Book Review

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BOOK REVIEW


If an attempt to understand historical legal decision making in the United States is now most frequently tied to an attempt to interpret that process in terms of societal and political goals, The Constitution and the Common Law represents an unusual insistence upon the separation of these studies. Rather than claiming to analyze cases from the first half of the nineteenth century as manifestations of changing patterns of judicial thought, the authors maintain that those decisions continued to reflect a constant concept of law and were unrelated to any judicial determination to foster a given conception of where or how the country ought to change. According to Professors Bridwell and Whitten, case law speaks for itself; when properly read, it defeats the analysis so often grafted onto it by later historians.

The focus of the book is the decision of Swift v. Tyson and its later repudiation in Erie Railroad Co. v. Tompkins. Its thesis is that the judicial repudiation of the power of a federal court, claiming subject matter jurisdiction because of the parties' diversity of citizenship, to determine the common law independently of state decisions responded not to the case it vilified but to the misuse of that case in the latter half of the nineteenth century. While agreeing


2. As well as analyzing specific cases decided during the first half of the nineteenth century, the authors point out that the rubric by which the common law was described both before and after 1800 did not change. Taking issue with Horwitz's conclusion that older common law was seen as an expression of inherent or natural justice while after 1800 its justification rested on notions of popular consent, Bridwell and Whitten quote extensively from cases of both periods to demonstrate that both concepts were continually present. Bridwell & Whitten, supra note 1, at 24-27.

3. Randall Bridwell is a Professor at University of South Carolina School of Law; Ralph U. Whitten is a Professor at Creighton University School of Law.


5. 304 U.S. 64 (1938).
that the classic common law did change after 1860, the authors argue that that change had not yet occurred at the time of the *Swift* decision and marshall impressive and detailed support for their contention. If that contention is accepted, then the doctrine of *Swift* at the time it was rendered was both defensible and necessary; its subsequent misinterpretation led to the current state of the law which the book deplores.

The source of the common law, as it existed in 1789 and until at least 1860, was not any sovereign authority but the customary activity of the people it governed. In comparing the treatment by the courts during this period of common criminal and common or general admiralty law, Bridwell and Whitten make their point clearly and succinctly. While some early decisions support the idea of common criminal law, the concept was eventually and firmly abandoned. Clearly such law could not and was not created by consensual recognition; inherently it demanded imposition from a sovereign source of authority upon those who in other contexts could and did determine the rules of ordinary intercourse. Criminal law as well required a choice between decrees of prohibited activity and between degrees of punishment, a choice which must reflect policy concerns of the society as a whole and which was thus uniquely unsuited to the common law courts. On the other hand, law governing, for example, admiralty or commercial dealings was by nature consensual and customary; the courts acted only to determine the existence of that custom and consent and to apply it to the facts before them. Their primary goal was thus to fulfill the reasonable expectations of the parties.

That these expectations might evolve from local rather than general practice was recognized in the decisions of the common law courts, including *Swift*. The disregard of such local custom (or of local statutes and their interpretations) occurred only when the acceptance of such custom would violate the reasonable expectations of parties relying on general usage. To maintain, as *Swift* did, that

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7. 41 U.S. (16 Pet.) at 18, discussed in Bridwell & Whitten, supra note 1, at 107.
8. Bridwell & Whitten, supra note 1, at 100-112. The authors point out that such disregard occurred only infrequently; in many of the cases cited by other authorities to sustain the thesis of federal interference, the federal courts were faced with ambiguous or unsettled issues of localized law and, therefore, had no state rulings to follow. See Huidekoper's Lessee v. Douglass, 7 U.S. (3 Cranch) 1 (1805) and Wilson v. Mason, 5 U.S. (1 Cranch) 45 (1801).
the federal system owed to parties before it an independent judgment of governing law was only to grant them that which was necessary to secure the goal of diversity jurisdiction. Only by providing an unbiased tribunal to determine whether general custom existed and whether it reasonably ought to apply to a given factual dispute could the federal courts assure a non-citizen of the forum that local prejudice would not defeat his claim or defense.

Given the system and theory of law which the authors present, it is clear that the doctrine of Swift violated no constitutional provision. There was no intrusion by the federal system into provinces reserved to the state sovereign, since the source of the common law was not sovereignty but custom. Nor was there any conflict between the judicial and legislative branches of the federal system, since judges in no way "created" law. Rather they determined and applied custom created by individuals acting over a period of time.

Although Bridwell and Whitten clearly dislike the Erie decision, they grant that by the time it was rendered it was a proper response to the increasing creation of law by the federal judiciary in areas where no such authority was given to the federal sovereign. However, the decision left open the possibility, since realized, of the judicial exercise of the legislative function. Once the only recognized source of law becomes the sovereign, federalism demands that all courts enforce the constitutional law which the sovereign creates, not the law which those courts believe the sovereign should have created. However, under the Constitution, only the legislative branch of that sovereign has the authority to create law. In the absence of the exercise of that authority, the judiciary has nothing to enforce. Indeed, the logic of the book suggests that all "federal common law" as that phrase is now used, is unconstitutional, not

9. With respect to those matters within the sovereign power of the states, local authority was protected by the "local-general" distinction applied by the federal courts under the conflict of laws directive of the Rules of Decision Act. See note 16 and accompanying text infra.

10. The "modern" Erie approach, designed to restrict judicial authority as exercised under Swift, is in fact far less restrictive than the older doctrine. Erie articulated as novel functions that were actually inherent in the Swift system and set up a model for future decision making on the federalism question that was less efficient and, in most respects, worse than Swift's. This ensured the translation of the federal system into something it was never intended to be.

BRIDWELL & WHITTEN, supra note 1, at xii-xiii (emphasis in the original).

11. Id. at 116.
as a violation of federalism but as a denial of the separation of powers. Unfortunately, this is an argument touched upon only briefly and never expanded.

If *Erie* was an appropriate response to the reality of 1938, if not to the *Swift* decision, then why, save as an historic exercise, should anyone spend the time or the trouble to criticize its straw man? While the authors obviously think highly of Justice Storey and in part have undoubtedly written to justify him, the implications of their research have other, recognized and currently important results. Because *Erie* misread and hence discarded *Swift*, later courts disregarded the conflict of laws rationale inherent in *Swift* and equally valid today. While there may be justification for *Erie*, there is none for *Klaxon Co. v. Stentor Electric Mfg. Co.*, which holds that a federal court sitting in diversity must apply the conflict of laws rules of the state in which it sits as a part of that state's "substantive" law.

The Rules of Decision Act, "misinterpreted" by *Swift* and "correctly interpreted" by *Erie*, holds that the laws of the states shall provide the rules of decision, in the absence of federal law, in cases to which they apply. The *Erie* court focused upon the correct scope of the word "laws," holding that it encompassed not only the statutory but also the common law of the state (a proposition, given the source of traditional common law, which makes little if any sense). In so doing, the Court ignored what Bridwell and Whitten maintain are the central words of the Act: "in cases to which they apply." This phrase constituted a codification of the applicability of the common or international law of conflicts rules and was so utilized by the *Swift* courts. Localized custom and law were found to be controlling in abrogation of the general common law when the reasonable expectations of the parties, derived in part from the general conflicts rules, would be fulfilled by their use. Even if, once courts began "creating" substantive law, *Erie* constitutionally confined their creativity to areas over which the federal sovereign could claim authority, there is no reason why the classic common law of conflicts should have been discarded for the current geographically

12. Id. at 132-34.
13. Id. at 123.
14. Id. at 135.
15. 313 U.S. 487 (1941).
16. 304 U.S. at 71.
determined principles. Such a result is required by neither the Constitution nor logic, and therefore ought to be abandoned.

The Constitution and the Common Law is an uncommonly well-reasoned and well-researched piece of historical analysis. It is at its best when discussing and justifying the role of the courts during the era of Swift. Unfortunately, the authors, while pointing to the time when the perceived role of the common law changed, make little attempt to define the causes of that change or to demonstrate how it occurred. Neither do they focus clearly on the Erie-Klaxon problem, although they provide all the ingredients for the argument as well as its general outline. The book is difficult to read without a thorough background in both the common law and the Erie doctrine—but it is well worth the necessary effort.

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17. Bridwell and Whitten attribute the change after 1860 to two primary factors: the death of Justice Storey in 1845 and the rise of a body of literature thereafter which legitimated judge-made law. BRIDWELL & WHITTEN, supra note 1, at 123-27. While clearly the authors hesitate to read current historical analysis of the political and social realities of the late nineteenth century into the legal decisions of that time for fear of making the same errors they accuse the Erie court of committing vis-a-vis Swift, it is difficult to imagine that such a change was unrelated to either the Civil War or the growing industrial nature of the Union.

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