

Sec. 2—Judicial Power and Jurisdiction

Cl. 1—Cases and Controversies

disagreement to the strongest point and perhaps precipitated the overruling of *Swift v. Tyson* in *Erie Railroad Co. v. Tompkins*.¹¹⁰¹

"It is impossible to overstate the importance of the *Erie* decision. It announces no technical doctrine of procedure or jurisdiction, but goes to the heart of the relations between the Federal Government and the states, and returns to the states a power that had for nearly a century been exercised by the federal government."¹¹⁰² *Erie* was remarkable in a number of ways aside from the doctrine it announced. It reversed a 96-year-old precedent, which counsel had specifically not questioned; it reached a constitutional decision when a statutory interpretation was available though perhaps less desirable; and it marked the only time in United States constitutional history when the Court has held that it had undertaken an unconstitutional action.¹¹⁰³

Tompkins was injured by defendant's train while he was walking along the tracks. He was a citizen of Pennsylvania, and the railroad was incorporated in New York. Had he sued in a Pennsylvania court, state decisional law was to the effect that, because he was a trespasser, the defendant owed him only a duty not to injure him through wanton or willful misconduct;¹¹⁰⁴ the general federal law treated him as a licensee who could recover for negligence. Tompkins sued and recovered in federal court in New York and the railroad presented the issue to the Supreme Court as one covered by "local" law within the meaning of *Swift v. Tyson*. Justice Brandeis for himself and four other Justices, however, chose to overrule the early case.

First, it was argued that *Tyson* had failed to bring about uniformity of decision and that its application discriminated against citizens of a state by noncitizens. Justice Brandeis cited recent researches¹¹⁰⁵ indicating that § 34 of the 1789 Act included court decisions in the phrase "laws of the several States." "If only a ques-

¹¹⁰¹ 304 U.S. 64 (1938). Judge Friendly has written: "Having served as the Justice's [Brandeis'] law clerk the year *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* came before the Court, I have little doubt he was waiting for an opportunity to give *Swift v. Tyson* the happy dispatch he thought it deserved." H. FRIENDLY, *BENCHMARKS* 20 (1967).

¹¹⁰² C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 355 (4th ed. 1983). See Judge Friendly's exposition, *In Praise of Erie—And of the New Federal Common Law*, in H. FRIENDLY, *BENCHMARKS* 155 (1967).

¹¹⁰³ 304 U.S. at 157–64, 171 n.71.

¹¹⁰⁴ This result was obtained in retrial in federal court on the basis of Pennsylvania law. *Tompkins v. Erie Railroad Co.*, 98 F.2d 49 (3d Cir. 1938), *cert. denied*, 305 U.S. 637 (1938).

¹¹⁰⁵ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 72–73 (1938), citing Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 84–88 (1923). See C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 353 (4th ed. 1983).