

## Erie, Swift, and Legal Positivism

**Author :** Michael Green

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Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 **Wm. & Mary L. Rev.** (forthcoming 2013) available at [SSRN](https://ssrn.com/abstract=2081111).

Philosophy of law can get lonely. Most law professors, not to mention lawyers, don't care whether [legal positivism](#) or some kind of [anti-positivist alternative](#) is correct. It is surprising, therefore, that philosophers of law so rarely discuss [Erie Railroad Co. v. Tompkins](#), since *Erie* suggests that the philosophy of law can be relevant to legal practice.

Legal positivism is identified, in part, by the *social fact thesis*: the law of a jurisdiction is fundamentally a matter of social facts concerning officials (or the general population) within the jurisdiction. In his opinion in *Erie*, Justice Brandeis rejected the regime of [Swift v. Tyson](#), in part, because he thought *Swift* was incompatible with this thesis. In *Swift*, Justice Story opined about the common law prevailing in New York without deferring to the decisions of New York state courts. That sounds anti-positivist. Story apparently understood the common law to be binding in New York independently of social facts about New York (or, indeed, any other jurisdiction's) officials.

There is another reason that philosophers of law should be interested in *Erie*. If Brandeis's reading of *Swift* is correct, it actually poses a *threat* to legal positivism. Legal positivism is supposed to be a *general* theory of law. It identifies the essential features of law *wherever law occurs*. If *Swift* really was anti-positivist, that suggests that positivism fails as a theory of law.

To be sure, the positivist might redescribe what went on in *Swift* in positivist terms. She could insist, for example, that Story was really applying *federal common law* – that is, common law that existed due to social facts about federal officials – even if Story did not understand the law he was applying in those terms. Indeed, that is precisely Brandeis's strategy in *Erie*. Construed positivistically as federal common law, the law applied in *Swift* was unconstitutional, Brandeis argued, because federal courts lacked the requisite common lawmaking power.

But this strategy has its limits. I cannot claim, for example, that bachelors are essentially *married* males and that the rest of the world is conceptually confused. Although a theory of law can reject what some people say about the nature of law, it must by and large be compatible with people's intuitions. Thus, the more people there are who are anti-positivist, the more questionable positivism is.

It is philosophically important, therefore, whether Story, as well as other advocates of *Swift*, really understood the common law in anti-positivist terms. Although philosophers of law have had little to say about the matter, this marvelous essay by [Caleb Nelson](#) shows that the common law was largely conceived of positivistically. I should emphasize that Nelson's essay has many other virtues – indeed, it is the best assessment of all of Justice Brandeis's arguments in *Erie* that I have read. But my goal here is to highlight only how Nelson deals with issue of positivism.

Following judicial practice at the time, *Swift* drew a distinction between the *local* and the *general* common law prevailing in a state. Concerning the content of local common law (as well as the content of state statutes) federal courts followed the decisions of the relevant state's highest court. Federal

courts came to their own conclusion, however, about the content of the general common law. As Nelson persuasively shows, however, this does not mean that the general common law was anti-positivist. It was largely understood to be *state* law.

But how could the general common law applied in *Swift* have been state law when Story ignored the decisions of the relevant state's courts? We find this hard to understand because we tend to equate the content of a state's common law with such decisions, as if common law rules were simply judicially written statutes. But at the time *Swift* was decided (and well afterward), people drew a distinction between the general common law prevailing in a state and state court decisions interpreting that law. New York courts *themselves* did not think that the general common law within their borders was what they said it was. In effect, Story was able to ignore the decisions of New York courts because New York courts *let* him. The law Story applied in *Swift* was positivist because its existence ultimately depended upon practices among New York officials.

Although Nelson prefers this state-law account of the general common law, he does identify a competing account that some may have held at the time, under which the general common law consisted of "a body of rules and principles separate from the law of any state" and "the conflict-of-laws rules applied in federal court sometimes told federal judges to draw rules of decision from this body of law rather than from state law." (p. 5) Although under this account the general common law was not state law, Nelson argues that it was not federal law either "at least in the ordinary sense of the term," for state courts were not bound to defer to federal courts concerning the content of this law. (p. 5) Here it appears that the general common law was conceived of anti-positivistically.

I think Nelson should have reconsidered the possibility that in these cases the general common law was considered to be federal law. (Much rests on what he means by the general common law not being federal law "in the ordinary sense of the term.") The fact that people did not think federal decisions were binding on state courts is not enough to show that they didn't think the general common law was federal law. They may have thought that federal decisions were not binding on state courts because federal courts themselves understood the general common law as transcending federal decisions. State courts could ignore federal decisions because federal courts let them.

But, more fundamentally, I would question whether an alternative to Nelson's state-law account is necessary at all. If the general common law really was not understood as state law, a federal court could conceivably find this law to be binding in a state even if the state's officials had not accepted a common law legal system. But no one thought this was so. The general common law was never held to apply in jurisdictions, such as Louisiana or Native American tribes, that had not adopted the common law. I would argue, therefore, that Nelson's preferred reading is the only one we need. The general common law was, in fact, understood as state law.

In the interest of full disclosure, I should note that Professor Nelson's essay was written in connection with a [symposium](#) I organized at William & Mary.

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