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Swift v. Tyson Exhumed

Lawyers who derive their ideas about the proper relationship between federal and state courts from *Erie R.R. v. Tompkins* think they know three things about *Swift v. Tyson*. First, it was based on an "erroneous" construction of Section 34 of the Judiciary Act of 1789. Second, this construction, however "congenial to the jurisprudential climate of the time" *Swift* was decided, could not be reconciled with modern ideas of the nature of law derived from Austin and Holmes. Finally, the jurisprudence of 1842 led to a view of federal-state relations which was no longer tenable.

This Note argues that all three propositions, while not erroneous, miss the point of *Swift*. Others have pointed out that Justice Joseph

1. 304 U.S. 64 (1938).
3. "[T]he laws of the several states... shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Judiciary Act of 1789, ch. XX, § 34, 1 STAT. 92.
5. *See* *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938), explicitly adopting Holmes' view on "the fallacy underlying the rule" of *Swift*, most clearly stated in *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532-34 (1929) (Holmes, J., dissenting): "[I]n my opinion the prevailing doctrine has been accepted upon a subtle fallacy that never had been analyzed.

... It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.
6. Although the *Erie* opinion does not openly connect Story's jurisprudence with his idea of federalism, *Erie* is customarily presented with a strong implication of such a connection.
7. Justice Holmes was both more cautious than Justice Brandeis in his evaluation of the meaning of § 34 and less dependent on the intent of the framers. *See* *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 535 (Holmes, J., dissenting): "Mr. Justice Story probably was wrong if anyone is interested to inquire what the framers of the instrument meant." For even more cautious positions, see 1 W. CROSSKEY, *Politics*
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Story's construction of Section 34 can be supported on the language of the statute and on the intent of the framers of the Judiciary Act. Justice Story's jurisprudence, while not Austinian, derived from common and reasonable notions about what judges do. Most important, federalism had little to do either with that jurisprudence or with the decision in Swift. Story was concerned with issues involving law as the product of human endeavor which went much deeper than the organization of one nation's government, issues which were central to


8. The argument as to the intent of the framers began in 1923 with the publication of Warren, New Light on the History of the Federal Judicial Act of 1789, 37 Harv. L. Rev. 49 (1923). Both Holmes, in Black & White Taxicab Co., and Brandeis, in Erie, relied upon this article. Warren argued that the drafters of § 34 clearly intended that it cover the common law as well as the statute law of the state, Warren, supra at 52. Warren, always one to avoid criticism of the Supreme Court, said that if Justice Story had known of the documents which Warren discovered, chiefly the original draft of the Judiciary Act, Swift would have gone the other way. This becomes a dubious conclusion when Warren's argument is examined in detail. The original draft of that part of the Act which became § 34 provided that both the state statute law and the state common law were to be rules of decision in the federal courts. When this section was revised, the word "statute" and the phrase referring to the common law were eliminated and replaced by the word "laws." Warren argued that this was simply a stylistic revision to make the section more concise. In other parts of his article, Warren noted that Congress deliberately struck out a phrase limiting the criminal jurisdiction of federal courts to crimes specifically defined by Congress, and intended that federal courts have jurisdiction over common-law crimes, Warren, supra at 51-52, 81-88.

Taken together, the changes certainly indicate no general intent to preclude a federal common law. Thus the revision of § 34 may have been a deliberate attempt to allow a federal civil common law to develop along with the criminal one: the word "statute" dropped from § 34 to eliminate redundancy, the phrase about the common law excised for substantive reasons. Therefore, Warren's argument notwithstanding, Story's interpretation of § 34 is not obviously contrary to the intent of the framers or to the language of the statute. See also 1 W. Crosskey, supra note 7, and Friendly, supra note 7, for readings of Warren's new evidence which, though similar to that given here, differ slightly from it and from each other.

9. Justice Frankfurter seemed to acknowledge that neither the jurisprudence of Swift nor that of Justice Holmes led inexorably to his own view of federalism. For example, the core of Holmes' dissent in Black & White Taxicab Co. does not make clear why the "definite authority" of the federal courts is not sufficient to create a federal common law. Frankfurter's opinion in Guaranty Trust Co. v. York, 226 U.S. at 102, summarizes his view of Story's jurisprudence and its effect on federalism:

Law was conceived as a "brooding omnipresence" of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law. . . .

This impulse to freedom from the rules that controlled State courts regarding State-created rights was so strongly rooted in the prevailing views concerning the nature of the law, that the federal courts almost imperceptibly were led to mutilating construction even of the explicit demand given to them by Congress to apply State law in cases purporting to enforce the law of a State. See § 34. . . .

226 U.S. at 102. Though Frankfurter again uses the confusing phrase "authoritatively declared State law," he seems to recognize that the jurisprudence he attributes to Story tends toward a certain view of federalism, but does not compel it. The statement later in the opinion, 226 U.S. at 109, that Erie "expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts," indicates that the jurisprudence of Erie is not sufficient to establish Frankfurter's federalism, which has an independent base in policy.
the movement to codify American law which began in the 1820's and flourished in the 1840's.

I.

The development of the federal common law began with a brief flirtation with the common law of crimes, followed by a decade of doctrinal confusion. By 1816, however, those who opposed a federal common-law criminal jurisdiction had won out and consolidated their position. Federalist judges in the 1790's occasionally charged juries that they could indict persons for non-statutory offenses, usually actions implicating the good repute of the nation, such as attempted extortion of diplomats and privateering.10 But the common law of crimes included seditious libel, and judicial and popular repugnance to the Sedition Act led naturally to a general rejection of a federal common-law criminal jurisdiction.11 Thus, as early as 1798 Justice Chase on circuit declared that "the United States, as a federal government, have no common law . . .", so bribery of a public official, not made criminal by statute, was no crime.12 Despite conflicting language in earlier cases,13 by 1812 in United States v. Hudson, Justice Johnson could write for the Supreme Court that, by the "general acquiescence of legal men," there was no common-law criminal jurisdiction in the federal

10. The best recent scholarship agrees that the framers of the Constitution did not intend to abolish federal jurisdiction over certain common-law crimes. See L. Levy, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 239-46 (Torchbook ed. 1969), and 1 W. CROSSLEY, supra note 7, at 620-24.
11. Levy found judicial endorsement of common-law criminal jurisdiction only in the period before 1800, when the Sedition Act expired. L. Levy, supra note 10, at 241-44. While this is only suggestive, it does support the inference that rejection of the Sedition Act carried with it a tendency to reject a federal common law of crimes.
12. United States v. Worrall, 2 U.S. (2 Dall) 884, 393 (C.C.Pa. 1798). Chase argued that, while the English common law might have been introduced into the individual states and modified by them, at no time had the federal government adopted the English common law. Federal courts were therefore being called upon to create a common law of crimes ab initio, with no historical or legal background upon which they could justly rely. Id. at 394. Reaction against the Sedition Act can hardly explain Chase's actions, since he became notorious and was nearly impeached for the vigor with which he enforced the Act and others against Jeffersonians. See 1 C. Warren, THE SUPREME COURT IN UNITED STATES HISTORY 165-66 (2d ed. 1928); 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 34-43 (1919). It seems rather too Machiavellian to suggest that Chase, in denying the existence of a federal common law of crimes, was attempting to force Jeffersonians, not particularly averse to political prosecutions, to acknowledge the validity of the Sedition Act. In Worrall, Chase's colleague on the bench, Judge Richard Peters, disagreed and Worrall was convicted by the jury. 2 U.S. (2 Dall.) at 394.
13. See United States v. McGill, 4 U.S. (4 Dall.) 426, 429 (C.C.Pa. 1806) (Washington, Circuit Justice): "I have often decided, that the federal courts have a common-law jurisdiction in criminal cases . . ." This statement was unsupported by reasoning and unnecessary for decision because of the way Washington interpreted the relevant federal statute, making murder on the high seas a crime.
But this case settled little, in part because Justice Story persisted in raising the question. Johnson had written in the most controversial of cases an indictment charging seditious libel of the President and Congress by a newspaper editorial saying that they had approved a secret bribe to Napoleon in order to secure a treaty with Spain. The Attorney General declined to argue the case, perhaps because he too acquiesced in the general belief, but more likely because he understood the incongruity of a Jeffersonian administration’s attempt to use the federal common law to do what earlier Jeffersonians had excoriated Federalists for attempting to do by statute in the Sedition Act.

The issue came before the Supreme Court again in 1816, in United States v. Coolidge, an indictment of a pirate for the forcible “rescue” of a prize lawfully taken, and again the Attorney General declined to argue the case, now asserting that Hudson had settled the issue. Though three of the seven justices disagreed with this proposition, the effect of Coolidge was to resolve the doctrinal confusion; few later opinions even felt it necessary to state that federal courts had no jurisdiction over crimes at common law.

Although this doctrine was developed in response to central political
issues of the early national period ranging from neutrality, as in Coolidge, to sedition, as in Hudson, the major commentators of the 1820's attempted to account for it in jurisprudential terms. This jurisprudence, as it turned out, preserved room for what was later seen as the proper and necessary intellectual activity of judges.  

Kent's Commentaries on American Law, unoriginal in its treatment of the case law, acknowledged the imprudence of lodging criminal jurisdiction in the federal courts but argued that in civil cases the common law in its improved condition, that is, as adapted to American conditions and as a matured ethical system, might be used.  

The most extensive and most influential consideration of the issue was given by Peter DuPonceau in his Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States. At the outset, DuPonceau tried to dispel the fears of "the vulgar" that the common law was a device used by judges to do what they wished. In contrast to England, he asserted, where there is no written Constitution and where the common law is all-pervasive, uncertain, and ever-fluctuating, the American Constitution sets limits on jurisdiction. The common law is the instrument, not the source, of jurisdiction. Though it is difficult to make sense of this phrase, it is the key to the Dissertation. DuPonceau apparently meant that constitutional limitations were set out in words to which their meanings at common law must be given and upon which methods of interpretation derived

20. While the following discussion in the text concentrates on Kent and DuPonceau, another treatise, W. Rawle, A View of the Constitution of the United States 251ff. (1825), is significant. Rawle argued that the common law, a system of rules of moral action, derived from the original social compact. No positive enactment was needed even to confer criminal jurisdiction. Rawle did not bother with the niceties of federalism, indicating the issue's lack of salience, the depth to which Hudson and Coolidge had been undermined, and the shallowness of the penetration of the case law's basic approach, an approach which emphasized limitations on judicial power.  

21. J. Kent, Commentaries on American Law 319-21 (1826). Kent placed the prior cases on alternative bases, such as the general admiralty law in Coolidge, rather than the scope of federal jurisdiction. It is not clear whether Kent meant to assert a civil jurisdiction, as a surface reading indicates, whether he meant that common-law words were to be given common-law meanings, or whether he meant only that the policy considerations which led to the denial of a criminal jurisdiction had a weaker impact in civil cases.  

22. (1824) [hereinafter cited as DuPonceau]. The work was cited by Richard Henry Dana in Swift to support the position that there was no substantive federal common law. Though the portion of DuPonceau's Dissertation which Dana cited did add weight to his argument, he ignored the tenor of the Dissertation and explicitly attempted to limit the application of DuPonceau's method. The fact that Dana felt it useful to cite DuPonceau and necessary to distinguish his arguments suggests that most lawyers had come to regard DuPonceau's position as convincing. For another example of DuPonceau's influence, see J. Park, A Contre-Projet to the Humphreysian Code (1828), a British work whose misgivings about forcing the common law into an inflexible text were drawn heavily from DuPonceau's arguments. See TAN 34 infra.  

23. DuPonceau vi-xi. The same thought was also expressed by saying that the common law did not give power, but prescribed how power was to be exercised. Id. at xiv.
from the common law were to be used. This allowed DuPonceau to exalt the common law as pervading all American institutions, not as in England through judicial creation of substantive law, but through construction of the fundamental document by common-law methods.24

Prior case law, to DuPonceau, held that federal courts drew no jurisdiction over common-law crimes from the mere existence of the courts, but derived it solely from the Constitution and federal statutes.25 But DuPonceau was not convinced that these cases should be accepted uncritically, and proceeded to examine them in light of his general conception of jurisdiction. Jurisdiction, “the power to make, declare, or apply the law, . . . [t]he right of administering justice through the laws by the means which the laws have provided for that purpose,”26 could be derived from the court’s relation to the place,27 the subject-matter,28 or the person. Crimes involving federal officials exemplified the last, but DuPonceau, after a struggle, decided that the case law was correct. Though he mentioned the need for uniformity of substantive criminal law within a state, DuPonceau was more concerned with the breadth of the only argument he could conceive which

24. *DuPonceau* 91:
We live in the midst of the common law, we inhale it at every breath, imbibe it at every pore; we meet it when we wake and when we lay down to sleep, when we travel and when we stay at home; it is interwoven with the very idiom that we speak, and we cannot learn another system of laws without learning at the same time another language. We cannot think of right or wrong, but through the medium of ideas that we have derived from the common law.

DuPonceau cited the constitutional provisions involving habeas corpus, attainder by corruption of blood, and the right to a jury in suits at common law as provisions which demanded his mode of interpretation. Elsewhere he used metaphors, such as that of the common law as a “sun under a cloud” of local law which was ready to illuminate the true law as soon as the clouds were cleared away, *id.* at 88, which call to mind Holmes’s “brooding omnipresence in the sky,” *Southern Pac. Co. v. Jensen*, 244 U.S. 295, 222 (1914) (Holmes, J., dissenting). Such metaphors, however, do not adequately express DuPonceau’s conception of the common law.

25. *DuPonceau* 17. Though jurisdiction in a state which had a written constitution must be derived from the document, the constitution might grant full common-law jurisdiction. The American Constitution, however, did not do so.

26. *Id.* at 21.

27. By analogy to certain principles of international law, the law prevailing in territories before acquisition must be applied in federal courts and, where that law was the common law, federal courts derived power to apply the common law from their territorial jurisdiction. *Id.* at 63ff.

28. Under §§ 34 and 14 of the Judiciary Act of 1789, federal courts could devise forms of proceeding different from those of the state in which the court sat, at least in criminal trials. Chief Justice Marshall’s issuance of a *capias* instead of the state form, a summons, in the Burr treason trial, *United States v. Burr*, 25 F. Cas. 187 (No. 14,854) (C.C. Va. 1807), provided the opportunity for a brief nationalistic flourish: it was “in the true spirit of the *American* common law, which abhors unnecessary forms, and is averse to putting an accused party to unnecessary expense,” *DuPonceau* 41 (emphasis DuPonceau’s). The blurring of meanings is important: “American” might mean only that all states in the nation had modified their common law in the direction indicated, a meaning hard to accept in the face of Virginia’s use of an “unnecessary form,” but the word also carries overtones of “national” and “federal,” thus suggesting that there might indeed be a federal common law.
would give federal courts jurisdiction. He argued that jurisdiction over offenses involving federal officers, be they seditious libels or attempts at bribery, could be derived only from the grant giving jurisdiction of "cases . . . arising under . . . the Laws of the United States." Federal officers held their positions because some federal law created the positions. But DuPonceau believed that to base federal criminal jurisdiction on this argument would give the judiciary too much power.

The commentators, then, had set the argument in terms which severely limited emphasis on notions of federalism for determining the common-law jurisdiction of federal courts: jurisdiction over crimes was denied because its limits could not be found in the Constitution, and because DuPonceau and Kent believed it must be limited. State courts with common-law criminal jurisdiction, in contrast, were bound by English precedents. As Justice Chase had argued earlier, individual states had adopted the common law as it existed at the time of the Revolution, and this historical background limited the power of state courts. But the federal government had never adopted the common law; federal judges therefore would have had a free hand in creating a federal criminal law. DuPonceau's main argument was directed against establishing federal jurisdiction over acts criminal at common law. He assumed that no one would dispute the existence of a "national" common law in civil matters, by which he meant the common law applied in each state and "for all national purposes and for all cases in which the local law is not the exclusive rule." He took it for granted that this common law would be applied concurrently by state and federal courts.

DuPonceau was concerned as well with the growing feeling in favor of codification. Because he saw the common law as pre-eminently malleable, able to be improved and adjusted in the new situations posed by the unique American experience, DuPonceau opposed codification of the civil common law. A code would inevitably be incomplete in contrast to the inherent completeness of the common law, and would force the law into an unyielding frame and prevent its easy adjust-

30. DUNPONCEAU 52-53. See also id. at xiii, 99. The Supreme Court was soon to adopt much the same rationale that DuPonceau opposed, though in a civil case, Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824) (clause in charter of Second Bank allowing it to sue in federal courts held constitutional because Bank created by federal statute).
32. DUNPONCEAU 90.
33. Id. at 92.
ment. At the same time, both because his doctrine required codification for there to be any federal jurisdiction over common law of crimes and because he supported national power, DuPonceau endorsed Congressional attempts to enact a federal criminal code, and to specify certain general maxims of the commercial law.

During the period when DuPonceau was writing, the Supreme Court began to consider cases involving potential conflict between federal and state civil law, and announced a number of restrictions on the federal common law.34 While these restrictions might have been read as supporting a general proposition that there was no federal common law, nothing compelled this reading, and the language of some cases suggested otherwise. From 1818 to 1823, three decisions suggested that the deference given to state court decisions by the Supreme Court was a matter of gracious acquiescence not compelled by statute or Constitution.35 But in Jackson v. Chew in 1827, the Court held, in a

34. Id. at xvii-xviii, 81, 104-06.
35. His support for the latter was extremely mild. See id. at xix, 123.
36. Justice Chase in Worrall recognized the potential difficulties his opinion created for the civil law and tried to deal with them in dictum by saying that the state common law would be applied in civil suits: "[T]he common law of England is that law of each state, so far as each state has adopted it; and it results from that position, connected with the judicial act [of 1789], that the common law will always apply to suits between citizen and citizen whether they are instituted in a federal, or a state court." 2 U.S. (2 Dall.) at 394. Although this suggests that federal courts would apply state common law, the words also bear the reading that there is a general common-law tradition in the United States which any court may apply. Furthermore, the dictum might mean that there is a core of "substance" which the common law of every state contains and that this core will be applied where relevant, although a different rule may apply to the area of substantive law which varies from state to state.

A later dictum by Justice Washington, sitting on circuit, suggested that comity would dictate adherence to state statutes in federal courts, a rationale that seems almost equally applicable to state court decisions. "[I]ndependent of § 34 . . . , if a contract made in this state . . . be discharged under a law of this state, . . . such laws would be regarded as rules of decision by this court." Golden v. Prince, 10 F. Cas. 542, 543-44 (No. 5509) (C.C. Pa. 1814). The representative character of legislatures might have induced greater respect for statutes than for judge-made common law. But while the subsequent movement for an elected judiciary would have increased its representativeness, the change might also have altered the basis for comity in the judicial process.

37. In Robinson v. Campbell, 16 U.S. (3 Wheat.) 212 (1818), the Court found first that its own decision was consistent with Virginia law. However, in an extensive though dictum-laden discussion of § 34, the Court suggested that Congress' purposes in enacting § 34 would be thwarted under certain circumstances if state law were followed. For example, if a state had no court of chancery and there was no adequate remedy at law, to follow state law would defeat the equitable remedies which Congress desired. "The Court, therefore, think that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles." Id. at 221-23.

In Preston's Heirs v. Bovma in 1818, Justice Story, writing for the Court, acquiesced in a state court's construction of a title to land: "It cannot be affirmed that there has been such a clear mistake of construction, as that justice and law require us to depart from the decision of the local tribunals." Id. at 560. "Possession ought not to be ousted without a clear title in the other party, especially, where it has
well-reasoned opinion by Justice Thompson, that the federal courts must follow settled principles of state law with regard to construction of transfers of land by will. Justice Thompson relied somewhat disingenuously on

the rule which has uniformly governed this court, that where any principle of law, establishing a rule of real property, has been settled in the state courts, the same rule will be applied by this court, that would be applied by the state tribunals. This is a principle so obviously just, and so indispensably necessary, under our system of government, that it cannot be lost sight of.  

The Supreme Court had always followed state courts’ constructions of their own statutes; Justice Thompson saw no reason why the Court should not honor state constructions of transfers of land as well “when [a federal court] is applying settled rules of real property.”

This court adopts the state decisions because they settle the law applicable to the case; and the rules assigned for this course apply as well to rules of construction growing out of the common law, as the statute law of the State, when applied to the title of lands. And such a course is indispensable, in order to preserve uniformity; otherwise, the peculiar constitution of judicial tribunals of the states and of the United States, would be productive of the greatest mischief and confusion.

What emerges from Jackson v. Chew is a policy in favor of the stability of land titles rather than against federal interference with state law in general. Certainly there is no suggestion that deference to state court decisions is compelled by the theory of federalism. Even

been upheld by the state tribunals.” Id. at 582 (emphasis added). “[W]e, therefore, acquiesce in the opinion of the [state] court of appeals, upon the ground, that the point is one of local law, has been fully considered in that court, and is a construction which cannot be pronounced unreasonable, or founded in clear mistake.” Id. at 583.

The third case is Daly v. James, 21 U.S. (8 Wheat.) 495, 535 (1823); “[U]pon a question of so much doubt, this court, which always listens with respect to the adjudications of the courts of the different states, where they apply, is disposed, upon this point, to acquiesce in the decision of the Supreme Court of Pennsylvania. . . .”

38. 25 U.S. (12 Wheat.) 153 (1827). A canvass of the decisions of the state in question disclosed a single settled rule, although the rules in other jurisdictions varied.

39. Id. at 162.

40. Id. at 167.

In an earlier case the Court had recognized the need for a settled course in state court interpretations of state statutes, though only when statutes were closely linked to the common law, e.g., statutes of limitations, of uses, and of frauds were involved. Shelby v. Guy, 24 U.S. (11 Wheat.) 361, 366-67 (1836). In another previous case, Justice Johnson wrote in dissent that “a single decision on the construction of a will, cannot be acknowledged as binding efficacy, however it may be respected as a precedent.” Daly v. James, 21 U.S. (8 Wheat.) 495, 542 (1829).

41. The Jackson decision seems to be a compromise, achieved because of a universal concern for land title, between Thompson who wished comprehensively to prevent disregard of state law, and Story.
in the area of land title the Court characterized its actions as "ac-
quiescence," and cautioned that it would acquiesce readily if state
decisions could be reconciled with English law, reluctantly if not.42
By the 1830's, however, all reservations about applying the state law
of land titles had disappeared, and the Supreme Court followed settled
local rules about wills and statutes of limitations, of uses, and of frauds,
even when it believed the state rule unreasonable.43 Nevertheless, the
case law before 1842 did not justify Justice McLean's dictum that
"it is clear, there can be no common law of the United States."44
Strictly read, the cases established a rule about property in land which
was justified on independent grounds concerning the policy of stability
in land title, without reference to a theory of federalism.

_Swift v. Tyson_ presented a simple question of contract law involving
the validity of past consideration.45 New York law was almost certainly
against plaintiff, though the rule elsewhere, which his counsel con-
tended was the general commercial law, favored him. Plaintiff argued
that the Supreme Court should construe Section 34 to cover only
statutes, not simply because the language of the section supported such
a construction, but for broader reasons as well:

> How can this court preserve its control over the reason and the
> people of the United States; that control in which its usefulness
> consists, and which its own untrammeled learning and judgment
> would enable it naturally to maintain; if its records show that it
> has decided . . . the same identical question, arising on a bill of
> exchange, first one way, and then another, with vacillating incon-
> sistency? In what light will the judicial character of the United
> States appear abroad, under such circumstances?46

The defense based its argument on the wording of Section 34 and
adopted DuPonceau's view of the common law as a mode of inter-

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42. See Bell v. Morrison, 26 U.S. (11 Pet.) 351, 360 (1828). "In the construction of local
statutes we have been in the habit of respecting and following the judgments of local
tribunals." Id. at 363. "[This opinion] has been principally, although not exclusively, in-
fluenced by the course of decisions in Kentucky upon this subject." Id. at 375.
43. See Henderson v. Griffin, 30 U.S. (5 Pet.) 151 (1831) (wills and statute of uses);
45. The only law review note on _Swift_, 1 PA. L.J. 219 (1842), placed it under the head-
ing "Bills of Exchange" and did not mention either § 34 or federalism.
46. 41 U.S. (16 Pet.) at 9 (argument for plaintiff). Presumably, "the same identical
question" could not be presented in cases involving statutes from different states, and
thus the application of § 34 would not undermine respect for the federal judiciary. How-
ever, the argument does explain why the "common-law" statutes, note 40 supra, gave the
Court such trouble, since their language usually duplicated that of their English
archetypes.
Despite some uncertainty in the New York law, Justice Story assumed that the state law was against plaintiff, presumably out of respect for the lower court's decision. He then construed Section 34 as referring to statutes and constructions thereof, and "to rights and titles to things having a permanent locality, such as rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character." Most critics of *Swift* contend that Story's jurisprudence was unsound, that he believed there existed, outside and independent of the decisions of courts, some entity called The Common Law. But this misconceives Story's approach to the case. The core of the opinion makes it clear that he was concerned with the functions inherent in a court, and not with the existence of a transcendent body of law.

It never has been supposed by us, that the section [34] did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to

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47. Id. at 10ff (argument for defendant).
48. Id. at 18. The final qualifying clause, obviously inserted to deal with *Jackson*, probably should not have been included as part of the interpretation of § 34, but should have been stated as an independent rule of sound policy in favor of the stability of land title. See TAN 41 supra. Story may have been trying to provide a theoretical justification for § 34: both state statutes and property rules, although not the general commercial law, were intraterritorial, and § 34 was aimed at restricting federal courts' interference in intraterritorial matters. Besides injecting into *Swift* a false issue, i.e., federalism, this interpretation seems weak: General commercial law may in a given case be no less intraterritorial than property rules. Nevertheless, it may not have been unreasonable to consider the general commercial law interterritorial; since the issue could be raised only in diversity cases, there would always be reason for presuming interterritoriality, particularly during this period, when commerce was becoming national, when balkanization was a real possibility, and when interregional trade was essential to the economy of every section. For a discussion of these economic issues, and especially the last, see generally D. North, *The Economic Growth of the United States 1790-1860* (1966). A better justification for excepting land law may be found in the notion that land cases raise issues of a peculiarly local nature. See, e.g., Livingston v. Jefferson, 15 F. Cas. 660 (No. 8411) (C.C. Va. 1811).
50. At one point Story did write in *Swift*, "In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws," 41 U.S. (16 Pet.) at 18. But this remark, occurring in the midst of the interpretation of § 34, had two main thrusts, neither of which went to the existence of a law independent of court decisions. First, court constructions of a statute are evidence of the true meaning of the statute; the meaning inheres in the words of the statute. Second, one court decision is evidence of the law, but only a series of decisions can determine what the law is. Both these facets of Story's explanation comport with prior cases and with his jurisprudence in *Swift*. 

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questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed.\textsuperscript{51}

To Story it would demean the Supreme Court to preclude it from "general reasoning and legal analogies": as a court it must reason and analogize.\textsuperscript{52} Federal jurisdiction over civil cases under the common law existed neither to promote uniformity\textsuperscript{53} nor to enforce a nationalist theory of federalism. \textit{Swift} meant that federal courts could draw on cases arising in all jurisdictions, English, state, and federal, and need not consider themselves limited to cases arising in the state where the action was brought. It had little to do with the existence of an entity called The Law; it dealt with the materials available for a federal court to use when it acted as courts must act.\textsuperscript{54}

\textsuperscript{51} 41 U.S. (16 Pet.) at 18-19.

\textsuperscript{52} The mechanical application of state court decisions, see, e.g., Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940), would both make federal judges less than true judges in diversity cases and tend to deny one of the intended advantages of diversity jurisdiction— the presence of better-skilled judges on the federal bench. See Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 493 (1928).

\textsuperscript{53} The statement of the substantive general commercial law applied in \textit{Swift} was not followed in at least one state case soon after, Bramhall v. Beckett, 31 Me. 203 (1850). See also Bertrand v. Barkman, 13 Ark. 150 (1852) (distinguishing instant case from \textit{Swift} while noting that dictum in \textit{Swift} covered instant case).

\textsuperscript{54} For similar readings of \textit{Swift}, see Note, Of Lawyers and Laymen, 71 Yale L.J. 344 (1961); Note, Federal Common Law and Article III, 74 Yale L.J. 325 (1964). The cases immediately following \textit{Swift} extended its holding drastically. State constructions would be respected but not binding. Lane v. Vick, 44 U.S. (3 How.) 464, 476 (1845) (wills); Foxcroft v. Hallett, 45 U.S. (4 How.) 325, 379 (1846) (deeds). But see Beauregard v. New Orleans, 59 U.S. (18 How.) 497 (1855) (invoking exemption for rules relating to real property). The Supreme Court began to disregard state constructions of local statutes despite the seemingly clear command of § 94. See Williamson v. Berry, 49 U.S. (8 How.) 495 (1850) (private acts); Murray v. Gibson, 56 U.S. (15 How.) 421, 425 (1853) (dictum that state construction of state statutes will be approved "where such interpretation does not conflict with the paramount authority of the Constitution, or laws of the United States binding upon their own courts, or with the fundamental principles of justice and common right" [emphasis added]); Watson v. Tappley, 59 U.S. (18 How.) 517, 521 (1855)
To read *Swift* as an unlimited victory for national supremacy is misleading. As historians since Charles Warren have found, the major concern of the Taney Court was to develop doctrines which, while maintaining the power of the federal government, would leave the states some scope for regulation and innovation.55 The development of commerce-clause doctrine provides the clearest example of this.56 When the Marshall Court was confronted with what it saw as challenges to federal power, it had attempted to find a conflict between state regulation and some federal statute,57 and had rejected the extreme position that the dormant commerce power precluded any state regulation of interstate commerce. The Taney Court made the notion of the police power of the states more explicit,58 and finally adopted Justice Curtis' formulation, that states could regulate subjects not "in their nature national, [nor which] admit only of one uniform system."59

State and nation could regulate commerce jointly unless there was either a conflict inherent in the subject matter, where congressional inaction had to be taken as a specific policy of non-regulation, or an actual conflict. Such a recognition of the dual sovereignties in the commercial field strongly suggests a similar interpretation of *Swift*.60

Though on its face *Swift* appears to be an expansion of federal power *tut court*, it need not be so treated. In 1842, it could not be predicted with certainty that the federal common law which was to be developed in the future would conflict with the common law of any state. This uncertainty is precisely what gives *Swift* its importance in the intellectual development of American law. The case is best seen as

(intepretation of state statute which violates general commercial law is "inadmissible": "[A]ny state law or regulation, the effect of which would be to impair the rights thus secured [by the general commercial law] . . . must be nugatory and unavailing"). This last is one of the earliest appearances of a concept of substantive due process in a Supreme Court decision, and is not cited in Corwin's major article, *Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 460 (1911). Even state constructions of state constitutions were not followed in Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842) (royal charter) and Rowan v. Rynnels, 46 U.S. (5 How.) 134 (1847) (refusing to reconsider Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841), despite intervening decision by Mississippi Supreme Court construing constitutional provision at issue and not construed in 1811).

56. See F. FRANKFURTER, supra note 55.
60. Harris, supra note 55, treats the dual sovereignty problem quite well, though he cannot account for *Swift* and other expansions of the power of federal courts, since he treats the Taney Court's position as one of arbiter between the sovereigns. See id. at 97-99, 99-102.
a judicial response to social and intellectual forces embodied in the movement to codify the common law, which appeared to Story to threaten the integrity of the entire legal system. Swift gave federal courts the power to develop the common law in isolation from the confusion and ideological partisanship of the state judicial systems. But it also left the future substance of federal law unclear, and so avoided entanglement in those disputes.

II.

In 1811, Jeremy Bentham wrote James Madison, offering his services to codify American law. He proposed a code which would cover all matters of importance with rules justified by the principle of utility, using prior cases only as general guides.61 Madison received this offer coolly, deferring his reply until 1816, when he wrote to suggest that the United States did not need Bentham's aid in developing a better system of laws.62 Over the next ten years, however, a movement did begin among lawyers to "codify" the common law. To them, codification was the ordering and distillation of a confused mass of cases; they would cull the cases of their underlying principles and organize them in a coherent way.63 These lawyers were not opposed to the common law as a body of doctrine, but, as Thomas Grimké wrote, it must be "redeemed from the bondage of a barbarous state of society, and accommodated to the enlightened, benevolent, practical spirit of our own times."64

These codifiers based their position on a sharp distinction between

61. Letter from Jeremy Bentham to James Madison, Oct., 1811, in J. BENTHAM, PAPERS RELATIVE TO CODIFICATION 5, 37-38 (1817). Since Bentham most often served as advocate of his own employment, many of his papers qualify but also partly conceal his philosophical intentions, see, e.g., Objections 2-4 in id. at 38-54, to make acceptance more palatable.
62. Letter from James Madison to Jeremy Bentham, May 8, 1816, id. at 67. See also letter from Simon Synder to David Randolph, May 31, 1816, id. at 75.
63. See, e.g., W. Sampson, A DISCOURSE UPON THE HISTORY OF THE LAW (1826). To Sampson, who revived the notion of codification, the common law in its present state was "grotesque" and could best be restored to "its pristine vigor" by statute rather than by judicial effort. Id. at 7, 8. The letters of other lawyers who agreed with Sampson are reprinted with his Discourse. E.g., letter from Thomas Cooper of South Carolina to William Sampson, id. at 52, conceding that circumstances changed too rapidly to make a fixed statute useful, but contending that this would provoke a beneficial periodic re-codification to clear away "accumulated rubbish." See generally P. Miller, THE LIFE OF THE MIND IN AMERICA 241-52 (1967) (hereinafter cited as Miller); Bloomfield, William Sampson and the Codifiers: The Roots of American Legal Reform, 1820-30, 11 AM. J. LEGAL HIST. 234 (1967).
64. T. GRIMKÉ, AN ORATION ON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING THE WHOLE BODY OF THE LAW TO THE SIMPLICITY AND ORDER OF A CODE 8 (1827). Grimké saw the common law as the perfection of reason in its maxims but not in its forms and terms. Id. at 15.
the forms and organization of the inherited common law on the one hand and its substance and intellectual method on the other. The principles of the common law were admirable, and the techniques represented the perfection of Reason. Principles and techniques were therefore to be preserved, not because they had been handed down from the feudal past but because they were independently valid. However, the codifiers regarded the forms and organization of the law as encumbrances, inefficient in practice and dangerous because they drew the law into disrepute among the people.

Though codification was the goal, European codes and civil law were not regarded as models; they relied too much on "untried speculations" of civilian jurists, and were looked to only as examples of legal systems which did not rely on acquiescence in the unexamined inheritance of an existing body of law. American codification as a method of applying reason to law would isolate maxims whose validity had been tested by experience, and these maxims would serve as general guides to judges in the process of analogistic reasoning by which the common law constantly adjusted itself to new situations.

This lawyers' codification movement, which found expression in the works of Northerners and Southerners, Whigs and Democrats, reflected one branch of the American attempt to define a national identity. Like James Fenimore Cooper, among others, these lawyers saw the American experience as the culmination and transcendence of the European Enlightenment. American law, unburdened by the heritage of medieval forms, could show Europe how Enlightenment principles could be put into practice. In Perry Miller's words, the American common law strove for universality and not uniqueness, "a philosophy of national personality within a frame of cosmopolitan reference."

But during the 1830's the movement was transformed into one closer to Bentham's reformist vision. The later codifiers would simplify the law, and in the process reform its substance, stripping it of its mysteries and giving it popular sanction. One leading reformer,

65. Id. at 7-8.
66. Sampson was a Jacksonian from New York, Grimké a Whig from South Carolina. Only the West was unrepresented, perhaps because organs for publication were few. The first law review in the Old Northwest, the Western Law Journal, appeared in Cincinnati in October 1843.
67. The best exposition of the duality involved is H.M. Jones, O Strange New World (1964); see also H.N. Smith, Virgin Land (1950). Both these analyses ignore the rise of a distinctive Southern civilization. For an attempt to place the Southern experience in the same framework, see W. Taylor, Cavalier and Yankee (1961). Though it deals with a later period, E. Wilson, Patriotic Core (1962), is more successful in interpreting the South.
68. Miller 133.
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Thomas Walker of Ohio, wrote: "My creed is that the law should be made as simple, as intelligible, and as certain as possible. To this end, written or statute law should, as far as practicable, supply the place of unwritten or common law . . . ." He echoed Bentham's distrust of lawyers:

If legal reform be called for, the people must bring it about. If opposition come from any quarter, we anticipate it from lawyers. And the reason is natural. They are the most directly interested in keeping things as they are. The more abstruse and recondite you make the law, the more indispensable will be their professional services.

As the movement developed a new animus, the thinking of the reformers became confused, never clearly differentiating the new from the old approach. The later reformers, like the earlier, thought it essential to reduce the law to a body of easily intelligible maxims or principles. They differed from the earlier reformers in that they seem to have believed that once this reduction had been achieved, it would be possible to state the whole of the law in statute form, so that any citizen could determine the legal rights and duties of complex situations merely by consulting the code.

For example, when Walker endorsed a reformist codification he proposed principles for reform superficially indistinguishable from those of the earlier rationalizers:

The whole body of law, in whatever form it exists, must be composed of a series of principles, and surely it cannot be impossible to collect these principles together, arrange them into a system, and give them a legislative sanction.

Yet Walker thought that his codification would change the fundamental nature of the common law by removing the judge's discretion to

69. Walker, Law Reform in Ohio, 1 WEST. L.J. 37 (1843).
70. Walker, Codification, 1 WEST L.J. 433 (1844, first delivered in 1835). Bentham had written, "Every man his own lawyer!—Behold in this the point to aim at." Jeremy Bentham, An Englishman, to the Citizens of the several American United States, July, 1817, in J. BENTHAM, PAPERS RELATIVE TO CODIFICATION, Supplement 115 (1817). Bentham's arguments that codification would provide certainty and security (id. at 136 and J. BENTHAM, ELEMENTS OF CODIFICATION 49-51 [W. Hancock ed. 1852]), do not differ significantly from those of the early American codifiers.
71. Compare Law Reform in Ohio, 6 WEST L.J. 557 (law reform praised as "a glorious triumph of common sense over arbitrary forms—of reason over technicality") and Note, 6 WEST L.J. 431 (1849) (Missouri Civil Code praised as "another Declaration of Independence, as to the forms, and technicalities, and quibbles, which too often defeat justice") with Edmonds, Law Reform, 6 WEST L.J. 14 (1849) ("much that is hasty and ill-digested" along with much of benefit in Field Code).
72. Walker, Codification, supra note 71, at 436.
overrule or ignore prior cases and evolve new rules. Under the new system the judges would still apply the general principles of the code to new situations, but they would not be "changing" the law, as common-law judges had, since in every case they would be bound by the clear expression of legislative will.\textsuperscript{73}

The reformist program of simplifying the law to bring judges under control, reduce the power of lawyers, and increase the layman's ability to understand and deal with his own legal problems was loosely related to the Jacksonian ideology of the period. Jacksonian Democrats and Whigs, like all American political parties, were coalitions to achieve political success; as in all American political parties, the leaders of the opposing coalitions held similar views on fundamental social and economic issues.\textsuperscript{74} When they disagreed, it was over the implementation of the same policy, the expansion of opportunities for entrepreneurs.\textsuperscript{76}

Though codification was not a central partisan issue,\textsuperscript{70} it did embody some of the ideological positions held by Jacksonians. "Negative

\textsuperscript{73} Id. at 435, 437.

\textsuperscript{74} See generally L. Hartz, The Liberal Tradition in America (1954).

\textsuperscript{75} Both parties were led by members of the entrepreneurial class, but in competing for political supremacy they adopted divergent ideologies in the appeal to other social classes for support. The Jacksonians argued that a "negative liberal" state which would free men to pursue individual gain unimpeded by remnants of the past, see L. Benson, The Concept of Jacksonian Democracy, chs. 5, 11 (1961), would also promote equality, see also J. Hurst, Law and the Conditions of Freedom, ch. 1 (1957) (law as a means of freeing individual energy). Such an ideology appealed both to new entrepreneurs, who saw in it a chance to compete with established wealth on equal terms, and to urban workers, who saw in it a more general program of the reduction of social and economic inequality. The Whig program of regulating business, for example by limiting access to banking and to the use of the corporate form, spoke to established capitalists, whose wealth had been acquired under those conditions and to landed interests who still adhered to semi-mercantilist notions of the proper role of the state. For a discussion of the mercantilist strain in American politics, see generally W. Williams, The Contours of American Liberty (1961). In addition, an undercurrent in the Jacksonian ideology, an implicit anti-elitism, attracted the many disaffected individuals whose unease at the course of American development had not become sufficiently concrete to form the basis for independent political action. See Lebowitz, The Jacksonians: Paradox Lost, in Towards a New Past 65-90 (B. Bernstein ed. 1967).

For general discussions of Jacksonian politics and ideology, upon which this analysis is based, see also R. Hofstadter, The American Political Tradition, ch. 3 (1948); M. Meyers, The Jacksonian Persuasion (1957); and B. Hammond, Banks and Politics in America (1957). Though recent work has cast serious doubt on the economic arguments of these works, see, e.g., P. Temin, The Jacksonian Economy (1969), their interpretation of the social bases of Jacksonian politics has withstood most criticism. The argument here, however, has modified theirs by stressing the need to maintain a coalition of several social groups through ideological commitments, and does not assume, as the works mentioned occasionally do, that all who adhere to a certain ideology are members of the same social class.

\textsuperscript{76} Though a major issue at the New York Constitutional Convention of 1846 was the democratic reform of the judiciary into an entirely elected branch of government, see Debates and Proceedings in the New York State Convention for the Revision of the Constitution (1846), codification was not, see note 87 infra.
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liberalism" viewed governmental interference with business just as the
reformers saw the common law, as an archaism perhaps suitable to
feudal England but not to dynamic America. Similarly, some entre-
preneurs thought they could handle their affairs without the aid of
lawyers schooled in the mystifications of the common law, particularly
if the law were simplified by codification. But the movement called
Jacksonian Democracy was animated by more concerns than those of
the entrepreneurs who led the Democratic Party. One of the themes
which united the coalition was its anti-elitism and anti-intellectualism,
which led to a distaste for lawyers and a desire to make the law ac-
cessible to everyone.77 On a level of even more generality, the Jack-
sonian appeal to equality was echoed in the attempt to replace a class-
based law derived from its English history by a democratic American
law.

Something of the threat which the new, quasi-Jacksonian brand of
codification posed for established lawyers can be gathered from their
rather complicated counter-tactics. Justice Story, whose advocacy of a
federal common law was stronger than that of any other writer during
this period,78 was appointed in 1835 by the Massachusetts legislature
to a commission to consider the wisdom and expediency of codifying
the state's common law. Story had written in the Commentaries on
American Law in 1833 that the common law was "our birth-right and
our inheritance."

It has become the guardian of our political and civil rights; it has
protected our infant liberties; it has watched over our maturer
growth; it has expanded with our wants; it has nurtured that
spirit of independence, which checked the first approach of
arbitrary power; it has enabled us to triumph in the midst of
difficulties and dangers threatening our political existence; and
by the goodness of God, we are now enjoying, under its bold and
manly principles, the blessings of a free, independent, and united
government.79

Not surprisingly, Story's commission praised the common law,

78. Several times in dicta on circuit, Story said that federal courts would not be bound
by state decisions relating to the general commercial law. See Briggs v. French, 4 F. Cas.
117 (No. 1871) (C.C. Mass. 1835); Donnell v. Columbian Ins. Co., 7 F. Cas. 889 (No. 3937)
(C.C. Mass. 1836); Williams v. Suffolk Ins. Co., 29 F. Cas. 1402, 1405 (No. 17,738) (C.C.
Mass. 1838).
79. 1 J. Story, Commentaries on the Constitution 140-41 (1833). The ensuing foot-
note is not surprising: "It would be a most extraordinary state of things, that the com-
mon law should be the basis of the jurisprudence of the States originally composing the
Union: and yet a government engrafted upon the existing should have no jurisprudence
at all." Id. at 141 n.2.
not in its nature and character an absolutely fixed, inflexible system, like the statute law, providing only for cases of a determinate form which fall within the letter of the language in which a particular doctrine or legal proposition is expressed. It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade and commerce and the mechanic arts, and the exigencies and usages of the country. 80

No written code could encompass all the cases which might arise in a commercial nation which is growing and changing rapidly.

[P]rivate convenience as well as public policy requires that the common law should be left in its prospective operations in the future (as it has been in the past) to be improved, and expanded, and modified, to meet the exigencies of society by the gradual application of its principles in courts of justice to new cases, assisted from time to time, as the occasion may demand, by the enactments of the legislature. 81

But, as the most limited concession to "the present state of popular opinion," 82 the commission recommended an extremely tempered form of codification, in which the general principles of some areas of commercial law, such as agency and insurance, would be collected in a short code. As an affirmation of the common law, the code would be used by judges just as they used "rules" of the common law, as a fruitful source of analogy. 83

While Story's hostility to the anti-legalist, populist animus of the reformers is evident, the American Jurist, published in Boston by several young graduates of the Harvard Law School who had studied under Story, adopted a more subtle approach. Almost continuously from its founding in 1829, the magazine advocated codification, "by [which] we do not mean the introduction of a new system of law; all that is meant is the ascertaining and expressing in clear and intelligible terms the law as it actually exists, and arranging the subject into a methodical and systematic form." 84 In a long series of articles,

81. Id. at 40, 41.
83. Report of the Commissioners, supra note 80, at 34, 43-44, 58.
84. Written and Unwritten Systems of Law, 9 AM. JURIS. 5, 83 (1833). See also id. at 55 (suggesting how to codify); 1 AM. JURIS 31 (1829) (suggesting that judicial vigilance, not codification, is American remedy since evils of common law are not entrenched as they are in England); Revision of the Laws in Massachusetts, 13 AM. JURIS 344, 369-64.
“Codification, and Reform of the Law,” appearing from 1835 to 1840, the editors attempted to divert the new movement into the kind of rationalizing activity which had been popular among the lawyers themselves a decade before. Instead of advocating thorough overhaul of the system, these articles picked out individual areas in the common law which the legislature might profitably codify. Though a substantial number of specific topics are discussed, the impression left by the series is that the common law needed only limited repair, quite unlike the radical reform suggested by other codifiers.

But this may have been too sophisticated. The differences between those who saw the common law as an instrument of mystification which enriched lawyers at the expense of the common man and those who saw it as the force of reason in human affairs could not be papered over by attempts to redefine the word codification. When in the 1840’s the reforming codifiers finally managed to obtain a thorough-going revision and codification of procedural law in New York and several Western states, Eastern law reviews reacted in a way which shows their awareness that they had lost a battle, if not the war. The New York Legal Observer saw codification as almost cataclysmic:

Erections which had stood for ages were levelled to the dust [by law reform]. Rules and principles which had survived many contests, and, by all the methods which the ingenuity of man could devise, had been tried as by fire; distinctions treasured up by masters of science; masses of solemn and well considered adjudications of our own and of the English Courts, were swept away and out of their fragments and out of the original elements, a new system was suddenly arranged! Old words and terms, once of known and mighty import, were proscribed, a new vocabulary supplied in their place.  

This view was certainly an exaggeration. The Field Code, passed in 1848, represented the highwater mark of the reformist movement.

(1835) (flexibility of unwritten law). Bentham was criticized as a reformer whose notion of codification was not shared by the magazine. See Cushing, The Greatest-Happiness-Principle, 20 Am. Jurisr 332 (1839); Codification, and Reform of the Law, 14 Am. Jurisr 280 (1835).

85. 14 Am. Jurisr 280 (1835); 15 Am. Jurisr 16 (1836); 16 Am. Jurisr 59 (1836); 16 Am. Jurisr 289 (1837); 17 Am. Jurisr 71 (1837); 20 Am. Jurisr 303 (1839); 21 Am. Jurisr 332 (1839); 22 Am. Jurisr 282 (1840); 24 Am. Jurisr 32 (1840).

86. The Revision of 1830—The Innovations of 1847 and 1848, 6 N.Y. Legal Observer 49 (1848). The author also wrote: "The benefits of a legal reform are not to be speedily realized; its evils fall upon us." Id. at 97. Time is needed to reconcile conflicts, and the common law is precisely the product of time and men's minds.

87. The Convention of 1846 had directed the legislature to appoint a commission to
and this success was obtained only by tacitly abandoning grand reform schemes in return for the limited, though not trivial, reforms in civil procedure. An equally anti-reformist but more realistic assessment of the situation was given by the *American Law Journal* of Philadelphia:

Many of our most experienced brethren view this change [the Field Code] with the most serious alarm. But they should remember that the change is only in *forms* of proceeding. The *substance* —the great and eternal principles of justice as found in the decisions and in books of authority on Law and Equity remain unchanged. . . . [B]y a firm adherence to the ancient doctrines, so far as the real rights of the parties are concerned, the hand of Vandalism may be stayed.88

The dissipation of the moral and intellectual energy of the reformers after the limited success of the codes of procedure parallels the dissolution of the Jacksonian coalition beginning around 1840. The Depression of 1837-43 increased the general disaffection and limited the opportunities for entrepreneurs; at the same time sectional differences, exacerbated by the Depression and changing trade patterns, began to dominate the political scene.89 Enough entrepreneurs, formerly split into two parties, came together as Whigs for that party to represent their coherent class interests. As a unified political force, they could hope to stabilize the economy and restore the chances of the entire class for economic success, thereby reducing the possibility that disaffected classes might coalesce and challenge the entrepreneurs' political supremacy and view of the good society.90

propose revisions in civil procedure, *Debates and Proceedings*, supra note 76, at 644. The convention seemed in a temporizing mood, and rejected a provision which would have mandated the commissioners to abolish "if practicable," the forms of action and to provide that justice would be administered without regard to law or equity. *Id.* at 618-44. Proponents of the commission, while objecting that the convention's "evident impatience" minimized debate on the issue, stated that the provision was simply a declaration that an attempt to remedy a great evil be made. *Id.* at 817-18. The only other discussion relating to codification was a suggestion, never pursued, that the legislature be permitted but not obliged to appoint a commission. *Id.* at 643.

88. 1 AM. L.J. 188 (1848).
90. As the Whigs became the party to which most entrepreneurs adhered, the Democrats became a party which appealed increasingly often to the sectional interests of the South. This prevented the disaffected classes from transforming an existing party into their own. The channelling of energy into reform activity not linked to political parties, see generally A. Tyler, *Freedom's Ferment* (1944), effectively precluded the development of a radical party, particularly as the country recovered from the Depression.

This realignment was naturally accompanied by a blurring of the ideological distinctions which had formerly identified the parties: the consolidation of the entrepreneurial class in the Whig party led it to abandon an ideology which had been designed to attract political support, while the increasingly sectional orientation of the Democratic Party led it to an ideology based on the interests of planters, not entrepreneurs or urban workers.
Swift was decided in 1842. The Jacksonian movement was in the process of losing its appeal for the reformers; the ideological bases of party politics were already confused; the reformers had begun to compromise their drive for total reform. In this context, it is overly simple to view Swift as a Whig reaction to a Jacksonian crusade. Indeed, Swift itself partakes of the ambiguity which had overtaken the codification movement. In 1842 no one could tell what the future development of the federal common law would be. The substantive rules that emerged might be idiosyncratic to the federal courts or in accord with the rules in many state courts. They might have limited scope, remedying only a few defects in special portions of the local common law, or they might become a well-developed, nearly complete body of law independent of state law. Though sheer partisanship may have had some impact on Story's thinking, the opinion he wrote can be interpreted only by considering the dominant themes in American legal culture, for it was for the accommodation of those themes that Story strove.

III.

According to Perry Miller,91 whose analysis is followed here,62 two ideas dominated American thought before the Civil War: The Heart and The Mind.93 More important in the development of the law was the Mind, by which Miller seems to mean nothing more than reason.94 The Heart encompassed not only emotion, but the combination of passion and spontaneity which in the Revival led to what contemporaries called enthusiasm. For the legal profession to attempt to achieve social predominance, lawyers had to couch their arguments about the importance of law in ways which would combine sentiment with reason. Miller lavishes attention on the intellectual and reasoned

91. P. MILLER, THE LIFE OF THE MIND IN AMERICA (1965). This book contains two complete sections of what was projected to be a nine-part comprehensive intellectual history of America from the Revolution to the Civil War. In its scope, it was compared by Miller’s colleagues to Parrington’s work. May, Book Review, 35 Am. Scholar 562 (1966).
92. The exposition in this Note varies from Miller’s, largely because he was too devoted to his view of the law as the embodiment of the Mind to see various compromises between the Heart and the Mind in the development of the law. While lawyers may write better legal history than intellectual historians, a law degree does not insure historical writing of high quality, see, e.g., L. FRIEDMAN, CONTRACT LAW IN AMERICA (1965).
93. These are analytic constructs, which are derived from the works of some portion of the public whose ideas are worth considering as part of the intellectual development of the country.
94. Miller generally treats this construct with caution. For example, in characterizing
defense of the Heart made by Charles Grandison Finney. However, he does not recognize that the legal profession made the same combination of appeals, contending instead that the legal mentality, the most completely worked-out aspect of the Mind, refused to acknowledge its need for the sentimentality and romanticism of the Heart.

Miller's evidence suggests, however, that the profession did develop such a combination in order to appeal to the general populace. The legal mentality, and the lawyers who developed it, faced almost implacable hostility by "the mass of the people in rural or frontier regions."

It was not that the American people were positively resolved on becoming lawless, in the manner of cinema badmen, but they did profoundly believe that the mystery of the law was a gigantic conspiracy of the learned against their helpless integrity. Nor was this anti-legalism "merely Jacksonian, merely the expression of a party." Though the Whigs tried to exploit the fears anti-legalism aroused, largely because important elements in the Whig coalition were men threatened by any change, "the mood was something more pervasive than either of the parties could control, something deep, atavistic, persistent in the community." Without law, Americans believed, they would lead simple, free, and secure lives. America could admire lawyers, but had to avoid developing a "scholastic mystique, against which its native genius and the genius of the Revival were antipathetic." To most Americans, according to Miller, the law was "by its very nature sophisticated, whereas the American people were natural, reasonable, equitable." Miller uses Natty Bumppo, the Leatherstocking, as his paradigm, "the image of a human being, uninstructed in an academic discipline, who, by following the bias of his natural feelings, would maintain the dignity of sublime Nature against the constricting efforts of the intellect and of intellect's vice-regent, the law." Along with this pervasive hostility to law, Amer-

the lawyers' support of the common law as an assertion of "the universal against the particular, the comprehensive rationality of traditional wisdom against the flat of individual statute, the heritage of civilization against provincial barbarism," Miller sees that not tradition but wisdom and rationality were the basis of the legal position. Tradition is relevant not as part of the defense of the common law but as the link with Enlightenment values which placed America in a broader cultural context, see TAN 65-66 supra.

95. Id. at 102.
96. Id. at 103.
97. Id. at 104. This image is drawn chiefly from the conflict between Natty Bumppo and Judge Marmaduke Temple in J. COOPER, THE PIONEERS (Signet ed. 1964). Though this simplifies the novel, particularly in its view of Judge Temple, Miller's reading is clearly a fair one. See also H.N. SMITH, VIRGIN LAND, ch. 6 (1951).
icans harbored a specific hostility to the common law, chiefly as a British artifact.\textsuperscript{98}

But, according to Miller, the lawyers refused to compromise and responded by attempting to create “a ‘system’ which should be cosmopolitan enough to be intellectually respectable and at the same time a triumph of American ‘genius.’”\textsuperscript{99} Their intellectual system was the weapon with which, if used with force and erudition, they might overcome popular fears. The fundamental strategy was to build a system so completely imbued with the Mind that the forces of the Heart must give way.

In line with this approach, lawyers said they sprang from the common people and were dedicated to making the common law conform to American conditions. Since tradition in America was a weak base for a complex intellectual system, the lawyers returned to reason: all law must be based on reason, to “control . . . temper by logic,” and reason, which they saw as neither mechanical nor emotional, was precisely the common law, embodying values such as fairness which, to these lawyers, inhered in the concept of reason itself.\textsuperscript{100}

The common law, lawyers claimed, alone protected American liberty and property, and so insured progress. Reason in the common law would adapt old rules to new conditions, changing the law naturally as Nature changed. But with this change, “the supreme quality of the Common Law is precisely that amid its complexities it sustains order, supplies certainty.”\textsuperscript{101} To protect the rationality of the law, lawyers said that only through rigorous scholarship and intellectual discipline could the law be mastered. Finally, lawyers drew on the civil law to polish the common law and give it a further aura of cosmopolitanism.\textsuperscript{102}

So far the lawyers had established that the law could be seen as the scientific exercise of reason in human affairs. However, Miller’s evidence, though not his argument, shows that the lawyers never restricted themselves to this purely intellectual appeal. They responded to popular pressure by attempting to incorporate the emotional elements of the Heart into their system and tried to show that science was not incompatible with sentiment. In this, they could take advantage of the American common law’s characteristics; it had never

\textsuperscript{98} Miller 105-09.
\textsuperscript{99} Id. at 105.
\textsuperscript{100} Id. at 114-30.
\textsuperscript{101} Id. at 122-32.
\textsuperscript{102} Id. at 62-69.
been the creature of cold logic, as some of its advocates, as well as some of its critics, had imagined. For example, the preacher, the personification of the Heart, was “eloquent,” the lawyer “elegant.” They seem now to have been almost equally bent on swaying an audience by appeal to sentiment. Though some lawyers felt that elegance precluded the spontaneity of the preachers, the distinction probably served mainly to preserve the lawyer’s image of himself by setting the practice of law apart from the practice of revivalism. The lawyers likewise found themselves obliged to venerate a final decision-maker, and to urge on others that they obey as an act of faith where they were not compelled by reason. The social necessity of finality thus made emotion as well as reason an element in gaining obedience to legal decisions. And law, even if a science, was a “natural science,” identified with and drawing legitimacy from the notion of natural law, the moral basis of Christianity. The appeal to “fairness” was close, in the end, to the preachers’ appeal to charity.

Once lawyers began to play on these sentimental elements in the law, they could present themselves as operating at but a small remove from inspiration and intuition, the less rigorous but at the same time more accessible criteria of sentiment. The pressure to move in this direction was constant: lawyers feared popular hostility and they were vulnerable to the charge that “by becoming increasingly technical they betrayed morality.” The structure of formal rationality, the element of the Mind in the legal mentality, provoked a deep antagonism. In the end, the lawyers capitulated, though some tried to veil the collapse by what today seem inept attempts to justify technicality as morally neutral. When the leaders of the profession asserted that “the real source of legal technicality is a heart as much imbued with benevolence as that of any revivalist,” they had transformed the legal mentality from a defense of the Mind against the Heart into a means of allying themselves with popular sentiment. All that remained was a defense of the common law as a mechanism of judicial restraint in which precedent and not a code confined the judges.
Swift v. Tyson Exhumed

Swift can be put into this context in two slightly different ways. First, and more obvious on the surface, Swift may be seen as an assertion of the paramount role of the common law, and thus of the Mind. It would then be a blow for the Mind in the profession’s battle against the new codification movement. By removing an important part of the common law from state control, at least in diversity cases, Swift might have deprived the codification movement of much of its reformist thrust.  

Second, Swift may be read as Justice Story’s attempt to reconcile the Heart and the Mind, though the emphasis is on the primacy but not necessarily the total dominance of the Mind. By creating an area of uncertainty in which federal judges would be able to develop the common law, Story might have been expressing his faith in the ability of those judges to achieve a synthesis of reason and emotion, a synthesis more satisfying than one which could emerge either from a successful codification movement or from the common-law courts of the states. Such a reconciliation required—and there is no reason to believe that a judge as great as Story did not know it—judges able to manipulate the forms of the law and the multiplicity of facts presented to bring into prominence first one and then another of the powerful but contradictory underlying principles which give a decision its emotional force. The process is not spontaneous and the Mind predominates. But if what is required is far from pure emotion, it is even further from the “correct” application of a rule to a complex fact situation between that mentality and the legal profession.) When enough ideas about the role of the Mind are found, it is the task of the intellectual historian to order them into a coherent framework and to explore their logical implications. In addition, Miller shows that prominent lawyers were involved in creating the defense of the Mind. Miller recognizes the difficulties of marshalling convincing evidence, writing, e.g., “There was, naturally, somewhat greater difficulty in getting into formal expression, outside such fictional devices as Natty Bumppo and the still more fictitious Crockett, the basic American distrust of law in all its forms,” Miller 102. Much of the evidence is circumstantial, such as the popularity of the Leatherstocking Tales, but it is adequate and, given the nature of historical evidence, convincing. Miller’s major index of popular feeling is, not unreasonably, the response of articulate lawyers: “The accusers are vague, but the defendants show by their responses that they felt the sting.” Miller 188. The articulation between ideology and court decisions can be found, in part, in the arguments of lawyers before courts, see note 104 and TAN 46 supra. During the 1840’s, thirty-five lawyers appeared in 81 per cent of the cases heard by the Supreme Court. These elite lawyers were, almost to a man, Whigs or conservative Democrats who presented the arguments Miller depicts. See, e.g., Groves v. Slaughter, 40 U.S. (15 Pet.) 448, 485, 490 (Clay and Webster attack the idea of an elected judiciary).

108. On this view, Swift’s sequels, note 54 supra, were essential to prevent state codes from controlling decision. The notion of substantive due process might have been developed even more had the codifiers been more successful in the states. Since codification by Congress was unlikely for political reasons involving Southern distrust of national power over commerce, this would have kept control over the commercial law in the hands of the judges.
achieved by analyzing the problem into a series of elementary logical steps. Story might well have feared for American law in the hands of state court judges. Even though what he regarded as the disaster of codification might be avoided, state judges were less accomplished as technicians of the law than federal judges, and they were increasingly likely to be elected, and therefore subject to the pressures of popular emotion and political interest to an extent unknown in the federal system. Insofar as Story's attempted accommodation of the Heart and the Mind failed, it did so because he overestimated the capacity of national institutions to perform the task he set them.

* * *

Swift v. Tyson responded to deep needs in the legal profession for a defense against the social and intellectual forces which transformed the codification movement from a lawyers' to a popular movement. A desire to protect the profession against popular demands, and not only a desire to exalt national over state power, lay behind Justice Story's attempt to provide a legal framework in which judges could respond to the claims of the Mind to which the profession adhered and to the appeals of the Heart which the populace put forth.

By 1938 the ground of the argument had changed. Codification was still an important issue, and the struggle to define what a Restatement of the Law should be recalls the battles of the 1830's and 1840's. But the central concern was no longer the relative competence of state and federal courts to accommodate the Heart and the Mind within the law. Rather, legal realists called into question the ability of any court to achieve an acceptable synthesis. Judicial deference to the legislature came to be seen as a general principle derived from the incompetence of courts, and not as a duty only in constitutional cases. Swift was superseded as an intellectual endeavor not by the economic growth of the nation, which made forum-shopping a practical problem, but by a change in the lawyers' approach to the task of reconciling the Heart and the Mind.
