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Symposium: Introduction

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Symposium

Introduction

Donald L. Doernberg*

Supreme Court enthusiasm for creating federal common law reached its high points in *Swift v. Tyson*'s¹ declaration of the federal courts' duty to create federal common law in contract cases and the Court's extension of that idea to tort cases in 1893.² Even by 1893, however, the *Swift* doctrine's countenancing of a general federal common law had its detractors,³ and Justices' statements of dissatisfaction culminated in Justice Holmes' well-known dissent ten years before *Erie Railroad v. Tompkins*⁴ was decided.⁵ *Erie* buried the *Swift* doctrine and

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1. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

2. *Baltimore & O.R.R. v. Baugh*, 149 U.S. 368 (1893).

3. *Id.* at 403 (Field, J., dissenting) ("[T]his, like other errors, will, in the end, 'die among its worshippers'").

4. 304 U.S. 64 (1938).

5. *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting) (referring to *Swift* as "an unconstitutional assumption of

sharply curtailed, through clearly did not signal the end of, federal common law.⁶

In the last two decades, and particularly since Justice Powell's dissent in *Cannon v. University of Chicago*,⁷ some judges and commentators have suggested that the creation of federal common law is always (or almost always) illegitimate, relying for that conclusion not upon the federalism theories stressed so heavily in Justice Brandeis' opinion for the Court in *Erie*, but instead on concepts of separation of powers. The debate has intensified in recent years and promises to continue, not least because some of the Court's most ardent proponents of what has been called the New *Erie* Doctrine themselves on occasion create federal common law.⁸ The authors in this symposium present enlightened, thought-provoking and substantially disparate views of the role of the federal courts with respect to the propriety of creating federal common law in light of the doctrine of separation of powers.

powers . . .").

6. See, e.g., *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (decided the same day as *Erie* and declaring that federal common law governed a dispute over the apportionment of water from an interstate stream); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (applying federal common law to determined the rights and duties of the United States with respect to federally-issued commercial paper).

7. 441 U.S. 677 (1979).

8. See, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). See generally Donald L. Doernberg, *Juridical Chameleons in the "New Erie" Canal*, 1990 UTAH L. REV. 759.