action in Pennsylvania, “or, put another way, in forcing the Ferenses to litigate in Mississippi or not at all.” The Court, however, minimized the importance of this advantage to a defendant. It stated that the maneuver in *Ferens* only deprived Deere of an opportunity to force the plaintiffs to litigate in an inconvenient forum.

In doing so, Justice Kennedy miscast the tactical situation of the defendant. When both the transfer to Pennsylvania and the use of Mississippi limitations were allowed in *Ferens*, the defendant got the worst of both worlds—the law of Mississippi and a trial in Pennsylvania. The latter is not only more convenient for the plaintiff, but also probably assures the home-state plaintiff a more sympathetic jury than the more distant, more conservative state of Mississippi. This consideration might be central to any competent attorney’s preparation of the defendant’s case and, therefore, could represent far more than the minimal loss for the defendant that Justice Kennedy described.

174. *Id.* at 520-21.
175. *Id.* at 523.
176. *Id.* at 524-25. In Justice Kennedy’s words:

> The *Erie* policy had a clear implication for *Van Dusen*. The existence of diversity jurisdiction gave the defendants the opportunity to make a motion to transfer venue under § 1404(a), and if the applicable law were to change after transfer, the plaintiff’s venue privilege and resulting state law advantages could be defeated at the defendant’s option. . . .

> Transfers initiated by a plaintiff involve some different considerations, but lead to the same result. . . . A defendant, in one sense . . . will lose no legal advantage if the transferor law controls after a transfer initiated by the plaintiff; the same law, after all, would have applied if the plaintiff had not made the motion. . . .

*Id.* (emphasis added). Emphasis was added to highlight the euphemism Justice Kennedy used to describe forum shopping to obtain more favorable state law. See infra note 185 (analyzing Justice Kennedy’s use of term “forum shopping”).

177. *Ferens*, 494 U.S. at 525.
178. *Id.*
179. *Id.* at 536-37 (Scalia, J., dissenting).
Ferens rests on additional grounds not relevant here and there is no need to belabor the issue of whether the case was correctly decided. More relevant to the instant discussion is the manner in which Justice Kennedy explained the Erie implications of Ferens. He stated them concisely: "Applying the transferee [Pennsylvania] law . . . would undermine the Erie rule in a serious way. It would mean that initiating a transfer under § 1404(a) changes the state law applicable to a diversity case."

In other words, the Court accepted the maneuver of a Pennsylvania plaintiff, injured in Pennsylvania, who filed suit in Mississippi to shop for the benefit of Mississippi law. Because the defendant was diverse from the plaintiff, the plaintiff was able to file the suit in a Mississippi federal court which, under Erie, would probably have applied Mississippi law. Because the suit was filed in federal court, it could then be transferred to a federal court in the more appropriate forum, Pennsylvania. As a result, the case ended up in the state in which, considering the convenience of witnesses and parties, it presumably should have been filed in the first place.

But there is an important difference between getting the case to federal court in Pennsylvania through this maneuvering and getting it there simply by filing suit in Pennsylvania. The plaintiff who initiates suit in a Mississippi federal court to obtain more favorable Mississippi law—a result obtainable only because Erie directs the federal court to use the same law that a Mississippi state court would use—and then transfers to Pennsylvania, is rewarded for ingenuity in forum shopping. Mississippi law will control this case. By contrast, the more mundane plaintiff, who simply files a Pennsylvania case in a Pennsylvania federal court, will likely have to litigate under less favorable Pennsylvania law.

Erie, the doctrine established to deter forum shopping between federal court and state court based on differences in approach to common law within one state, has evolved into the doctrine that, in Ferens, actively encourages and rewards forum shopping among the laws of the various states. If a plaintiff seeks to shop for Missis-

180. Id. at 527-31 (concerning additional rationales in support of decision in Ferens, including reducing opportunities for forum shopping, focusing on convenience considerations rather than potential prejudice from change of law, and establishing clear rule in interest of judicial economy).
181. Id. at 526.
182. Id.
183. See, e.g., Sharon N. Freytag & Michelle E. McCoy, Conflict of Laws, 45 Sw. L.J. 149, 176-77 (1991) (stating rule in Ferens "seemed to reward [plaintiff] for his arguably manipulative conduct" by giving him both choice of law and forum); Michael H. Gottesman, Draining the Dismal Swamp: The Choice of Law Statutes, 80 Geo. L.J. 1, 11 n.41 (1991) (criticizing result which allows plaintiff to file suit in one state, obtain advantage of favorable choice of law, and
sippi law without having to litigate in a Mississippi forum, *Erie* helps make it possible. The Court justified this conclusion in *Ferens* by explaining that a contrary result would “undermine” *Erie* by “chang[ing] the state law applicable to a diversity case.”

Thus we learn that, in maintaining *Erie*, a doctrine justified in large measure by the Court’s opposition to forum shopping based on differences in federal and state common law, the Court is willing to tolerate—or even encourage—forum shopping based on differences between the law, judge-made or statutory, of states. Put another way, the Court was willing to tolerate one type of forum shopping in order to prevent another kind of forum shopping. Even more than showing the Court’s tolerance of forum shopping as a price for improving its approach to in personam jurisdiction, *Ferens* and *Van Dusen* demonstrate the highly relative nature of the Court’s longstanding criticism of the forum shopping encouraged by *Swift*.

Of course, the fact that different kinds of forum shopping are at issue cannot be ignored. Under *Swift*, the standard of conduct by which the parties would be judged was allowed to vary within a single state, thereby encouraging forum shopping within a state. *Erie* sought to discourage that kind of legal inconsistency within a state. While *International Shoe* and *Ferens* encourage forum shopping among states, they do not involve changes in the standard of conduct by which the parties are judged—at least in theory. In practice, however, litigation involving choices of law among states also creates substantial uncertainty as to what will be the standard of conduct imposed on parties. To the extent that such uncertainty occurs, the forum shopping encouraged by *International Shoe* and *Ferens* then transfer to more convenient forum for that party); Leandra Lederman, Note, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases, 66 N.Y.U. L. Rev. 422, 438 n.96 (1991) (citing *Ferens* as standing for proposition that plaintiff can bring suit in “improper venue” to obtain favorable law and then move case to “desired forum”).

185. Justice Kennedy shied away from recognizing that *Erie, Van Dusen*, and *Ferens* together encourage state-law forum shopping. While he regularly used the term “forum shopping” to describe *Erie*’s purpose in discouraging choices between federal and state courts, he avoided that term when describing the *Erie/Ferens* impact on a plaintiff’s choice of forum as a means of obtaining more favorable state law. *Id.* at 524-25. Instead, he simply described that sort of forum-shopping opportunity as *Erie*’s preservation of “state-law advantages.” *Id.*
186. See supra notes 156-59 and accompanying text (discussing impact of *International Shoe* in expanding in personam jurisdiction).
187. See *Ferens*, 494 U.S. at 527 (stating that plaintiffs had opportunity to choose between two fora in which to obtain personal jurisdiction over defendant without regard for differences in laws of each state); *International Shoe* Co. v. Washington, 326 U.S. 310, 319 (1945) (permitting personal jurisdiction over corporation in those states where it conducts business regardless of variation in state laws).
ens is not significantly less malign than the forum shopping condemned by *Erie*.

Perhaps to some, the *Erie* doctrine is worth the price of this anomaly. In the aftermath of *Ferens*, however, it should be clear that if a return to *Swift* can be justified on other grounds, the price paid for *Swift* in terms of increased potential for forum shopping between federal and state common law might be more tolerable than *Erie* advocates have made it appear.

**E. Swift's Constitutionality**

*Erie* got a bad start in life when Justice Brandeis rested his opinion primarily on the thesis that *Swift* was unconstitutional. It has long been easy to criticize this feature of *Erie*, but the entire problem did not originate with Justice Brandeis.

**I. Tenth Amendment considerations**

Without being entirely clear, the Supreme Court seemed to identify two possible grounds for holding *Swift* unconstitutional. The first was the lack of federal authority to make law in areas reserved for the states. As Justice Brandeis put it, Congress does not have the "power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." Presumably this was a reference to the Tenth Amendment restriction on the powers of the Federal Government only to

188. See infra notes 245-81 and accompanying text (setting out support for revival of *Swift* in light of *Erie*'s shortcomings).

189. *See Erie*, 304 U.S. at 77-78 ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so.").

190. See Keeffe et al., *supra* note 6, at 497 (questioning unconstitutionality of *Swift* and stating that, given proper diversity jurisdiction, choice of using federal common law is reasonable). The criticism is not limited to those who reject *Erie*. See FRIEDENTHAL ET AL., *supra* note 119, at 196 (stating that finding of *Swift*'s unconstitutionality by Justice Brandeis has sparked extensive debate as to validity of his analysis and precise grounds upon which it rests). But see Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 384 (1964) (stating that *Erie* reached correct result because overturning *Swift* brought uniform federal law to those areas in which states had greater power than federal courts). *Erie*’s constitutional analysis also receives the sort of passive support that caused Professor Ely, see *supra* note 2 and accompanying text, to characterize procedure scholars as strangely trusting. See Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 Duke L.J. 281, 293 (agreeing with Justice Brandeis’ finding that Constitution does not empower federal courts to create and apply substantive law in all matters brought before them, regardless of origin of cases).


192. *Id.*
those delegated by the Constitution. Because Justice Brandeis believed the Constitution contained no express authority for the Federal Government to make law in such areas as torts or contracts, he concluded that there was no constitutional foundation for the type of lawmaking undertaken by the Court in *Swift*.  

Even at the time of *Erie*, Justice Brandeis' view was challenged. Rather than signing the majority opinion, Justice Reed only concurred in the holding because he could not agree that *Swift* was unconstitutional. The passage of time seems to have strengthened Reed's position. As Professor Thomas Merrill observed, "Although the framers may have intended that the federal government would be a government of limited powers, in the years since *Erie* the Supreme Court has permitted those powers to expand so much that the federal government has authority to regulate in virtually any area it chooses."  

This argument can be supported in any number of situations. One of the most obvious demonstrations of increased federal power lies in our greatly expanded view of the reach of federal lawmaking authority under the Commerce Clause. It is now established Supreme Court precedent that congressional regulatory authority under the Commerce Clause extends even to intrastate or local activities which "might have a substantial and harmful effect upon . . . commerce." Given the nature of the most common circumstance in which *Swift* might have been applied—disputes involving citizens of different states—it is clear how readily the contemporary interpretation of congressional lawmaking authority under the Commerce Clause could reach such matters. Justice Brandeis may have been correct when he wrote *Erie*, but the lawmaking authority of Congress is much greater today.

Congressional authority and federal authority, however, are not
necessarily synonymous terms. Professor Merrill suggests that while Congress' authority to make law has expanded, constraints remain on the ability of federal courts to encroach on areas of state law.\textsuperscript{199} As plausible as the distinction sounds, Merrill's examination of its underlying principles indicates that the theory is less of a roadblock to a return to federal common law than it might at first appear.

The three most plausible constitutional considerations supporting a distinction between the withering of congressional constraints on intrusion into state preserves and the continuing vigor of similar constraints on the federal judiciary are (1) the absence of state representation in the judicial branch, compared to the representation states enjoy in Congress; (2) the separation of powers between the lawmaking (congressional) branch and the law-applying (judicial) branch; and (3) the absence of direct accountability of federal judges to voters.\textsuperscript{200}

The first constitutional issue operates as follows: Because states are represented in Congress, they can be said to have acquiesced in the congressional creation of federal law affecting their interests.\textsuperscript{201} Conversely, an absence of state representation in the federal judiciary suggests no acquiescence in the creation of federal judge-made law.\textsuperscript{202} To Merrill, this first constraint applied "only when federal law interferes with actual state interests,"\textsuperscript{203} which means that federal courts sitting in diversity can create law in those procedural areas in which no important state interests are affected.

It would seem, however, that if this restriction applies only when states cannot protect themselves through representation, it should limit little of a federal judge's power under \textit{Swift}. By its terms, \textit{Swift} applied only when a state legislature had not spoken, i.e., under \textit{Swift}, federal general common law could displace state common law, but not state statutes.\textsuperscript{204} Thus, if a state disapproved of a rule of substantive law developed by federal courts hearing diversity cases,

\textsuperscript{199} Merrill, supra note 196, at 15. Professor Merrill explained:

\textit{The federalism principle identified by \textit{Erie} still exists but has been silently transformed from a general constraint on the powers of the federal government into an attenuated constraint that applies principally to one branch of that government—the federal judiciary.... With respect to judicial power... the federalism principle still has force.}

\textit{Id.; see also Paul J. Mishkin, Some Further Last Words on \textit{Erie—the Thread}, 87 Harv. L. Rev. 1682, 1685-87 (1974) (discussing principle of federalism as institutional restraint on all branches of Federal Government, explicitly including federal judiciary in light of need to protect rights of states to make laws in areas of state competence).}

\textsuperscript{200} Merrill, supra note 196, at 13-27.

\textsuperscript{201} Id. at 16-17.

\textsuperscript{202} Id.

\textsuperscript{203} Id. at 18.

\textsuperscript{204} \textit{See Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842) (stating that because \textit{Swift} does not}
the state legislature could change the precedent simply by enacting law that reflected the state's view. Accordingly, legislatures that remained silent in the face of federal general common law created in diversity cases could fairly be said to have accepted the result.\textsuperscript{205}

The second constitutional consideration in the potentially disparate restraints placed on Congress and the federal judiciary—the separation of powers doctrine—rests on the assumption that Congress, not the federal courts, is supposed to make law.\textsuperscript{206} Thus, federal courts without power to make law in federal areas should a fortiori steer clear of lawmaking when the matter properly belongs to the states. Professor Merrill, however, points out that even taking a very restrictive view of the power of federal courts to "make" law, their apparently clear power to "interpret" law is not seriously contested.\textsuperscript{207} At the least, this indicates that federal courts have the power to make procedure.\textsuperscript{208} At the most, it might mean that federal courts are no more disabled from "interpreting" state law, in the absence of statute, than are state courts which are operating under an analogous constraint. In fact, if "interpreting" state law is intended to be a straitjacket on judicial lawmaking, it may cast a shadow on substantive common law itself—a result that even many observers partial to \textit{Erie} may not wish to reach.\textsuperscript{209}

The third constitutional consideration offered for constraining federal judicial incursions into areas of state law is the unac-

---

\textsuperscript{205} But cf. Merrill, \textit{supra} note 196, at 22 (reasoning that legislatures, with crowded agendas, are unlikely to have much opportunity to respond to judicial decisions with overriding legislation). Although crowded agendas may prevent legislative override, that assertion does little damage to the idea that in the end judges making common law can be overridden by legislatures. Crowded agenda or not, it is precisely in areas of greatest state sensitivity that legislatures are likely to make time to consider overriding a judicial decision intruding on state interests.

\textsuperscript{206} \textit{Id}. at 19.

\textsuperscript{207} \textit{Id}. at 23.

\textsuperscript{208} \textit{Id}. at 21-24.

\textsuperscript{209} Notwithstanding \textit{Erie}, federal common law exists in a variety of areas in which the federal courts have found its existence necessary to the vindication of an important federal interest. The classic example is \textit{Clearfield Trust Co. v. United States}, in which the Supreme Court held that the obligations of the United States on commercial paper are governed by federal common law, not state law. \textit{Clearfield Trust Co. v. United States}, 318 U.S. 363, 366 (1943). Scholars who are proponents of \textit{Erie} nonetheless often approve of this type of federal common law on the ground that it is necessary to preserve certain federal interests not precisely addressed by the Constitution or a federal statute. See Daniel J. Meltzer, \textit{State Court Forfeitures of Federal Rights}, 99 \textit{HARV. L. REV.} 1128, 1151-53 (1986) (approving \textit{Erie}, but justifying use of federal common law in areas of federal interest).

Unlike \textit{Swift}, \textit{Clearfield} and related cases do not defer to conflicting state law when the source of state law is statutory. Also unlike \textit{Swift}, federal common law of the type developed in \textit{Clearfield} must be applied in both federal and state courts. \textit{Friedenthal et al., supra} note 119, at 230-31.
countability of federal judges to an electorate.210 This idea is similar to the argument that federal judges should not make state law because they are not accountable to the states in the same way as Congress. Moreover, because federal judges usually sit for life,211 while many state judges are appointed, or even elected, for terms, it is clear that federal judges theoretically are less accountable to an electorate than their state counterparts.

This distinction, however, may have little practical consequence. Unlike legislators, whose success in elections can turn on the candidates' position on issues, judges are rarely turned out of office because they took a position on an issue of substantive law. The fact that a few notorious instances come to mind where that actually occurred demonstrates only how unusual, even bizarre, it was when the event took place.212 In practice, state judges are substantially insulated from the rigor of elective politics.213 To that extent they are not much more accountable to the voters than federal judges. If one group is disabled from making state law on that ground, then the other group must be nearly as unqualified.

Finally, there is still another answer to the argument that Congress can now properly intrude in many matters formerly reserved to the states, while federal courts cannot. Even if that distinction has substantial vitality, much of the problem can be overcome simply by enacting legislation in which Congress delegates its power to make substantive law to the courts. The precedent for Congress to delegate its authority, subject only to quite minimal standards, is now so well established that it seems an easy avenue around most of the roadblocks discussed above.214 Because Congress remains re-

---

210. Merrill, supra note 196, at 24.
211. U.S. Const. art. III, § 1.
213. See Bradley C. Cannon, Judicial Election and Appointment at the State Level: Commentary on State Selection of Judges, 77 Ky. L.J. 747, 747-48 (1989) (arguing that, although law and politics cannot be separated completely, state judges are usually not affiliated with particular parties or groups); Julio A. Thompson, Note, A Board Does Not a Bench Make: Denying Quasi-Judicial Immunity to Parole Board Members in Section 1983 Damage Actions, 87 Mich. L. Rev. 241, 254 (1988) (indicating that state judges are insulated from political pressure).
214. See, e.g., Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (stating that Congress delegated power to develop governing principles of law regarding Sherman Act to federal courts); United States v. Southwestern Cable Co., 392 U.S. 157, 177 (1968) (stating that unless Congress expresses clear intent to regulate actions of agencies, courts have delegated power from Congress to ensure agencies achieve their goals); Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957) (stating substantive law to be applied in labor suits is federal law which courts must fashion); see Merrill, supra note 196, at 40-46 (stating that delegated
responsive to both the states and the voters, the possibility of curtailing such a delegation through the democratic process should go far to answer the concern that federal courts should be sensitive to those constituencies when making common law.\textsuperscript{215} In short, the distinction between congressional power to enter the formerly forbidden realms of state law, and the perceived restrictions on the discretion of federal courts to do the same under a \textit{Swift}-like power, should not be a substantial obstacle to federal common law in diversity cases.

2. \textit{Equal protection} considerations

Another attack Justice Brandeis made upon \textit{Swift} may have been grounded in the Equal Protection provision of the Fifth Amendment.\textsuperscript{216} After observing that \textit{Swift}'s opportunities were available only to plaintiffs who were not citizens of the same state as the defendant, Justice Brandeis concluded that this "grave discrimination by noncitizens against citizens \ldots rendered impossible equal protection of the law."\textsuperscript{217} Under current equal protection analysis, this attack cannot be sustained.

There is no doubt that \textit{Swift} afforded plaintiffs who qualified for diversity jurisdiction a potential advantage not enjoyed by plaintiffs who could not qualify. In fact, it is in that difference that \textit{Swift} created the potential for forum shopping.\textsuperscript{218} Today, however, no one contends that such distinctions, even if they constitute "discrimination," would therefore be invalid as violations of an equal protection guarantee.

It is now long settled that courts will not strike down a law as unconstitutional simply because it creates classifications of people.\textsuperscript{219} Many laws have, as their bedrock purpose, the bestowal of

\textsuperscript{215} See Louise Weinberg, \textit{Federal Common Law}, 83 Nw. U. L. Rev. 805, 844-45 (1989) (arguing that not only are federal courts influenced by congressional accountability, but also that courts go further than Congress in protecting rights of political minorities).

\textsuperscript{216} U.S. CONST., amend. V. The Fifth Amendment does not contain an explicit guarantee of equal protection, but it has been held to be implicit in the due process provision of the Amendment. See \textit{Bolling v. Sharpe}, 347 U.S. 497, 499 (1955) (stating that concepts of equal protection and due process stem from American idea of fairness and are not mutually exclusive).

\textsuperscript{217} \textit{Erie R.R. v. Tompkins}, 304 U.S. 64, 74-75 (1938).

\textsuperscript{218} \textit{See supra} notes 121-24 and accompanying text (showing criticism dating back to 1880s of \textit{Swift}'s creation of forum shopping through advantages gained by plaintiffs from using federal law as opposed to state law).

benefits upon some, and not upon others. They must in some degree "discriminate" between those who will benefit and those who will not. A law providing state funds to buy lunches for economically disadvantaged children, for example, "discriminates" against children from wealthier families, but does not perforce violate equal protection. If the Government is able to provide a rational basis for the distinctions, the law may stand.\textsuperscript{220}

If legislation affects groups by creating distinctions that the Supreme Court denotes "suspect classes," of course, the result may be entirely different. In such cases, the equal protection analysis requires a court to undertake much closer scrutiny of the classification, and to strike down the law if the Government is unable to provide a sufficiently compelling justification for its classification.\textsuperscript{221}

The Supreme Court has not held, however, that distinctions between citizens of one state and citizens of another, as diversity jurisdiction differentiates them, constitute suspect classifications. The relevant analysis to apply to \textit{Swift} would therefore be the "rational basis" standard, which could be readily met. As Justice Brandeis himself noted in \textit{Erie}, one purpose underlying the \textit{Swift} decision was a desire to promote uniformity in state law\textsuperscript{222}—surely a rational goal supported by federal general common law. That goal alone would enable \textit{Swift} to withstand an equal protection attack today.\textsuperscript{223}

\begin{footnotes}
\footnote{holding that exclusion of addicts with two or more prior felony convictions from rehabilitative commitment program does not violate due process or equal protection): Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949) (holding that statute prohibiting advertising on vehicles unless connected with business purpose of vehicle itself is constitutional).}
\footnote{Railway Express, 336 U.S. at 110-11 (stating that when traffic control and use of highways are concerned, local authorities will be given great leeway to regulate even if regulation interferes with interstate commerce).}
\footnote{See, e.g., Clark v. Jeter, 486 U.S. 456, 461 (1988) (stating that classifications based on illegitimacy of children are subject to "intermediate" scrutiny); Flyer v. Doe, 457 U.S. 202, 230 (1982) (declaring statute that prohibited children of illegal aliens from receiving education in state school system to be unconstitutional); Craig v. Boren, 429 U.S. 190 (1976) (holding statute establishing classifications based on gender are subject to "intermediate" scrutiny).}
\footnote{\textit{Erie}, 304 U.S. at 74-75.}
\footnote{Probably with a view to the equal protection analysis that has developed since \textit{Erie}, the Supreme Court no longer refers to the new doctrine's purpose as upholding the equal protection requirements of the Constitution. Instead, at least since Hanna v. Plumer, 380 U.S. 460 (1965), the goal has been restated as "avoidance of inequitable administration of the laws," a description that stops well short of constitutionalization of \textit{Erie}. \textit{See id.} at 468 (finding unsubstantial variations between courts unlikely to raise sort of equal protection problems addressed in \textit{Erie}). It should be noted, however, that this remark was made in the context of the applicability of \textit{Erie} to procedural matters. The constitutional infirmities Justice Brandeis found in \textit{Swift}, however, were not similarly applicable to the use of federal procedure. \textit{See Erie}, 304 U.S. at 91-92 (asserting that \textit{Erie} does not displace federal procedure) (Reed, J., concurring). Accordingly, there was no necessity for the Court in \textit{Hanna}, which was considering the use of federal procedure in a diversity case, to discuss the constitutional foundations of \textit{Erie}. \textit{See Hanna}, 380 U.S. at 472-74 (holding that Federal Rules of Civil Procedure do not come under \textit{Erie} analysis due to absolute right of Congress to prescribe rules for federal courts).}
\end{footnotes}
Therefore, it is Justice Reed’s concurrence, not the majority in *Erie*, that has stood the test of time on the constitutionality of *Swift*.224

IV. OTHER JUSTIFICATIONS FOR *ERIE*

It would be surprising if, over fifty years of use, *Erie* advocates were unable to develop other reasons for continued application of the doctrine. While those that have surfaced tend to be modifications of the original justifications, rather than entirely new arguments, they provide a gloss which allows *Erie* to appear in a somewhat different light. For that reason, a discussion of the continued utility of *Erie* should take account of newer considerations developed by the Supreme Court.

A. Hanna’s Twin Aims

In cases that apply *Erie* to the use of federal procedure in diversity cases, the Court now commonly refers to the “twin aims” of *Erie*.225 These aims are described in *Hanna v. Plumer* as “discouragement of forum-shopping and avoidance of inequitable administration of the laws.”226 Both goals trace their roots to the original reasons for overthrowing *Swift*. Discouraging forum shopping has been part of the *Erie* doctrine since its inception. This concern has already been the subject of substantial discussion,227 and will be weighed against the costs that *Erie* imposes in other areas.228

The second of the twin goals will also be discussed later in this Article,229 but a few words should be said about this issue now. Avoiding “inequitable administration of the laws” appears to be a close cousin to Justice Brandeis’ concern that *Swift* might have vio-

224. See *Erie*, 304 U.S. at 91 (arguing that even in absence of federal statutory direction, federal courts would not necessarily be compelled to follow state decisions).

225. See, e.g., *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1222 (1991) (holding that courts of appeals have duty to review district court’s determination of state law which flows from twin aims of *Erie*); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 n.6 (1988) (asserting that if no federal statute or rule governs point in dispute, district court must evaluate whether application of judge-made federal law contradicts twin aims of *Erie*); id. at 40 (Scalia, J., dissenting) (disagreeing with majority opinion that fashioning judge-made rule is consistent with twin aims of *Erie*); *Walker v. Armco Steel*, 446 U.S. 740, 753 (1980) (stating that, in absence of federal rule, state law should apply in order to comply with *Erie’s twin aims*).


227. See supra notes 185-86 and accompanying text (discussing differences and similarities between forum shopping discouraged by *Erie* and acceptable types of forum shopping which have since been created).

228. See infra notes 248-50 and accompanying text (arguing that costs of *Erie* include problems in understanding doctrine and limited scholarly time and resources available to interpret doctrine).

229. See infra notes 279-80 and accompanying text (arguing that state courts will never wholly agree on all issues of common law, but when federal courts present better approach to issues, state courts will likely move toward similar positions).
lated equal protection guarantees. As Chief Justice Warren explained in *Hanna*, "[T]he *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court." The language is important. Writing as he did, Chief Justice Warren avoided a suggestion that the "unfairness" issue rose to the level of a constitutional concern.

The distinction between a policy based on fairness and a constitutional mandate is important to the future of the *Erie* doctrine. If the alternative to *Erie* is a violation of the Constitution, then *Erie* cannot be shaken. Because the Court's concerns in *Hanna* were not constitutional, however, that case does not preclude reconsideration of the costs and benefits of *Erie*. Thus, under *Hanna*, if reasonable people disagree with Chief Justice Warren's "fairness" assessment, or if they believe that other considerations outweigh the disadvantages of *Swift's* perceived unfairness, then they may advocate changes in *Erie* without contemplating amendments to the Constitution.

B. A New Swift in Conservative Hands

In preparing to write this Article, I was fortunate enough to mention my ideas about overthrowing *Erie*'s restraints on federal judges to a colleague, Professor Robert Vaughn. Included among his suggestions was a comment on the irony of advocating an increase in the power of federal judges to create common law when so many of them took office because they share a conservative view of judicial power to make laws.

Once pointed out, the irony was not entirely lost on me. Lurking within the irony might be an apprehension that conservative federal judges could use their power under a restored *Swift* to undermine

---


231. *See id.* (" *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. . . . Thus, the doctrine rendered impossible equal protection of the law."). (quoting *Erie*, 304 U.S. at 74-75).


233. The assertion that most federal district court judges are now, in this sense, judicial conservatives is based on the assumption that most of them were nominated by either President Reagan or President Bush, and that they generally reflect views on the judiciary that those presidents have advocated. Obviously the assumption can be no more than a generalization. Moreover, because there can be substantial differences among conservatives, it does not follow that all, or even most, would adopt a unified position toward exploiting the new discretion that a return to *Swift* would afford to federal judges. *See generally* Donald W. Fyr, *Judicial Selection: New Players, Same Game*, 38 Emory L.J. 771, 771-72 (1989) (pointing out that new conservative additions to courts are not as eager to play part of "activist" as liberal judges have in recent years).
more liberal features of current state common law. Is that a reason to retain *Erie*? I think not, for several reasons.

First, the goal of procedure should not be to favor one side or another of either a political debate or a cause of action. Instead, the goal should be to establish fair, efficient processes for prosecuting the causes of action that society chooses to create. To the maximum extent practicable, standards of fair play should reflect the shared values that a democratic society develops.

Obviously this goal is one that will never be achieved completely. Too many practical obstacles stand in the way, including friction between fairness and efficiency, perceived shared values that turn out not to be so widely shared after all, and the reality that some areas of procedure, such as class actions, tread so closely to political, economic, or social sensitivities that notions of neutrality in procedure can be ephemeral. In fact, there are so many obstacles to perfectly fair and efficient procedure that we can forget why we should strive for it. We need to be reminded not only of what our direction is, but why it should be our direction. Simple analogies can help us here.

The impossibility of completely achieving a goal does not invalidate the goal. Professional baseball players hit safely less than half of the times they bat. Yet no one suggests that, because they are likely to fail in any given effort to hit safely, they should stop trying. In procedure the goal should be to produce fair processes that reflect consistency with our Constitution and the best achievable compromises between various conflicting interests. We will not always succeed; but we are likely to succeed more often, or at least come closer to success, if we continue to try.

In this context, that means trying to establish the best procedure—even if it gives a temporary advantage to one group of partisans in a continuing judicial debate. The advantage is likely to be temporary; the political pendulum swings freely within the United States, and the day will probably return when less conservative judges predominate.

Second, the irony of empowering conservative judges to perform an activist role in making common law contains within it the seeds of another irony which may nullify the first. Conservative judges, if drawn from the group that values judicial restraint, may well forego much of the opportunity to remake state common law. If *Erie* is abandoned, it might be a generation or more before the imprint of federal general common law is felt on state law.

Finally, the ultimate irony is that in the *Swift/Erie* confrontation,
the newer doctrine may embody conservative values more completely. Keep in mind that it was Charles Warren who explored the outermost reaches of conservative states' rights judicial values and whose work so influenced Justice Brandeis' opinion. The more conservative wing of the current Supreme Court has been able to employ Erie to limit the role of lower federal courts.

Perhaps the conservatives' use of Erie is not so surprising. Swift, after all, tilted the balance of federal/state judicial relations toward federal authority. Erie's redress of that tilt would, at most times in American history, have been something conservatives would be inclined to favor. In the end, the lesson may be that altering procedure to create winners and losers in left/right judicial debates can be a very convoluted process, one in which the tactics obscure the goals. Probably all sides would benefit by keeping a closer eye on more bedrock notions of fair play—irrespective of the identity of the immediate winner.

V. ABANDONING ERIE

A. The Benefits of Hindsight

The reasons Justice Brandeis offered for overthrowing Swift were well thought out. Swift had not achieved complete harmony in state common law. There was uncertainty about when to apply the doctrine, as well as when to disregard it. Swift encouraged forum shopping between federal and state courts based on potential differences between federal and state common law, and restricted the

234. See supra notes 37-40 and accompanying text (demonstrating Warren's aversion to allowing federal access to cases which could be tried in state courts).
235. See supra notes 33-47 and accompanying text (noting Warren's predisposition against active role for federal courts).
236. See George D. Brown, Of Activism and Erie—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts, 69 Iowa L. Rev. 617, 617-18 (1984) ("Justices Powell and Rehnquist, in particular, view Erie as powerful support for their view of the proper role of federal courts in the context of what might be called nonconstitutional litigation. Not surprisingly, given the views expressed by these two justices in other contexts, that role is viewed as a highly limited one.").
238. See supra notes 49-58 and accompanying text (stating that Swift provided an additional body of law to consider along with state law choices).
239. See supra notes 60-62 and accompanying text (showing that Justice Brandeis' research led him to list of approximately 1000 cases which involved unclear distinctions between questions of general and local law that left no discernable rule for court to follow).
availability of such opportunities only to potentially diverse liti-
gants.\textsuperscript{240} Furthermore, the 1930s view of federal power under the
Constitution was different from what we know today.\textsuperscript{241} In other
words, the Court had many reasons to be concerned about \textit{Swift},
and to search for palatable alternatives. Only hindsight suggests
that the remedy of \textit{Erie} may have been worse than the problem of
\textit{Swift}. But hindsight is just another word for the process by which
we use life's experience to measure our successes and shortcomings.
It is only fair to see if \textit{Erie}, in its middle age, lives up to the promise
of its youth.

\section*{B. \textit{Erie}'s Shortcomings}

It appears that adopting \textit{Erie} was a change we could have done
better without. The uncertainty of \textit{Swift} was real, but \textit{Erie}'s record of
uncertainty is such that, had it been known in 1938 when \textit{Erie} was
decided, the new rule would have been hard to justify on the ground
that it would afford greater predictability.\textsuperscript{242} Moreover, today our
view of the Constitution is sufficiently different in that it is now a
struggle to justify the constitutional concerns that Justice Brandeis
called the bedrock reason for overruling \textit{Swift}.\textsuperscript{243}

That \textit{Erie} proved to be unwise, though, is not necessarily the same
as concluding that \textit{Erie} should now be displaced. Before that con-
cclusion is reached, two obstacles should be overcome. First, the
benefits of displacing \textit{Erie} must at least be greater than the costs (in
retraining lawyers and judges, etc.) that an important change in law
inevitably requires.\textsuperscript{244} Second, and more important, there must be
an alternative body of law that is preferable to \textit{Erie}. In practice,
many of the considerations addressing one obstacle may also apply
to the other.

\begin{enumerate}
\item \textsuperscript{240} See supra notes 121-25 and accompanying text (pointing to possibility that some litigants could manipulate system of procedure by altering state of citizenship, while others could not).
\item \textsuperscript{241} See supra notes 189-98 and accompanying text (referring to difference between 1930s notion that Congress had no power to create substantive rules of common law applicable to states, and today's notion that Congress may reach individuals in state matters).
\item \textsuperscript{242} See supra notes 69-119 and accompanying text (distinguishing between possibility that \textit{Erie}'s uncertainty might have been due to problem of working out new doctrine and reality that \textit{Erie} has produced substantial confusion in American law).
\item \textsuperscript{243} See supra notes 195-98 and accompanying text (portraying Supreme Court's role since \textit{Erie} as one of allowing Federal Government to expand powers to regulate).
\item \textsuperscript{244} John B. Cott, \textit{Supreme Court Doctrine in the Trenches: The Case of Collateral Estoppel}, 27 WM. & MARY L. REV. 35, 83-84 (1985) (asserting that landmark changes in law impose greater costs than evolutionary changes).
\end{enumerate}
C. Reasons for Change

1. The cost of Erie's uncertainty

Some years ago I examined the application of two Supreme Court doctrines in the lower federal courts. I was less interested in the doctrines themselves than in the lessons that might be learned about general considerations that should go into fashioning judicial rules. One of the conclusions of that study was that, other things being equal, legal rules of substantial complexity impose costs that simpler statements of the law probably do not incur. Such costs come not only in the degree of difficulty citizens have in understanding rules to which they should conform their behavior, but even among the judges who struggle to understand the law they are supposed to apply.

At the time, it did not occur to me to use Erie as one of the doctrines to put under the microscope. Few doctrines, however, demonstrate better than Erie how rules that are difficult to apply can inflict costs so substantial that they undermine the value of the rules. As I have already noted, Erie has been the subject of a continuing Supreme Court effort, over two generations, to clarify the boundaries between federal procedure and state law. That such a huge effort is necessary is evidence that Erie is difficult law. The time and effort it takes the Supreme Court to work out and explain law must count as a cost against a doctrine.

The cost is also felt at many levels below that of the Supreme Court. Lawyers and lower court judges are no better equipped, either intellectually or in the way of research resources, to work out the doctrine. Those practitioners can only struggle in the swamp while they wait for another Supreme Court pronouncement which perhaps will bring some light to a doctrine that even the Court described, thirty years after Erie, as "unguided." The time expended in these efforts is also a cost, but it is not the only one felt at this less exalted level of lawyers and trial judges. When the decision is wrong at this level—and the experience of the Supreme Court in difficult cases suggests a fifty-fifty chance that the decision will in-


246. See Corr, supra note 244, at 84-85 (arguing that Supreme Court's task is to provide enough complexity to allow doctrine or rule to work while avoiding trap of making doctrine or rule too intricate or incomprehensible).

247. See id. at 86-89 (calling for Supreme Court to allow lower courts more discretion in implementing new rules and doctrines).

deed be wrong at the lower level—the parties who would have won their cases, but for the error, often pay a much greater cost than mere loss of time.

Many scholars have described *Erie* as confused,249 and two have even characterized it as "the central concern of an entire generation of academic lawyers."250 The comment was meant as evidence of the importance of *Erie*, but it is also evidence of its burden. Limited scholarly time and resources are valuable, as is the time of justices, judges, and practicing attorneys. All of that effort must be paid for in one way or another, suggesting that the investment must be justified by a return.

*Erie*’s costs do not end even there. They also enter the classroom. The evidence here is anecdotal, but telling. When law students recount their difficulties with the civil procedure course, *Erie* figures prominently in their complaints. In that sense, their suspicions of their professors’ motives may be misplaced, but are not entirely neurotic. When one considers how expensive law school can be, and how much time may be devoted to *Erie*, it may be reasonable to ask if this much time, effort, and money should be expended on a doctrine whose difficulty in application remains beyond the grasp of so many, even after they leave law school.

In addition to all the frustrations of learning and applying this elusive doctrine where federal procedure meets state law, there is more. Uncertainty and potentially bad decisions emanating from the pronounced tendency of federal courts to guess at what state law may be are also unacceptable costs. Perhaps these costs would be more tolerable if *Erie* was a doctrine of profound social significance or otherwise of fundamental value. The costs would be less irritating if, whatever the flaws of *Erie*, there was no alternative but to accept this approach. There is, however, an alternative. It is *Swift*, or something like *Swift*.251

249. *See*, e.g., Freer, * supra* note 5, at 1091-92 (arguing that federal courts have ignored underlying reasons for *Erie* inquiry—federalism and protection of state’s rights); Mary K. Kane, *The Gold Wedding Year*: *Erie Railroad Company v. Tompkins and the Federal Rules*, 63 NOTRE DAME L. REV. 671, 687 (1988) (stating that lower federal courts have knee-jerk reactions to *Erie* questions, furthering crowding of Supreme Court docket); Louise Weinberg, * supra* note 215, at 829 (stating that *Erie* doctrine became muddled instead of providing clarity as intended).

250. *See* Westen & Lehman, * supra* note 5, at 512 (referring to *Erie* as most studied principle in American law and keystone of civil procedure courses).

251. *See* Weinberg, * supra* note 215, at 851-52 (discussing possibility of return to common law and calling for scholars to search for true issues in debate, rather than masked *Erie* issues).
2. **Comparing Swift’s costs**

   a. **The cost of change**

   Justice Brandeis pointed out how much time and effort was invested in determining, under *Swift*, when to apply federal general common law.\(^{252}\) That was certainly a cost *Swift* imposed. In returning to *Swift*, however, the existence of those 1000 digested federal cases cited by Justice Brandeis play a different role. In fact, they actually help keep the costs of change down.

   As has already been discussed, there is a transaction cost involved in changing from one judicial doctrine to another.\(^{253}\) This cost originates in the time and effort it takes to work out wrinkles in a new doctrine. In some measure, that cost may reflect the degree of difficulty of a new doctrine, but introducing even the most straightforward doctrine will impose some transaction cost based simply on change itself. Returning to *Swift*, however, with its base of experience in those 1000 cases, should reduce such transaction costs substantially. The old cases will obviously not be as valuable as a more recent body of precedent, but their utility in reducing the cost of a change from *Erie* to *Swift* should not be underrated.

   b. **Confusion under Swift**

   Even if the existing *Swift* precedent has value, there will be costs involved in applying *Swift*. If *Swift* is restored in its original form, the uncertainty of which Justice Brandeis complained would remain a real cost.\(^{254}\) Determining when a court could apply federal common law, and when it must defer to state statute or state judicial decisions construing statutes, as *Swift* required,\(^{255}\) will remain a nettlesome problem. Nevertheless, our fifty years of experience with *Erie*’s difficulties should suggest that the difficulty of applying *Swift* now seems comparatively more manageable. In fact, it may even be possible to strip away some of the uncertainty associated with one of *Swift*’s exceptions.

---

252. See *Erie*, 304 U.S. at 74 n.8 (referring to Brandeis’ list of 1000 cases involving distinctions between federal and state law); Warren, *New Light, supra* note 33, at 89 (discussing uncertainty caused by attempts to apply *Swift* to diversity cases).

253. See supra notes 69-88 and accompanying text (demonstrating evolution of applying Rule 3 as example of unpredictability).

254. See *Erie*, 304 U.S. at 74 (describing uncertainty caused by *Swift* doctrine as result of impossibility of discovering satisfactory line between province of federal common law and state common law).

255. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842) (holding that decisions of federal courts should normally apply unless there is specific state interest and action by state in area of controversy being reviewed).
Recall that, under Swift, there were two important exceptions to the general practice of allowing federal courts hearing diversity cases to apply federal general common law. The one exception arose in cases addressing "rights and titles to things having a permanent locality," i.e., real estate. Determining when a case addresses issues of realty, subject to state common law, was part of the cost of uncertainty Swift imposed.

In fact, in the Black & White case that was so important to the emergence of Erie, Justice Holmes cited this Swift exception as an additional reason why the case should not be governed by federal general common law. Given current views of the constitutional power of the Federal Government to regulate matters that once might have been reserved to the states, it is plausible to consider whether the real estate exception Justice Story created in Swift could be eliminated so that, in all common law matters, federal courts could fashion federal general common law. If that is practical, it would reduce by a significant amount the cost of uncertainty in Swift.

c. Damage to federalism?

As we have already seen, part of the problem in choosing between Swift and Erie can be placed in a larger context that contemplates the proper balance between state and federal power in our judicial system. Erie represents a growth of state authority, while Swift favors the federal side. In that sense, restoring Swift might be seen to impose a cost in federal/state relations because any shift of power from one side to another necessarily creates winners and losers. That cost, however, may be smaller than it first appears to be.

Among Swift's original assumptions was the expectation that fed-
eral courts empowered to create common law for diversity cases would thereby help the state courts achieve better and more uniform common law of their own. Justice Story, however, never intended that *Swift* would strip the states of any choice but to accept federal general common law. By requiring federal courts to defer to state statutes and to state judicial decisions construing those statutes, Justice Story left open the possibility that states could not only continue to use their own common law, but also force federal courts to adopt the same view of an issue as the state held. In other words, if a state disagreed with the view of a question that federal courts adopted, the state could restore its own view by enacting legislation which, under *Swift*, the federal courts would be compelled to follow.

State legislatures may not follow this practice often. They would, however, have the option available to them if the decision of a federal court in a diversity case addressed an item of particular sensitivity to the state. In that situation, the democratic process could not only vindicate itself but also ensure that the federal/state balance was not overthrown. While returning to *Swift* would alter the current balance of federal/state relations imposed by *Erie*, any diminution in the status of state law would only be as great as state legislatures allow.

d. Forum shopping

*Swift* was subject to criticism because it encouraged forum shopping. Undeniably, that is a cost associated with returning to the older doctrine. While the Supreme Court has accepted forum shopping as an acceptable cost when associated with improvement in

264. See supra notes 49-50 and accompanying text (stating that Brandeis' critique of *Swift* included attack on *Swift's* failure to bring about uniformity among states).
265. See supra note 21 and accompanying text (focusing on deference to state law when ruling on issues dealing with in-state constitutions or of intra-state or immovable character).
266. *Swift*, 41 U.S. at 18 (stating that decisions of state courts will "receive, the most deliberate attention and respect").
267. For those indoctrinated in the power of the Federal Government under the Supremacy Clause, it might be jarring to contemplate state legislation nullifying a federal judicial decision. Where the federal authority itself permits parallel state action, however, the Supremacy Clause is not implicated. Cf. JOHN NOWAK ET AL., CONSTITUTIONAL LAW 295-96 (3d ed. 1986) (arguing that judiciary has shouldered burden of discovering congressional intent and striking down state laws when appropriate, though Congress can declare that it did not intend to preempt area). *Swift's* deferral to state legislation may not be compelling authority because Justice Story was proceeding on the assumption that judicial declarations of law were not themselves law, but only evidence of what the laws were. See *Swift*, 41 U.S. at 17 (stating that judge-made laws were often re-examined, reversed or qualified when found defective or ill-founded). That assumption might not carry much weight today. It would seem, however, that a restored *Swift* doctrine could contain a declaration that it would defer to state legislation, and that such a declaration would be effective.
other areas—and has even tolerated forum shopping in order to protect *Erie* itself—it does not follow inevitably that the cost of increased opportunities to shop for fora should also be accepted in order to return to *Swift*. Reasonable people may still consider this cost sufficient to justify retaining *Erie*. Others may conclude that the costs imposed by *Erie* outweigh this advantage *Erie* may enjoy over *Swift*. Most important, however, is a recognition that, even if one believes that *Erie* retains some advantage over *Swift* in preventing forum shopping, the advantage is smaller than Justice Brandeis could have contemplated.

3. **Better law**

Law should produce benefits. If *Swift* merely cost less than *Erie*, but produced no positive benefits of its own, it would be hard to justify reconsidering *Swift*. The old doctrine is useful, however, and offers the possibility of helping to develop better law. *Swift* has such potential because, other things being equal, two minds working on a question are more likely to produce a satisfactory answer than a single mind working alone. This proposition is sufficiently obvious so that one vignette may be sufficient to demonstrate the point.

In *Erie*, the federal district court had a choice between the law of Pennsylvania and the federal general common law that had developed in the wake of *Swift*. Pennsylvania law at that time still determined the liability of landowners to persons injured on their land by placing plaintiffs in one of several categories. In *Erie*, Pennsylvania law would have labeled the plaintiff a trespasser, to whom no duty of care was owed. Under federal common law, the defendant would have breached its duty of care to plaintiff.

Developments in the law of torts since *Erie* have tended to vindicate the federal position. While many states still determine the duty owed based on the plaintiff’s status as an invitee, licensee, or

---

268. See supra notes 156-60 and accompanying text (considering growth of in personam jurisdiction and resulting greater choice of fora).

269. See supra notes 166-86 and accompanying text (stating that Supreme Court is willing to tolerate one type of forum shopping to avoid another).

270. See Brummett, Note, supra note 5, at 109 (validating scope of *Erie* doctrine while advocating inapplicability to foreign-country judgments).

271. See Freer, supra note 5, at 1141-42 (stating that courts have found their way around *Erie* and have continued to avoid state law).

272. See *Erie*, 304 U.S. at 71.

273. See id. at 70 (stating that courts of Pennsylvania had established rule regarding persons who use railroad pathways which determined whether person was trespasser).

274. Id.

275. See id. (stating that under federal common law, operators of railroads owe duty of care to public when public has made open and notorious use of railroad’s right of way).

276. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 435 (5th ed. 1984)
trespasser, a number of other states have moved toward the federal position as it existed prior to *Erie*. Admittedly, even if all the states had thrown in the towel and adopted the old federal position entirely, it would not prove that federal common law was correct or Pennsylvania law less just. The changes in state law that have occurred, however, suggest at the least that the federal courts have something to contribute to the making of common law for diversity cases. *Swift* encouraged this contribution while *Erie* stifles it.

4. **More uniform law**

Other scholars have already demonstrated that, when progress toward uniformity is measured realistically, *Swift* can be seen as having performed an important function. It was never in the cards that the states would generally adopt uniform positions on common law. The disparate state positions on duties owed to trespassers on land, which have developed in the wake of *Swift'*s demise, demonstrate clearly that the states are unlikely ever to achieve truly uniform positions on some large bodies of law. That is not the same, however, as saying that state courts are beyond influence when a better approach is presented to them. Where federal courts create such an approach, it is likely to help move state courts toward adopting more nearly similar positions. Such modest pressures favoring harmonization of law are a great deal less than Justice Brandeis apparently expected from *Swift* when he suggested it had failed to produce uniformity. They may, however, be as much as one should expect in a truly federal system. In fact, the evidence of

(Showing movement of state courts to abolish categories of occupiers of land as basis for determining duty of care owed individuals by owners of property).

277. *Id.* at 432-34.

278. *Erie*, of course, did not entirely preclude a contribution by federal courts to state common law. Federal courts hearing issues in which state common law was uncertain have often felt free to estimate for themselves what the state law was or should be. *See supra* note 67 and accompanying text (arguing that such estimation results in little more than federal court guesswork). Under *Swift*, however, federal courts would not have to wait for the less frequent case in which state law was uncertain, and could adopt federal common law simply because it was perceived to be better than the state alternative.

279. *See supra* notes 57-58 and accompanying text (arguing that although *Swift* did not result in immediate change, it exerted subtle pressure on state courts to move toward uniformity); *see also* Saunders, *supra* note 5, at 666 (indicating *Swift* created federal-state procedural uniformity); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 803 (1985) (stating that *Swift* regime created uniformity in law in federal courts and limited forum shopping at federal level); Craig A. Hoover, Note, *Deference to Federal Circuit Court Interpretations of Unsettled State Law: Factors, Etc., Inc. v. Pro Arts, Inc., 1982 DUKES L. J. 704, 704-05 (showing *Swift*’s creation of state/federal law dichotomy and failure of *Erie* to provide effective method for ascertaining unsettled state law).

280. *See Erie*, 304 U.S. at 74 (focusing on problem of state court persistence in applying own opinions to questions of common law).
other scholars suggests such influences are attainable under *Swift.*

**D. Swift and State Courts**

The end of *Erie,* of course, does not mean the end of the power of state courts to create common law or construe statutes. Even under *Swift,* federal courts were supposed to accord deference to state common law before creating their own. *Swift* also made clear that when state courts construed a state statute, their interpretations received deference and more: federal courts had no authority to create law in conflict with state court interpretations of state statutes. Thus, while a return to *Swift* undercuts somewhat the authority of state courts in the area of "pure" common law, it is important not to overstate its impact on the judicial balance.

**VI. Conclusion**

In one sense, law is a lot like diplomacy: success and failure are rarely delineated by clear bright lines, but rather by nuances and shades of grey. If it does not often appear that way in judicial opinions, it may only be because judges, being human, are inclined to organize with care the arguments that support their position, giving lesser shrift to contrary views.

The reality, however, is that more often than not good arguments can be made for alternative positions. Or, less happily, that no compelling argument can be made for any particular position because each alternative is afflicted with one weakness or another. In either of those circumstances, the preferred position is the one that, on balance, has the most to offer, even allowing for its weaknesses. In fact, it may be that, when an idea seems to come replete with advantages and free of drawbacks, it should be viewed with the suspicion once reserved for itinerant peddlers of patent medicine.

Choosing between *Swift* and *Erie* is also difficult because the choice is so stark. If those are the only choices, students of the

---


283. *See id.* at 17-18 (holding that federal common law applies only in areas of more general nature that are not dependent on state statute or local usage of fixed and permanent operation).
problem are necessarily driven to one pole or the other. That is something which might make many of us instinctively uncomfortable. While writing this Article, I have tried to imagine what a modification of Erie involving only a partial return to Swift would look like. Candor requires a confession that I have been unable to develop a plausible third choice.

Obviously that does make the quest for such an alternative undesirable. Something that reduced the cost of Erie while retaining its benefit in discouraging a particular form of forum shopping would greatly improve current law. Then, selfishly, I will claim the additional consolation of having played a small catalytic role in its development.284

In the absence of a happy third choice, however, the alternatives of Swift and Erie are typical of some of the sober decisions we must make in the law. In the eyes of many, not the least of which includes the eyes of the Supreme Court, Swift retains its disadvantage of encouraging forum shopping within a state and still seems, somehow, unfair. These problems should look substantially less severe, however, particularly when viewed against the forum shopping opportunities already offered to plaintiffs in other contexts. Moreover, the costs of Erie—particularly those associated with learning the doctrine, applying the doctrine, and predicting the outcome—outweigh the costs of its alternatives.

Whether through legislation that resolves the ambiguity in the Rules of Decision Act that both Justice Story and Charles Warren exploited, or through Supreme Court reconsideration of Erie itself, the time seems long past to accept the costs of Erie stoically. If reconsideration produces, as it should, a decision to cast Erie adrift, clearly it will not produce civil procedure nirvana—Swift will still have disadvantages. But at least we may have reduced the problems in this difficult area. If that happened, it might also take away one ground for the suspicion that civil procedure students have about the motives of their professors. Of course, nonmutual collateral estoppel would still remain.

---

284. However, if further musing produces something that looks like a plausible alternative, it will appear in another Article.