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# Horizontal Erie and the Presumption of Forum Law

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## HORIZONTAL *ERIE* AND THE PRESUMPTION OF FORUM LAW

Michael Steven Green\*

*According to Erie Railroad v. Tompkins and its progeny, a federal court interpreting state law must decide as the state's supreme court would. In this Article, I argue that a state court interpreting the law of a sister state is subject to the same obligation. It must decide as the sister state's supreme court would.*

*Horizontal Erie is such a plausible idea that one might think it is already established law. But the Supreme Court has in fact given state courts significant freedom to misinterpret sister-state law. And state courts have taken advantage of this freedom, by routinely presuming that the law of a sister state is the same as their own—often in the face of substantial evidence that the sister state's supreme court would decide differently. This presumption of similarity to forum law is particularly significant in nationwide class actions. A class will be certified, despite the fact that many states' laws apply to the plaintiffs' actions, on the ground that the defendant has failed to provide enough evidence to overcome the presumption that sister states' laws are the same as the forum's. I argue that this vestige of Swift v. Tyson needs to end.*

*Applying horizontal Erie to state courts is also essential to preserving federal courts' obligations under vertical Erie. If New York state courts presume that unsettled Pennsylvania law is the same as their own while federal courts in New York do their best to decide as the Pennsylvania Supreme Court would, the result will be the forum shopping and inequitable administration of the laws that are forbidden under Erie and its progeny. As a result, federal courts have often held that they too must employ the presumption of similarity to forum-state law, despite its conflict with their obligations under vertical Erie. Applying horizontal Erie to state courts solves this puzzle.*

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## INTRODUCTION

We all know the story. At the time of *Swift v. Tyson*,<sup>1</sup> federal courts thought of the common law as a “brooding omnipresence”<sup>2</sup> about which they could make their own judgments. All that ended with *Erie Railroad v. Tompkins*.<sup>3</sup> The common law, Justice Brandeis argued, is always “the law of [a] State existing by the authority of that State.”<sup>4</sup> A federal court could not come to its own conclusions about the common law in Pennsylvania. It had to defer to the Pennsylvania Supreme Court.<sup>5</sup>

Another story, which is remembered a good deal less, is that state courts had their own horizontal version of *Swift v. Tyson*. If a state court in New York had entertained the facts in *Erie*, it too might have come to its own judgment about the common law in Pennsylvania.<sup>6</sup> Even less recognized is that horizontal *Swift* never had its *Erie*. To a large extent, state courts *still* ignore sister-state courts when interpreting sister-state law. I will argue that

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1. 41 U.S. 1 (1842).

2. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

3. 304 U.S. 64 (1938).

4. *Erie*, 304 U.S. at 79 (internal quotation marks omitted).

5. *Id.* at 80.

6. See *St. Nicholas Bank v. State Nat’l Bank*, 27 N.E. 849, 851 (N.Y. 1891); *Faulkner v. Hart*, 82 N.Y. 413 (1880); Alfred Hill, *The Erie Doctrine and the Constitution* (pt. 2), 53 *Nw. U. L. REV.* 541, 598 (1958). Examples of other states accepting *Swift* include *Franklin v. Twogood*, 25 *Iowa* 520, 531 (1868); *Roads v. Webb*, 40 *A.* 128 (Me. 1898); and *Fellows v. Harris*, 20 *Miss.* 462, 466–67 (1849).

it is time for this legacy of *Swift v. Tyson* to end. Although horizontal *Swift* takes a number of forms, my focus in this Article will be on the presumption, commonly used by state courts, that unsettled sister-state law is the same as the law of the forum state.<sup>7</sup>

The obligations of a state court when interpreting sister-state law go to the heart of what it means to have fifty states cohabiting a federal union. The vertical analogue—namely, a federal court’s obligations when interpreting state law—has been given plenty of judicial and academic scrutiny. But aside from one unfortunate pronouncement by the Supreme Court, made without argument,<sup>8</sup> and a fifty-year-old student note,<sup>9</sup> discussion of the horizontal question has been largely absent.<sup>10</sup>

7. The presumption that unsettled sister-state law is the same as forum law is a relatively mild example of horizontal *Swift*, since the forum still respects *settled* sister-state law; that is, law that has been unambiguously decided by the sister state’s courts. A more dramatic example of horizontal *Swift* exists in Georgia. Although Georgia state courts will apply a sister state’s statute to events in the sister state and respect how its courts have interpreted the statute, *see, e.g., Calhoun v. Cullum’s Lumber Mill, Inc.*, 545 S.E.2d 41, 44 (Ga. Ct. App. 2001), if the matter is governed by the common law, they will ignore the decisions of the sister state’s courts entirely and come to their own judgment about what this common law is. *E.g., id.* at 45; *Briggs & Stratton Corp. v. Royal Globe Ins. Co.*, 64 F. Supp. 2d 1340, 1343–44 (M.D. Ga. 1999); *Trs. of Jesse Parker Williams Hosp. v. Nisbet*, 7 S.E.2d 737, 741 (Ga. 1940); *Leavell v. Bank of Commerce*, 314 S.E.2d 678, 678 (Ga. Ct. App. 1984); John B. Rees, Jr., *Choice of Law in Georgia: Time to Consider a Change?*, 34 MERCER L. REV. 787, 789–90 (1983); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 821 n.85 (1989). The constitutionality of Georgia’s approach has not been challenged. *But see Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 n.6 (11th Cir. 1987) (stating, in dicta, that Georgia’s approach must be limited by constitutional considerations); *In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 677 (N.D. Ga. 2003) (same).

8. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730–31 (1988).

9. Note, *Misconstruction of Sister State Law in Conflict of Laws*, 12 STAN. L. REV. 653 (1960).

10. For a rare exception, see Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1840–41 (2005). There is a literature on the presumption of similarity to forum law in class action certification. *See, e.g.,* Russell J. Weintraub, *Choice of Law as an Impediment to Certifying a National Class Action*, 46 S. TEX. L. REV. 893 (2005); Patrick Woolley, *Erie and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723 (2006). But it does not address the presumption’s constitutionality in any detail.

One might wonder why no sizeable literature on the topic of this Article exists. Why has there been so little interest in a state court’s constitutional obligations when interpreting the law of a sister state? One reason is that the question of how state courts should decide unsettled issues of sister-state law has tended to be pigeonholed as a purely evidentiary matter to be determined by forum law. *E.g.,* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136(2) (1971). Supporting this conclusion was the tradition of treating the content of sister-state law as a question of fact rather than law. *See infra* Section III.A. So understood, the question did not appear to implicate significant constitutional concerns.

Another reason is probably the following: to the extent that a state court has constitutional obligations when interpreting sister-state law, these obligations have generally been thought to depend upon its constitutional obligation to apply the law of the sister state. Under this theory, if the court is constitutionally permitted to apply forum law but chooses to apply sister-state law instead, no interesting interpretive obligations are possible, since any misinterpretation of sister-state law could simply be reconceived of as the permissible application of forum law. *E.g.,* Note, *supra* note 9, at 653. Because cases in which a state court is constitutionally obligated to apply sister-state law are relatively rare, *see infra* Section II.A, discussions of the topic of this Article are correspondingly rare. It is only with the rise of nationwide class actions—in which it is often clear that the forum is constitutionally prohibited from applying its own law—that the problem has been put into focus. In Part V, *infra*, I argue, however, that the assumption that a state court with lawmaking power cannot

I begin with an account of the vertical *Erie* doctrine.<sup>11</sup> The basis of vertical *Erie* is the recognition that a federal court does not have lawmaking power simply because it has jurisdiction over a case. The transaction being litigated can be subject to the exclusive lawmaking power of a state. If it is, the federal court has an affirmative duty to respect state lawmaking power by doing its best to discern the content of state law. For example, if state law is unsettled—in the sense that there are no state court decisions on point—the federal court remains obligated to predict, on the basis of all the available evidence, what the state’s supreme court would do. It cannot presume that unsettled state law is the same as federal law.

I then argue that state courts are bound by a horizontal *Erie* doctrine.<sup>12</sup> Like a federal court, a state court does not have lawmaking power simply because it has jurisdiction over a case. The transaction being litigated can be subject to the exclusive lawmaking power of a sister state. If it is, the forum has the same interpretive obligations that a federal court has under vertical *Erie*. It has an affirmative duty to respect the sister state’s lawmaking power by doing its best to discern the content of the sister state’s law. It may not presume that unsettled sister-state law is the same as its own. I argue that the Supreme Court has failed to attribute horizontal *Erie* obligations to state courts because it has confused these obligations with the circumstances under which it should *review* whether the obligations have been abided by.

Next, I explore how state courts violate their horizontal *Erie* obligations by employing a presumption of similarity to forum law.<sup>13</sup> The presumption can be particularly important in nationwide class actions. A class will be certified, even though the plaintiffs have causes of action under many sister states’ laws, on the grounds that the defendant has not provided sufficient evidence to overcome the presumption that these laws are the same as the forum’s.

I then discuss the effect of state courts’ violations of horizontal *Erie* on federal courts.<sup>14</sup> Consider a federal court in New York deciding an unsettled issue of Pennsylvania law. If New York state courts would presume that Pennsylvania law is the same as their own, the federal court, it seems, must employ the same presumption, or the result will be the forum shopping and inequitable administration of the laws that are forbidden under *Erie* and its progeny. Rather than deciding the issue of Pennsylvania law as the Pennsylvania Supreme Court would, the federal court must decide the issue as the New York Court of Appeals would.

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have a constitutional duty to interpret sister-state law with fidelity is mistaken. Even if a state court *could* have applied forum law, having chosen to apply the law of a sister state it is generally obligated to interpret sister-state law as the sister state’s supreme court would. For this reason, the constitutional duty to interpret sister-state law with fidelity applies widely.

11. *See infra* Part I.

12. *See infra* Part II.

13. *See infra* Part III.

14. *See infra* Part IV.

Applying horizontal *Erie* obligations to state courts solves this puzzle. It adds nothing to tell a federal court in New York to interpret unsettled Pennsylvania law as the New York Court of Appeals would if the New York Court of Appeals itself is obligated under horizontal *Erie* to decide as the Pennsylvania Supreme Court would. But at this point in the Article, I have shown only that New York state courts are bound by a horizontal *Erie* obligation to interpret Pennsylvania law with fidelity if they are constitutionally obligated to apply Pennsylvania law. What happens when both New York and Pennsylvania have lawmaking power? If New York state courts could apply New York law but choose to apply Pennsylvania law instead, are they free to misinterpret Pennsylvania law on the ground that any misinterpretation is a permissible exercise of domestic lawmaking power?

I end the Article by arguing that a state court with lawmaking power, having chosen to apply sister-state law to the facts, is bound to interpret this law with fidelity.<sup>15</sup> As a result, horizontal *Erie* obligations apply widely—to most cases in which state courts interpret sister-state law. In addition, federal courts' vertical *Erie* obligations are preserved: a federal court in New York must interpret Pennsylvania law as the Pennsylvania Supreme Court would, whether or not New York has lawmaking power.

### I. VERTICAL *ERIE*

The argument of this Article is driven by analogies between a federal court's vertical *Erie* obligations when interpreting state law and a state court's horizontal obligations when interpreting the law of a sister state. It is essential, therefore, to have a clear view of just what interpretive obligations vertical *Erie* puts upon federal courts.

#### A. Erie Railroad v. Tompkins

At 2:30 a.m. on July 27, 1934, Harry Tompkins was walking along a footpath parallel to some train tracks in Pennsylvania when he was hit by something protruding from a passing train operated by the Erie Railroad Company.<sup>16</sup> Tompkins sued Erie for negligence in the Federal District Court for the Southern District of New York. The source of federal jurisdiction was diversity.<sup>17</sup> Because Tompkins was trespassing when the accident occurred, an important issue in the case was Erie's standard of care. Appealing to decisions of the Pennsylvania Supreme Court,<sup>18</sup> Erie argued that it could be

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15. See *infra* Part V.

16. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 69 (1938).

17. 28 U.S.C. § 1332 (2006). Tompkins was a Pennsylvania citizen, and the Erie Railroad was deemed to be a New York citizen because it was incorporated in New York. This was prior to the amendment of the diversity statute in 1958 to treat the citizenship of a corporation as its state of incorporation and any state "where it has its principal place of business." *Id.* § 1332(c)(1).

18. Koontz v. Balt. & Ohio R.R. Co., 163 A. 212 (Pa. 1932); Falchetti v. Pa. R.R. Co., 160 A. 859 (Pa. 1932).

found liable only if it acted with wanton or willful negligence.<sup>19</sup> The district court concluded that a simple negligence standard could be used, and the Second Circuit agreed, holding with *Tompkins* that the issue could be “determined in federal courts as a matter of general law.”<sup>20</sup>

Both *Tompkins*’s and *Erie*’s arguments employed a framework established almost a hundred years earlier by Justice Story in *Swift v. Tyson*.<sup>21</sup> *Erie* argued that its common law duty of care fell into the category in *Swift* called *local*—that is, it concerned things “immovable and intraterritorial in their nature and character.”<sup>22</sup> *Tompkins* argued that *Erie*’s duty of care was *general*, which meant that a federal court was free to come to its own conclusion about what the common law was. There was a long line of cases holding that a railroad’s duty of care to its passengers and employees was general, as the interstate character of train travel would lead one to expect.<sup>23</sup> But *Tompkins* was neither a passenger nor an employee—indeed, he wasn’t on a train at all—so the case was difficult to characterize.

Story’s distinction between local and general common law was part of his interpretation of section 34 of the Judiciary Act of 1789, the statute that created the lower federal court system. This section, also known as the Rules of Decision Act, stated that “the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”<sup>24</sup> Story admitted that the Act required a federal court sitting in diversity to abide by any relevant state statutes. Furthermore, it was bound by state court decisions concerning local common law. But the Act did not require the federal court to follow state court decisions concerning general common law.<sup>25</sup>

Although in his opinion in *Erie* Justice Brandeis described this general common law as “federal,”<sup>26</sup> this is misleading, because it suggests that this general common law is binding under the Supremacy Clause upon a state court. In fact, general common law was thought of as neither federal nor state, leaving state and federal courts free to ignore each other’s decisions on the matter.

Even though both *Tompkins* and *Erie* assumed Story’s reading of the Rules of Decision Act, the Supreme Court took the case as an opportunity to overrule *Swift*. Justice Brandeis’s opinion might be read simply as a revised

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19. *Erie*, 304 U.S. at 70.

20. *Id.*

21. 41 U.S. 1 (1842).

22. *Swift*, 41 U.S. at 18.

23. *E.g.*, *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 370 (1893) (fellow-servant rule); *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101, 106 (1893) (punitive damages).

24. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (current version at 28 U.S.C. § 1652 (2006)). When the Act was amended in 1948, the phrase “trials at common law” was changed to “civil actions” to make it clear that the Act applied to actions in equity. 28 U.S.C. § 1652 (2006).

25. *See Swift*, 41 U.S. at 19.

26. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

reading of the Act, in light of evidence that the term “laws of the several states” was intended to include both local and general common law.<sup>27</sup> So understood, *Erie* would merely be a case of statutory interpretation. But Brandeis took his reading of the Act to be compelled by more fundamental considerations.

Brandeis argued that *Swift* was the product of a jurisprudential error, the misconception of general common law as “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”<sup>28</sup> All law exists only as the creation of some definite authority. It followed that the common law rule to be applied in *Erie* was either *federal* common law, rather than the amorphous general common law of *Swift*, or the common law of a *state*. But the Constitution did not give federal courts authority to regulate the transaction at issue in *Erie*.<sup>29</sup> In particular, a grant of lawmaking power could not be found in the decision to give federal courts diversity jurisdiction.<sup>30</sup> Accordingly, the federal court had to apply state common law, as decided by the state’s courts.<sup>31</sup>

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27. *Id.* at 72–73. In arguing that the Act was intended to cover general common law, Brandeis relied heavily upon Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). Warren’s reading of the Act has subsequently been questioned. JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 502–03 (1971); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

28. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting), *quoted in Erie*, 304 U.S. at 79.

29. *Erie*, 304 U.S. at 78 (“[N]o clause in the Constitution purports to confer such a power [to create common law] upon the federal courts.”). Brandeis went well beyond this principle to also insist upon a limitation on Congress’s power “to declare substantive rules of common law applicable in a State.” *Id.* This was pure dicta, given that the Rules of Decision Act, even as interpreted by *Swift*, cannot be understood as a congressional grant to federal courts to create general rules of common law.

30. *Tex. Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973) (stating that a principle of *Erie* is that the jurisdictional grant of diversity does not give federal courts the power to develop a “concomitant body of general federal law”); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 915–23 (1986); Paul J. Mishkin, *The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 799 (1957); Adam N. Steinman, *What is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 247–48 (2008).

31. *Erie*, 304 U.S. at 79. In this Article, I do not consider a serious challenge to the vertical *Erie* doctrine. Arguably the question of whether a federal court should respect state court decisions when interpreting state law is an issue to be decided by the state courts themselves. And since some state courts still accepted *Swift v. Tyson* at the time that *Erie* was decided, they did not think that a federal court should listen to them when interpreting the general common law in their state. Indeed, this remains a problem with Georgia, which has yet to give up its *Swiftian* approach to the common law. *See supra* note 7.

By claiming that state decisions are binding on federal courts without considering the state’s own views on the matter, Brandeis appeared to violate his own command to respect the authority of state courts concerning state law. What he should have said, it seems, was that federal courts are bound by state decisions if the state supreme court says that they are. In Michael Steven Green, *Erie’s Suppressed Premise*, 95 MINN. L. REV. 1111 (2011), I argue that vertical *Erie* in fact puts a limitation on state courts’ power over their own law. A state supreme court can free federal courts from the duty to abide by its decisions only indirectly, by freeing the courts of its own state from the



Brandeis assumed that the only common law available was Pennsylvania's. He did not consider what the federal court in *Erie* should do if both Pennsylvania and New York common law could permissibly be applied to the facts. I shall not address this issue myself until Part IV. Until then I shall assume, as a means of simplifying my argument, that if a federal court is constitutionally obligated to apply state law, it has no discretion in choosing which state's law to use. Only later will I discuss how my argument should be altered to take into account concurrent state lawmaking power.

### B. Federal Common Law

Under *Erie*, federal courts do not possess lawmaking power by virtue of having subject matter jurisdiction. But that does not mean that they cannot possess lawmaking power for *other* reasons. The point is not merely that they can interpret federal statutes or create interstitial common law when required to fill in gaps in these statutes.<sup>32</sup> They sometimes create federal common law without such direct statutory authorization, when there is a sufficient federal interest.

For example, the same day that *Erie* was decided, the Court also decided *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,<sup>33</sup> in which it was determined, in an opinion again by Justice Brandeis, that the apportionment of water from the La Plata River between Colorado and New Mexico is a question of federal common law.<sup>34</sup> This power to create common law was not tied specifically to some federal statute. Other cases in which the Court has found the power to make federal common law are those involving the rights and obligations of the United States<sup>35</sup> and international relations.<sup>36</sup>

This federal common law is compatible with Brandeis's opinion in *Erie*. It is *federal* common law, not general common law of the *Swiftian* variety, because it is the self-avowed creation of federal courts and is binding upon state courts through the Supremacy Clause. Federal courts have the power to create this common law, however, not because of federal jurisdiction, but due to a sufficient federal interest.<sup>37</sup>

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same duty. I also argue that there is an analogous horizontal limitation that prohibits a state supreme court from directly freeing sister states from the duty to abide by its decisions.

32. See, e.g., *Carey v. Phipus*, 435 U.S. 247, 264–67 (1978).

33. 304 U.S. 92 (1938).

34. *Hinderlider*, 304 U.S. at 110.

35. E.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

36. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). For further discussion of the federal interests found sufficient to create federal common law, see Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 Nw. U. L. REV. 585, 630–44 (2006).

37. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988). The actual scope of federal courts' power to make common law is the subject of an enormous literature, which I will not discuss here. The broadest readings can be found in Weinberg, *supra* note 7, at 813 (finding power wherever there is "a legitimate national governmental interest"), and Mishkin, *supra* note 30, at 800 (finding power in areas "substantially related to an established program of government operation"). The narrowest, driven by concerns about separation of powers and federal courts' lack of accountability to the electorate, would tie federal common lawmaking powers closely to the specific intentions of

The principle that federal jurisdiction does not confer lawmaking power on federal courts must be qualified, however, even though this requires using the perilous terms *substance* and *procedure*.<sup>38</sup> The common law that the federal court in *Erie* could not create—namely, Erie’s standard of care—was *substantive* in the following sense: its primary purpose was to define the right upon which Tompkins was attempting to sue.<sup>39</sup> Law that is substantive in this sense can be contrasted with *procedural* law, which regulates the means by which substantive rights are litigated in a court system.

*Erie* did not hold that a grant of jurisdiction could not give federal courts the power to create procedural common law.<sup>40</sup> Indeed, it is commonly thought that jurisdiction gives federal courts some power to make procedural common law.<sup>41</sup> But there is another *Erie* doctrine, of nonconstitutional origin,<sup>42</sup> that puts limits on federal courts’ ability to create procedural common law when entertaining state law actions. They are constrained by a “policy”<sup>43</sup> that recommends uniformity between federal procedural common law and the procedural law of the state where the federal court is located, if this uniformity is needed to discourage vertical forum shopping and to avoid the inequitable administration of the laws.<sup>44</sup> The bulk of the cases described as *Erie* problems by federal courts, as well as the bulk of the *Erie* cases read

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Congress. See Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761 (1989). Somewhere between these two extremes are Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263 (1992), and Field, *supra* note 30.

38. Although the definitions of the terms “substance” and “procedure” that I offer capture how the terms are often used, I do not want to suggest that they are never given different meanings. Cf. Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 YALE L.J. 333 (1933).

39. It was a matter of substantive law even though it had a subsidiary purpose of determining the means by which alleged violations were litigated, for example, by determining how the complaint should be drafted or when an action should be dismissed for failure to state a claim.

40. Cf. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring) (“The line between procedural and substantive law is hazy but no one doubts federal power over procedure.”).

41. See Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 846–78 (2008).

42. Many identify the Rules of Decision Act as the statutory source of the nonconstitutional doctrine. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 707–18 (1974); Richard D. Freer, *The State of Erie After Gasperini*, 76 TEX. L. REV. 1637, 1637 (1998); Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 364 (1977). Although I think this is a mistake, I will not argue that here.

43. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

44. *Hanna v. Plumer*, 380 U.S. 460, 467–68 (1965). It is a difficult question just where the constitutional *Erie* doctrine ends and the nonconstitutional one begins. At what point does state law stop defining the rights being sued upon and start regulating the means by which these rights are litigated? One of the few times the Supreme Court has dealt with this question is *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525, 535 (1958). In that case, Justice Brennan noted that *Erie* constitutionally demanded that federal courts sitting in diversity “respect the definition of state-created rights and obligations by the state courts,” including state procedural law “bound up with these rights and obligations.” *Id.* Beyond that area, the “policy” in favor of uniformity between state and federal procedure applied. *Id.* at 536–38.

in a first-year civil procedure course, concern this nonconstitutional question.<sup>45</sup>

The difference between the constitutional and the nonconstitutional *Erie* doctrines can be highlighted by considering *Erie Railroad v. Tompkins* itself. The federal court's constitutional obligation in *Erie* was to respect the law-making power of the state whose substantive common law was being applied, namely, *Pennsylvania*. On the other hand, when making procedural common law it also had a nonconstitutional duty—not discussed in *Erie* but explored in subsequent cases—to draw upon *New York's* procedural law if that was necessary to avoid forum shopping and the inequitable administration of the laws.<sup>46</sup>

Confusion between the *Erie* doctrines is encouraged by federal courts' tendency to describe as “substantive” the state law standards they are obligated to apply for nonconstitutional reasons.<sup>47</sup> So, for example, we are told that statutes of limitations are “substantive” for *Erie* purposes,<sup>48</sup> even though the argument for using the forum state's statute of limitations is not that it helps define the state law rights being sued upon but that federal limitations that differ from the forum state's would promote vertical forum shopping and the inequitable administration of the laws.<sup>49</sup> If the argument against using federal common law limitations were that they are truly substantive in the relevant sense, the applicable statute of limitations would not be that of the forum state but that of the state whose law provided the substantive cause of action sued upon. Throughout this Article, I will use the term “substantive” in the narrow sense, to refer only to law that helps define the cause of action sued upon.

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45. *E.g.*, *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504, 508–09 (2001); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996); *Byrd*, 356 U.S. at 525; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Guaranty Trust Co.*, 326 U.S. 99. To make matters worse, there is yet *another* category of “*Erie*” case that concerns the validity not of federal procedural common law but of Federal Rules of Civil Procedure. These rules are not subject to the same limitations that federal procedural common law is. Their validity depends solely upon two considerations: whether they are within Congress's power to regulate the procedure of federal courts and whether they satisfy the limitations of the Rules Enabling Act, 28 U.S.C. § 2072, in which Congress delegated its regulatory power to the Supreme Court. *See Hanna*, 380 U.S. at 464, 469–74. For a recent discussion, see *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S. Ct. 1431, 1442–44 (2010).

46. The matter is somewhat complicated by the fact that the nonconstitutional policy can recommend the application of the procedural law of a state other than New York if that law would be applied by New York state courts. For example, if New York had a borrowing statute according to which Pennsylvania's rather than New York's statute of limitations would be used when the plaintiff is suing under Pennsylvania substantive law, the nonconstitutional doctrine would recommend the application of Pennsylvania's statute of limitations in federal court in New York.

47. *E.g.*, *Gasperini*, 518 U.S. at 427 (“Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.”).

48. *E.g.*, *Jinks v. Richland Cnty.*, 538 U.S. 456, 465 (2003).

49. In some relatively rare cases, statutes of limitations *are* understood as substantive, meaning that they define the very right being sued upon. *See, e.g.*, *Davis v. Mills*, 194 U.S. 451, 454 (1904); *Bournias v. Atl. Mar. Co.*, 220 F.2d 152, 154–56 (2d Cir. 1955); RESTATEMENT OF CONFLICT OF LAWS §§ 603–605 (1934).

### C. The Predictive Method

The fact that federal courts sitting in diversity<sup>50</sup> must apply state substantive law puts a number of obligations on them when applying and interpreting this law. Properly describing these obligations is important because, I will argue, similar obligations apply horizontally to state courts concerning sister-state law.

First of all, a federal court is obligated to adjudicate in accordance with state law if it recognizes that state rather than federal law validly applies.<sup>51</sup> It may not employ federal law simply because the parties themselves have accepted federal law as the rule of decision.<sup>52</sup> It has an affirmative duty to protect state lawmaking power.

It follows from this duty that federal courts must take judicial notice of state law, including the law of states other than the one in which the federal court is located.<sup>53</sup> To say that federal courts must take judicial notice of state

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50. For convenience only I describe federal courts that are obligated to apply state substantive law as those sitting in diversity. Federal courts can be obligated to apply state substantive law in other circumstances as well, such as when a federal court exercises supplemental jurisdiction.

51. See, e.g., *Pecheur Lozenge Co. v. Nat'l Candy Co.*, 315 U.S. 666 (1942) (per curiam) (holding *sua sponte* that plaintiff had no action under federal trademark or copyright law, although issue was not mentioned below, and directing that case be remanded for court of appeals to apply appropriate state law); *Owings v. Hull*, 34 U.S. (9 Pet.) 607, 625 (1835) (stating that duty to take judicial notice of state law follows from duty “to administer the laws of all the states in the union, in cases to which they respectively apply”). For the purposes of my argument, I concentrate on cases in which a *federal district court* has *recognized* that state rather than federal law validly applies. In such situations, the court must apply state law, even if the parties want the case to be adjudicated according to federal law. I set aside the more difficult question of how much energy the federal district court must expend determining whether state law validly applies when the parties themselves rely on federal law. Furthermore, although *Pecheur Lozenge* was a case in which a lower federal court’s failure to apply state law was corrected on appeal, it is important to recognize that it does not follow from a federal district court’s duty to apply state law that its failure to satisfy that duty will always be corrected above. For a brief discussion of similar issues in a horizontal context, see *infra* note 106.

52. Indeed, if party consent were sufficient to allow a federal court to apply federal law, the parties could manufacture federal jurisdiction for their case or controversy through their consent. But party consent or waiver is clearly insufficient to create federal subject matter jurisdiction. FED. R. CIV. P. 12(h)(3); cf. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152–53 (1908); *Campanella v. Commerce Exch. Bank*, 137 F.3d 885, 890 (6th Cir. 1998) (“[F]ederal courts have a continuing obligation to inquire into the basis of subject-matter jurisdiction to satisfy themselves that jurisdiction to entertain an action exists.”).

Notice that the displacement of state law by federal law can be a matter over which the parties have control, *if state law says it is*. For example, the state might have a default rule of contract law—in the sense that state law applies unless the parties provide an alternative in the contract. The parties might contract around the rule, not by spelling out the alternative, but simply by saying that the standard in federal law should be used. See U.C.C. § 1-105 cmt. 1 (2001); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971). Because the state’s courts would hold that the federal standard should be used, a federal court would be violating vertical *Erie* if it held otherwise. Federal question jurisdiction would not be available in such a case, however, since the cause of action would still fundamentally be under state contract law.

53. *Lamar v. Micou*, 114 U.S. 218, 223 (1885) (“The law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof.”); *Covington Drawbridge Co. v. Shepherd*, 61 U.S. (20 How.) 227, 232 (1857); *Pennington v. Gibson*, 57 U.S. (16 How.) 65, 72, 81 (1853); *Owings*, 34 U.S. (9 Pet.) at 625; *Cont’l Technical Servs., Inc. v. Rockwell Int’l Corp.*, 927

law means that they, rather than juries, shall determine what state law is and that they are not confined in their determination to evidence offered by the parties.<sup>54</sup> They must treat state law with the same level of concern that they treat federal law.<sup>55</sup>

Because federal courts must protect state lawmaking power, they must do their best to determine the content of state law, even if the evidence submitted by the parties is inadequate.<sup>56</sup> As a practical matter, of course, federal courts generally rely on the parties concerning evidence of state law, just as they rely on the parties concerning evidence of federal law.<sup>57</sup> But they are not permitted to point to the parties' failure to offer sufficient evidence of state law as relieving them of their duty to protect state lawmaking power. In particular, they cannot take the parties' failure as permitting them to presume that state law is the same as federal law.<sup>58</sup>

A federal court's duty to interpret state law with fidelity extends even to those cases in which state law is unsettled, in the sense that the state's courts have not decided the issue or there are lower state court decisions that conflict. Under *Erie* a federal court addressing an unsettled issue of state law must predict what the state supreme court would do.<sup>59</sup> The federal court

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F.2d 1198, 1199 (11th Cir. 1991) (per curiam); *Kucel v. Walter E. Heller & Co.*, 813 F.2d 67, 74 (5th Cir. 1987).

54. Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 974 (1958). It also means that the parties, in offering legal materials, are not constrained by the rules of evidence, and that the district court's conclusions of law can be reviewed on appeal de novo.

55. *Owings*, 34 U.S. (9 Pet.) at 625 ("[State law] is then, in no just sense, a foreign jurisprudence, to be proved, in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established, but it is to be judicially taken notice of in the same manner, as the laws of the United States are taken notice of by these courts."):

56. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 249 (1998) (Kennedy, J., concurring); *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *King v. Order of United Commercial Travelers of Am.*, 333 U.S. 153, 161 (1948).

57. See, e.g., *Great Am. Ins. Co. v. Glenwood Irrigation Co.*, 265 F. 594, 597 (8th Cir. 1920) ("Judicial notice . . . means that the federal court will apply the state statutes without formal proof of their existence and contents. It does not mean that the court must know and apply at all times every statute of the state, without having the existence and contents of such statutes brought to its attention at a proper time."); see also Currie, *supra* note 54, at 989–90.

58. I ignore for the moment the fact that federal courts will sometimes ease the burden of determining unsettled state law by employing the forum state's presumption of similarity to forum law. My current emphasis is on the impermissibility of a presumption of similarity to federal law. I will later argue that state courts may not employ a presumption of similarity to forum law for similar reasons. See *infra* Parts II–III.

59. *Baker*, 522 U.S. at 249 (Kennedy, J., concurring); *Estate of Bosch*, 387 U.S. at 465; *King*, 333 U.S. at 161; 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4501 (2d ed. 1996); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 705–06 (1995). For a discussion of some of the nuances of the predictive method, see Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1495–1517 (1997).

In this Article, I do not consider a fundamental challenge to the predictive method. Although the Supreme Court has claimed that the method follows from *Erie*, it did not consider state courts' own views on how their unsettled law may be interpreted by federal courts. What if the state supreme court does not demand that federal courts use the predictive method concerning its unsettled law? Indeed, what if it permits federal courts to presume that unsettled state law is the same as federal law? In Green, *supra* note 31, I argue that vertical *Erie* imposes a limitation on a state supreme

must defer to the decision that *would* exist if the unsettled issue had been brought up in the state court system and ultimately appealed to the state's supreme court.<sup>60</sup>

The predictive method has been criticized on the ground that it is inconsistent with the jurisprudential theory expressed in *Erie*. The common law, Brandeis argued, is created by courts. It would appear, therefore, that there simply is no state common law on an issue if it has not yet been decided by the state's courts. The same point would be true of interpretations of state statutes and constitutional law. There would be no state law on these interpretive questions until state courts had resolved them.<sup>61</sup>

Although this argument has some appeal, its logical conclusion is that a federal court must dismiss cases with unsettled state law.<sup>62</sup> Notice that a case would have to be dismissed even when there was only a *tiny* unresolved interpretive issue in what otherwise was a perfectly clear state statute or common law rule, provided that deciding the issue was necessary to resolving the case. The unsettled issue would not be a problem if the case had been brought in the state's courts, since they could make law to fill the gap. It would be devastating for a federal court, however, which lacks any capacity to make state law.

But the Supreme Court has held that a federal court may not abstain from hearing a case over which it has federal jurisdiction simply because an issue of state law is unsettled.<sup>63</sup> Diversity jurisdiction exists to protect out-of-state litigants from the potential bias that state courts might show in favor of their own domiciliaries. This protection, the Court has concluded, should not be cast aside simply because state law is unsettled.<sup>64</sup> This puts the

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court's power over its own law. It may not permit federal courts to presume that unsettled state law is the same as federal law. I also argue that the same obligation applies horizontally. A state's supreme court may not allow sister-state courts to presume that unsettled state law is the same as their own.

60. Technically, the federal court should refer to the hypothetical state supreme court decision even when there is a state supreme court decision on point, since that decision might be overruled by the state supreme court. Clark, *supra* note 59, at 1514–15. But when the probability that the state supreme court would overrule its own decision is small—for example, when the decision is recent—it is surely permissible to say simply that the decision is binding upon a federal court.

61. *See id.* at 1462–63.

62. *Cf. id.* at 1462 (“If agents of the state have not adopted rules of decision that provide determinate answers to the questions in the case at bar, then arguably there is simply no law to apply—state or federal—and federal courts should rule against the party who bears the burden of persuasion on the question at issue.”). Clark assumes that the proper response to the legal gap in the plaintiff's cause of action is dismissal for failure to state a claim. I believe that the court would instead be obligated to dismiss the action on jurisdictional grounds. Because dismissal for failure to state a claim means taking a stand on the legal permissibility of the defendant's actions, it too would require filling the gap with law. I cannot pursue the matter here, however.

63. *See Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943). Although state courts would have greater powers to dismiss such actions on jurisdictional grounds, at times they too can be compelled to take jurisdiction of an action under a sister state's law. *Hughes v. Fetter*, 341 U.S. 609, 611 (1951) (“[A state] cannot escape this constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent.”); *see also Broderick v. Rosner*, 294 U.S. 629, 642–43 (1935).

64. *See Meredith*, 320 U.S. at 234–35.

federal court in a quandary. It must decide the unsettled issue, yet it lacks the lawmaking power to do so.<sup>65</sup>

Although I cannot address this puzzle in detail in this Article, I believe that it can be solved in one of two ways. The first is to reject unforgiving positivism and conceive of state law as transcending the actual decisions of the state's courts. A federal court deciding an unsettled issue of state law would not be asserting lawmaking power but simply discovering and applying preexisting state law that had yet to be articulated by the courts of the state.

A simpler solution is to understand federal courts as having a very limited power to make state law. Assume that a federal court deciding an unsettled issue of state law is indeed making state law. The fact remains that the Constitution permits the federal court to take jurisdiction of the action with the unsettled issue, and prohibits states from restricting this jurisdiction.<sup>66</sup> We must conclude, therefore, that by ratifying the Constitution the states granted limited state lawmaking power to the federal courts.<sup>67</sup> This conclusion might seem flatly contrary to *Erie*, since federal courts would have substantive lawmaking power by virtue of having jurisdiction over state law cases. But it is still in the spirit of *Erie* because federal courts' powers to make state law are strictly limited. The ad hoc state law created by federal courts in cases with unsettled law will apply solely to the transaction being litigated. Their decisions will not have precedential value for future cases, including future cases entertained by federal courts themselves. Furthermore, when making state law, federal courts would still be constitutionally bound to respect state lawmaking power, by deciding as they predict the state's supreme court would.

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65. One possible solution is for the federal court to certify any unsettled question to the state's supreme court. Clark, *supra* note 59, at 1544–63 (arguing for a presumption in favor of certification whenever state law is unsettled). *But see* Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869 (2008) (criticizing the use of certification). But the Supreme Court has not required certification of such questions, leaving the matter to “the sound discretion of the federal court.” *Lehman Bros. v. Schein*, 416 U.S. 386, 390–91 (1974). What is more, a few states do not allow certification. Deborah J. Challener, *Distinguishing Certification from Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 RUTGERS L.J. 847, 866 n.133 (2007).

66. *Ry. Co. v. Whitton's Adm'r*, 80 U.S. 270, 286 (1871).

67. The situation would be somewhat different with respect to sister-state courts deciding unsettled issues of state law, since the state supreme court would be free to demand that they refuse to take jurisdiction of such cases. Any delegation of state lawmaking power to the sister-state courts would not be constitutionally compelled but would occur through the state supreme court's choice to make the state's causes of action transitory, in the sense that they can be entertained by sister-state courts.

To be sure, in *Crider v. Zurich Insurance Co.*, 380 U.S. 39 (1965) it appeared as if the Supreme Court concluded that a state may not make a cause of action nontransitory. The Court held that it was not a violation of the Full Faith and Credit Clause for an Alabama state court to take jurisdiction of an action under the Georgia Workmen's Compensation Act, even though the Act stated that a remedy could be provided only by the Georgia compensation board. But the Court appeared to treat the case as one in which Alabama had sufficient contacts to permissibly displace the Georgia law on the jurisdictional limitation with Alabama law. It is probable, therefore, that a state court without sufficient contacts to apply forum law would be bound to respect a sister state's treatment of its actions as nontransitory.

But the predictive method is vulnerable to another objection. Even though a federal court deciding an unsettled issue of state law must respect state lawmaking power, one might question whether the predictive method is the proper way to show this respect. In its crudest form, in which the federal court takes into account the prejudices, pathologies, and ideologies of the members of the state supreme court in order to make the most accurate prediction, the method arguably shows disrespect for state law by treating it as unprincipled.<sup>68</sup> It might be better to decide on the basis of the underlying reasoning expressed in state decisions, even if the federal court believes that the state supreme court will not be true to this reasoning.<sup>69</sup> Indeed, true fidelity to state law might go even further and require a federal court to decide on the basis of principles that are latent in state decisions.<sup>70</sup> This would still not signal a return to *Swift v. Tyson*, since a federal court could not attribute a principle to a state's law—no matter how much merit it had in its own right—that was not latent in the decisions of the state's courts.

Although for ease of exposition I assume in this Article that the predictive method follows from *Erie*, this assumption is not necessary for my argument. The ultimate goal of this Article is to demonstrate that state courts may not presume that unsettled sister-state law is the same as their own. The heart of my argument is that the obligations that apply to a federal court interpreting state law under vertical *Erie* also apply to a state court interpreting the law of a sister state. It is not necessary for my argument that federal courts are obligated under vertical *Erie* to use the predictive method. It is enough that they may not presume that unsettled issues of state law are the same as *federal law*. And this is something that even skeptics about the predictive method can accept.

## II. HORIZONTAL *ERIE*

Having considered the scope of federal courts' vertical *Erie* obligations, one might think that it is a straightforward matter to show that these same obligations apply horizontally. Constitutional arguments for interpretive fidelity are not limited to a vertical context. Federal courts have vertical *Erie* obligations in diversity cases because, lacking lawmaking power, they are constitutionally obligated to apply state law. But the same situation can arise horizontally. A state court with jurisdiction over a case can nevertheless lack lawmaking power and so be constitutionally obligated to apply the law of a sister state. It would appear to follow that such a court has the same interpretive obligations that a federal court has under vertical *Erie*.

To be sure, the circumstances in which a state court is obligated to apply sister-state law are rarer than those in which a federal court is obligated to

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68. Dorf, *supra* note 59, at 685–89.

69. E.g., Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-Erie World*, 46 WM. & MARY L. REV. 1399, 1423–31 (2005).

70. See, e.g., RONALD DWORKIN, JUSTICE IN ROBES 7–14 (2006); RONALD DWORKIN, LAW'S EMPIRE 66 (1986).



apply state law. The constitutional limitations on a state court's ability to apply its own law are the weak ones laid down by the Supreme Court in *Allstate Insurance Co. v. Hague*.<sup>71</sup> All it needs to satisfy the Due Process Clause of the Fourteenth Amendment<sup>72</sup> and the Full Faith and Credit Clause of Article IV<sup>73</sup> is "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."<sup>74</sup>

The fact remains, however, that jurisdiction over a case does not mean that the requirements in *Allstate* are satisfied. Consider, for example, a brawl in Pennsylvania between two Pennsylvanians. One participant in the brawl sues the other for battery in New York state court. Because state courts are courts of general subject matter jurisdiction, the New York state court's primary jurisdictional hurdle is obtaining personal jurisdiction over the defendant. But personal jurisdiction would exist if the defendant were served within New York while on a business trip there,<sup>75</sup> even though such contact would clearly be insufficient to permit the court to apply New York law to the brawl.

It is an easy matter, therefore, to construct cases in which a state court has jurisdiction but lacks lawmaking power. Finding actual cases is harder, however, because a forum without sufficient contacts for lawmaking power is likely to dismiss the action on the basis of *forum non conveniens*, which allows a court to decline jurisdiction if the action may more conveniently proceed in another court system.<sup>76</sup> Our New York state court, for example, would likely dismiss the Pennsylvania battery action on *forum non conveniens* grounds, since it would be more convenient to litigate the action in Pennsylvania state court. Nevertheless, cases of state courts without lawmaking power refusing to dismiss on *forum non conveniens* can be found,<sup>77</sup>

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71. 449 U.S. 302 (1981).

72. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

73. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."). I shall not discuss the limited circumstances in which other constitutional limitations, such as the Privileges and Immunities Clause, U.S. CONST. art. IV, § 2, cl. 1, or the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, might constrain state choice of law.

74. *Allstate*, 449 U.S. at 312–13; *id.* at 320–32 (Stevens, J., concurring).

75. *Bumham v. Superior Court*, 495 U.S. 604 (1990).

76. *E.g.*, *Boaz v. Boyle & Co.*, 46 Cal. Rptr. 2d 888 (Cal. Ct. App. 1995) (affirming *forum non conveniens* dismissal of product liability actions by non-Californians concerning exposure to DES outside of California); *Cinouis v. Hechinger Dep't Store*, 594 A.2d 731 (Pa. Super. Ct. 1991) (affirming *forum non conveniens* dismissal of action by New Jerseyan against Delaware corporation with principal place of business in Maryland for slip and fall occurring in New Jersey store). Of course, to say that a state court that retains jurisdiction is likely to have lawmaking power does not mean that it will choose to exercise that power. Despite being constitutionally permitted to apply forum law, it may nevertheless choose to apply the law of a sister state.

77. *E.g.*, *Williams v. Taylor Mach., Inc.*, 529 So. 2d 606 (Miss. 1988) (refusing dismissal of negligence action in Mississippi state court by Tennessee domiciliary against Tennessee corporation for an accident that occurred in Tennessee); *Shewbrooks v. A.C. & S., Inc.*, 529 So. 2d 557 (Miss. 1988) (refusing dismissal of action in a Mississippi state court brought by Delaware residents

often because the actions concerning which the forum has no lawmaking power are joined with those that have more substantial connections to the forum state.<sup>78</sup> In this Article I will concentrate on examples of such cases that are of considerable current significance, namely nationwide class actions. In *Phillips Petroleum Co. v. Shutts*,<sup>79</sup> the Supreme Court allowed a state court to exercise adjudicative jurisdiction over absent nonresident members of a plaintiff class, although these members lacked even the minimum contacts with the forum that would support personal jurisdiction, so long as the state court provided procedural due process protection.<sup>80</sup> Since these nonresident plaintiffs had virtually no contacts with the forum, and since the defendant's contacts with the forum were unrelated to the nonresident plaintiffs' actions, the state court was constitutionally prohibited from applying forum law.<sup>81</sup>

One would think, therefore, that in such actions horizontal *Erie* obligations would follow as a straightforward matter. The argument for horizontal *Erie* is not straightforward, however, because there are some doubts about whether a state court ever has a duty to apply sister-state law that is comparable to a federal court's duty to apply state law.<sup>82</sup> A federal court's obligations under vertical *Erie* follow from its duty to respect state lawmaking power. This is an obligation *to the state itself*, not merely to the parties. But it is not as clear that a state court's obligation to apply sister-state law under *Allstate* has its source in a duty to respect the sister state's lawmaking power. The duty may instead be solely one of protecting the parties before the court. If it is, the analogies to vertical *Erie* break down.

For example, a federal court sitting in diversity must apply state law even if it is unsettled. It must decide as it predicts the state's supreme court would. But if a state court is obligated solely to avoid frustrating the parties' reasonable expectations, it would generally have no duty to apply sister-state

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against non-Mississippi corporations for asbestos injuries received through exposure to defendants' products in Delaware, New Jersey, and Pennsylvania).

78. *E.g.*, *Murdoch v. A.P. Green Indus., Inc.*, 603 So. 2d 655 (Fla. Dist. Ct. App. 1992) (allowing personal injury action by non-Floridians against non-Floridian corporations concerning asbestos exposure occurring outside of Florida, because actions were joined to another action against defendant with principal place of business in Florida); *Beatrice Foods Co. v. Proctor & Schwartz, Inc.*, 455 A.2d 646 (Pa. Super. Ct. 1982) (allowing action by non-Pennsylvania corporation against non-Pennsylvania corporation concerning fire in Maryland to proceed in part because it was joined to an action against defendant with principal place of business in Pennsylvania).

79. 472 U.S. 797 (1985).

80. *Phillips*, 472 U.S. at 811–12.

81. *Id.* at 814–23.

82. One clear difference is that a state court can circumvent the duty to apply sister-state law by refusing to take jurisdiction of the case. Federal courts with jurisdiction do not have comparable freedom to refuse to take actions under state law. *E.g.*, *Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943). But the question remains whether, once a state court *has* chosen to take jurisdiction, it can have an obligation to apply the law of a sister state comparable to a federal court's vertical *Erie* obligation to apply state law. Furthermore, there may be circumstances in which a state court is indeed obligated to take jurisdiction of an action under a sister state's law. *Hughes v. Fetter*, 341 U.S. 609, 611 (1951) (“[A state] cannot escape this constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent.”); *see also Broderick v. Rosner*, 294 U.S. 629 (1935).

law that is unsettled, since the failure to apply the likely decision of the sister state's supreme court would usually not frustrate party expectations. An obligation to apply the likely decision would arise only in those relatively rare cases in which the evidence of how the sister state's supreme court would decide was sufficiently robust and available at the time of the transaction being litigated, such that party expectations could have coalesced around it.

Likewise, a federal court sitting in diversity may not point to the parties' failure to offer evidence of state law as licensing it to apply federal law. No matter how difficult the parties have made its job, it must do its best to predict how the state supreme court would decide. But if a state court is obligated only to protect the interests of the parties before it, any duties that it has to apply sister-state law should be waivable by those parties. Their failure to offer evidence of sister-state law should license the court to apply the law of the forum.

In short, horizontal *Erie* obligations will exist only if state courts have a duty to respect sister-state lawmaking power that is comparable to federal courts' duty to respect the lawmaking power of the states. It is essential, therefore, to consider *to whom* the obligation in *Allstate* is owed.

#### A. Full Faith and Credit

*Allstate* points both to the frustration of party expectations and to the absence of forum-state interests as reasons that the application of forum law can be "arbitrary" or "fundamentally unfair." If the forum state lacks sufficient contacts, the application of forum law will be impermissible, not merely because the parties could not have reasonably anticipated this law applying at the time the transaction occurred<sup>83</sup> but also because applying forum law would serve no legitimate regulatory purpose of the forum state.<sup>84</sup>

As *Allstate* shows, a contact could be relevant for party expectations and not for state interests, or for state interests and not for party expectations. Ralph and Lavina Hague were both residents of Hager City, Wisconsin, only one and a half miles from the Minnesota border, when Ralph was killed in an accident in Wisconsin. The other participants in the accident, none of whom had insurance, were also Wisconsin residents. After her husband's death, Lavina Hague moved to Minnesota and married a Minnesota resident. She then brought suit in Minnesota state court seeking a declaratory judgment that Minnesota law applied to her recovery under her husband's automobile liability insurance policies with Allstate, which were entered into in Wisconsin. Her husband had insured three cars, and under Minnesota law the uninsured-motorist coverage on each car could be "stacked," provid-

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83. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317–18 (1981). The same consideration is mentioned in *Phillips*, 472 U.S. at 822 (application of Kansas law to gas leases arbitrary and unfair because "[t]here is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control").

84. See *Allstate*, 449 U.S. at 314–15, 318, 319. State interests are also appealed to in *Phillips*, 472 U.S. at 819, 822.

ing a maximum compensation of \$45,000 for the accident. Under Wisconsin law, which prohibited stacking, the limit would be the maximum compensation of \$15,000 specified in an individual policy.

The Supreme Court held that the Minnesota trial court's decision to apply Minnesota law was constitutionally permissible. One contact the Court identified was Lavina Hague's residence in Minnesota. Such a contact could not be relevant for party expectations. At the time it entered into the insurance contracts, Allstate could not have anticipated that the plaintiff would move to Minnesota. But the contact did give Minnesota a regulatory interest. The Minnesota stacking law probably existed to increase the recovery available to insured parties residing in Minnesota, and that is just what the plaintiff was.<sup>85</sup> Notice that the possibility that Wisconsin has a *greater* interest in its law applying is constitutionally irrelevant to Minnesota's power. All the forum needs is *some* legitimate interest in applying its law. It is not required to subordinate its interests to the interests of a sister state, even when the latter are stronger.<sup>86</sup>

By the same token, a contact might be relevant for party expectations, but not for state interests. Consider the fact, which was known by Allstate, that Ralph Hague worked in Minnesota.<sup>87</sup> As Justice Powell noted in his dissent, this contact did not give Minnesota a legitimate interest, since applying the stacking law would not "further[] any substantial state interest relating to employment."<sup>88</sup> This is particularly true given that Hague was not killed while commuting to work. But the contact might be relevant for party expectations. In general, Allstate should not have been surprised about the Minnesota stacking law being applied to the insurance contract, since it agreed to cover accidents occurring outside Wisconsin and knew that Ralph Hague would be regularly driving to his place of employment in Minnesota.<sup>89</sup> That Allstate's expectations would not have been frustrated is further

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85. *Allstate*, 449 U.S. at 319.

86. *E.g.*, *Nevada v. Hall*, 440 U.S. 410, 422 (1979); *Pac. Emp'r Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493 (1939). As a result, the fact that Minnesota state courts may permissibly apply Minnesota law to a transaction does not mean that Wisconsin state courts could not have permissibly applied incompatible Wisconsin law to the same transaction. A number of legal scholars have criticized the Supreme Court's failure to establish a consistent system for distributing lawmaking power among the states. *E.g.*, William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 25-42 (1963); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 331-36 (1992). Others accept that such inconsistency is allowable but argue that the Constitution requires a state to use neutral rules for overcoming conflicts between state interests. For two different accounts of this requirement of neutrality, see Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997), and Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2528-29 (1999).

87. *Allstate*, 449 U.S. at 313-17.

88. *Id.* at 339 (Powell, J., dissenting).

89. *Id.* at 318 n.24. One might argue that Allstate could not have anticipated the application of Minnesota law to the facts in the *Allstate* case. After all, the accident at issue in *Allstate* did not occur while Ralph was commuting to Minnesota. Allstate's expectations were therefore violated by the application of Minnesota law. Justice Brennan appears to suggest that party expectations should not be so closely tied to the particular transaction litigated. *Id.* at 314.

supported by the fact that it could have included a choice-of-law provision in the insurance contract specifying that Wisconsin law would govern, but failed to do so.<sup>90</sup>

In his concurrence in *Allstate*, Justice Stevens recommended that considerations of state interests be assigned to the Full Faith and Credit Clause and party expectations to the Due Process Clause.<sup>91</sup> It is unlikely, however, that the contributions of each clause can be usefully disaggregated in this way.<sup>92</sup> The Supreme Court has not always interpreted the Due Process Clause as concerned solely with party expectations. When considering whether a state court's assertion of personal jurisdiction is compatible with due process, it has taken state interests into account.<sup>93</sup> Nor has it always interpreted the Full Faith and Credit Clause as concerned solely with state interests. When considering whether a state court is obligated under full faith and credit to respect a sister state's judgment, the Court has appealed to party expectations.<sup>94</sup> Because due process and full faith and credit each take into account both state interests and party expectations in these other areas, there is a reason to believe that both do so when applied to choice of law. This supports Justice Brennan's statement in his plurality opinion in *Allstate* that due process and full faith and credit restrictions on choice of law have converged.<sup>95</sup>

Some have gone further, however, to argue that the constitutional restrictions on choice of law are reducible to due process, in the sense that they protect only the interests of the parties.<sup>96</sup> Full faith and credit, which has traditionally been understood as protecting sister states,<sup>97</sup> has dropped out entirely. If this due process reading is correct, state courts will not have horizontal *Erie* obligations.

Notice that the due process reading is not supported by Justice Brennan's statement in *Allstate* that due process and full faith and credit have converged concerning choice of law. It may be true that both due process and full faith and credit take into account party expectations and state inter-

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90. *Id.* at 326–30 (Stevens, J., concurring).

91. *Id.* at 320–32 (Stevens, J., concurring).

92. *E.g.*, Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95, 96 (1984).

93. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (determining that existence of personal jurisdiction over defendant includes looking to “the forum State’s interest in adjudicating the dispute”).

94. *See Allen v. McCurry*, 449 U.S. 90, 95–96 (1980) (stating that Full Faith and Credit Act, 28 U.S.C. § 1738, “foster[s] reliance on adjudication”); *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 288–90 (1980) (White, J., concurring) (noting that a purpose of Full Faith and Credit Clause is protecting litigants’ reliance on finality of judgment).

95. *See Allstate*, 449 U.S. at 308 & n.10.

96. *E.g.*, EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* § 3.20 (4th ed. 2004); Robert A. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 74–79 (1981); Russell J. Weintraub, *Who’s Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17, 34 (1981).

97. *See Allstate*, 449 U.S. at 320 (Stevens, J., concurring); SCOLES ET AL., *supra* note 96, § 3.20.

ests. But to say that they have converged in this respect does not mean that they have converged concerning *who* is protected by the requirement that the forum state have an interest. Under the due process reading, this requirement protects only the parties. Under the reading advocated in this Article, the requirement also protects the regulatory interests of sister states.

Conversely, one cannot show that full faith and credit continues to play a role in choice of law simply by pointing to the fact that *Allstate* considers state interests as well as party expectations. That state interests are taken into account in the constitutional restrictions on choice of forum law is compatible with the idea that these restrictions protect only the parties before the court.

Consider the analogy of personal jurisdiction. The Supreme Court has said that the requirement that a defendant have minimum contacts with the forum state for it to assert personal jurisdiction does not merely protect the defendant “against the burdens of litigating in a distant or inconvenient forum,” but also ensures “that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”<sup>98</sup> A forum without minimum contacts lacks the power to assert personal jurisdiction over a defendant, not solely because the defendant would find it inconvenient, but also because the forum state lacks sufficient interests to justify an assertion of adjudicative power.

It does not follow, however, that personal jurisdiction protects the interests of sister states. If it did, the defendant’s consent or waiver would not allow a state court to assert personal jurisdiction when minimum contacts are absent.<sup>99</sup> After all, even if the defendant does not object to personal jurisdiction, her state of domicile might. The requirement that the forum state have sufficient adjudicative interests is compatible with a due process reading, for we can understand the requirement as protecting *the defendant* against an arbitrary assertion of personal jurisdiction. An assertion of personal jurisdiction is arbitrary in the absence of sufficient forum interests.<sup>100</sup> Since it is the defendant who is protected by the requirement, it is waivable by her.

*Allstate*’s requirement that the forum state have a legitimate interest in order to apply its law could be similar to the requirement of minimum contacts for personal jurisdiction. It could exist not to protect the sovereignty of sister states but to protect the parties against an arbitrary application of forum law. If this were true, party consent or waiver should allow a disinterested court to apply its law—or to presume that sister-state law is the same as its own.<sup>101</sup> My evidence that constitutional restrictions on choice of law are not reducible to due process, therefore, is not that state interests are

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98. *World-Wide Volkswagen*, 444 U.S. at 292.

99. Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 *YALE L.J.* 189, 212 (1998).

100. See A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 *U. CHI. L. REV.* 617, 637–40 (2006).

101. *Cf. D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972).

relevant to constitutional restrictions on choice of law but that party consent cannot always make the application of a state's law constitutionally permissible.

The due process reading is sometimes justified on the ground that an interested state court is never constitutionally obligated to apply the law of a sister state, even when the sister state's interests are greater.<sup>102</sup> But the fact that the duty to protect sister-state lawmaking power is *weak*, because it can be overridden by any legitimate forum interest, does not mean that it can *never* play a meaningful role. Consider two Californians who enter into a gambling contract in California, with payment to occur in California. Private gambling contracts are enforceable under Nevada law, but not under California law. The losing party refuses to pay, and the winner sues the loser in Nevada state court. Because Nevada lacks any legitimate interest, the court's duty under full faith and credit to respect California's lawmaking power would come into play. It would be obligated to protect California's interests in prohibiting gambling contracts by California domiciliaries, even if the parties consented to Nevada law applying.<sup>103</sup>

Nothing in *Allstate* or subsequent Supreme Court cases on the constitutional restrictions on choice of law supports the notion that the parties' consent would be sufficient to permit the Nevada court to apply Nevada law.<sup>104</sup> Furthermore, the idea that a disinterested state court has a duty to protect the regulatory interests of sister states is a very intuitive notion, particularly when one sets aside worries about the extent to which this duty would require a court to investigate sister-state law without the aid of the parties.<sup>105</sup> Assume, for example, that the Californians have *admitted* to the Nevada court that California law prohibits their contract, but they ask the court to apply Nevada law anyway. Under the due process reading, the court

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102. *E.g.*, SCOLES ET AL., *supra* note 96, § 3.20.

103. Consent to Nevada law might not be a complete capitulation on the defendant's part because she might have other defenses under Nevada law.

104. Party consent to forum law would be effective, however, if the court was constitutionally obligated to apply sister-state law only because of party expectations rather than sister-state interests. An example would be if the plaintiff, after entering into the gambling contract, moved to Nevada and then sued in Nevada state court. Because the plaintiff's domicile in Nevada would arguably give that state a legitimate interest in applying its law, the only constitutional hurdle to applying Nevada law would be the fact that the defendant was unable to anticipate Nevada law applying at the time that she entered into the contract. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 319 (1981); *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936). This constitutional restriction on the choice of Nevada law exists to protect the defendant and therefore is subject to her control.

Another situation where constitutional restrictions on the choice of forum law could be overcome by party consent is when the court is choosing between its own law and the law of a foreign nation. Because the Full Faith and Credit Clause does not extend to the laws of foreign nations, *Allstate*, 449 U.S. at 321 n.4 (1981) (Stevens, J., concurring), only due process can prohibit a state court from applying forum law. *E.g.*, *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08, 410–11 (1930). As a result, party consent should be enough to allow a disinterested state to apply its law. This does not mean, of course, that a state court may not choose, as a discretionary matter, to refrain from applying forum law out of respect for foreign interests, or that it might be required to do so under federal common law or international law.

105. *See supra* note 51.

could respect their choice. My guess, however, is that it would consider the application of Nevada law to be an unconstitutional encroachment upon California's regulatory interests.<sup>106</sup>

It is true that courts commonly respect the parties' consent to law in the context of litigation.<sup>107</sup> But the parties generally agree upon the law of a state with a legitimate interest, removing any full faith and credit worries. Courts have not considered whether party consent can allow a truly disinterested court to apply forum law. The same point applies to choice-of-law clauses in contracts, in which consent to law occurs before litigation. Although such clauses are generally upheld, the law chosen is usually that of a state with interests sufficient to satisfy full faith and credit.<sup>108</sup> Here too the question of

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106. It would follow that a disinterested state court that recognizes that it is obligated under full faith and credit to apply sister-state law must introduce this law sua sponte if the parties fail to do so. Some courts have already held that they are *permitted* to bring up sister-state law on their own motion. *E.g.*, *Oparaugo v. Watts*, 884 A.2d 63, 70 (D.C. 2005); *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759, 769 (Tex. App. 1999). I would add that, if disinterested, they *must* do so. (When they do, the parties must be given adequate notice and the opportunity to respond. *Cf.* *Surat v. Nu-Med Pembroke, Inc.*, 632 So. 2d 1136 (Fla. Dist. Ct. App. 1994).) This obligation would not apply, of course, if, by the sister state's own lights, the consent of the parties is sufficient to release them from sister-state law. *See supra* note 52.

Notice that in saying that a disinterested state court is obligated to introduce sister-state law sua sponte, I take no stand on the amount of energy it must expend investigating the possibility of sister-state law applying when the parties fail to mention it. My point is only that, having recognized that sister-state law applies, the court may not take the parties' failure to invoke such law as a license to apply the law of the forum. It also is important to recognize that it does not necessarily follow from an obligation to apply sister-state law that the failure to satisfy this obligation will be corrected on appeal.

The obligation to introduce sister-state law sua sponte has important consequences for the commonly held view that a complaint is legally sufficient unless challenged by the defendant. Consider, once again, a Nevada state court adjudicating a gambling contract between two Californians, entered into in California and with performance to occur in California. Let us assume that the complaint says nothing about which state's law governs (although it is clear from these facts that it is California's) nor about which cause of action the plaintiff claims to have under that state's law. It is generally said that if the defendant does not challenge the legal sufficiency of the plaintiff's complaint through a motion to dismiss for failure to state a claim, the action can proceed. If the plaintiff proves all of the facts in his complaint, he will receive his requested relief. The complaint is presumed to be legally sufficient in the absence of an adequate challenge by the defendant. Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1305 (1989). I believe that this is a mistake. The presumption of legal sufficiency, so understood, is incompatible with the Nevada court's duty to protect California's lawmaking power. I hope to pursue these issues in a later article.

107. *E.g.*, *Bryant v. Silverman*, 703 P.2d 1190 (Ariz. 1985) (allowing New Mexico and Texas plaintiffs to waive reliance on domiciliary law and rely only on law of Arizona, where other plaintiffs and defendant were domiciled); *see also* *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679 (N.Y. 1985) (ignoring applicability of law of Ohio, defendant's place of incorporation, because defendant failed to appeal to this law).

108. For example, under the *Restatement (Second) of Conflict of Laws*, a choice-of-law clause will not be enforced if "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971). Admittedly, comment f to this section would allow, as "reasonable," the choice of a jurisdiction with well-developed law, even if it has no substantial relationship to the contract. *Id.* § 187 cmt. f.

The UCC also will uphold choice-of-law clauses only if the state chosen bears a "reasonable" relationship to the transaction. U.C.C. § 1-105 (2001); *see also id.* § 1-105 cmt. 1 ("Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs."). The 2001 version of Article 1 of the UCC drops the



whether party consent alone would allow a disinterested state court to apply forum law has not been explored by the courts, although a few cases have indicated that it would not.<sup>109</sup>

If party consent cannot allow a disinterested state court to apply forum law, neither should party *waiver*—in particular, the parties' failure to offer evidence of the content of sister-state law. Consider our gambling contract entered into between Californians in California, with payment to occur in California. Assume that rather than consenting to Nevada law, the defendant simply fails to offer any evidence of whether California law allows gambling contracts to be enforced. The defendant has surely waived any due process rights that he has. Indeed, it is difficult to see how he has any due process rights to protect. He can hardly argue that the enforcement of the gambling contract is arbitrary or unreasonable. For all he knows, under California law gambling contracts are enforceable.

But the Nevada court's duty is not simply to the parties. Whatever the parties may say or do, the Nevada court has an obligation to protect California's lawmaking power. It must do its best to figure out what California law on the matter is. Just as a federal court sitting in diversity may not take the parties' failure to offer evidence of state law as licensing it to apply federal law, a disinterested state court may not take the parties' failure to offer evidence of sister-state law as permitting it to apply the law of the forum.<sup>110</sup>

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requirement of a reasonable relationship for some transactions. *Id.* § 1-301(c)(1)-(2). But states have been reluctant to adopt this change. Jack M. Graves, *Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1-301 and a Proposal for Broader Reform*, 36 SETON HALL L. REV. 59, 59-63, 67-68 (2005); Dennis Solomon, *The Private International Law of Contracts in Europe: Advances and Retreats*, 82 TUL. L. REV. 1709, 1725-26 (2008).

109. For example, N.Y. GEN. OBLIG. LAW § 5-1401 allows parties to certain contracts to choose New York law if the transaction exceeds a certain dollar amount, "whether or not such contract, agreement or undertaking bears a reasonable relation to this state." But some federal courts have insisted that New York's provision cannot overcome constitutional limitations on choice of law. *E.g.*, *Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 118, 137 (S.D.N.Y. 2000). More cases can be found that refuse to enforce a choice-of-law clause that selects the law of a disinterested sister state, although they do not usually rest their decision on constitutional grounds. *Davis v. Siemens Med. Solutions USA, Inc.*, 399 F. Supp. 2d 785 (W.D. Ky. 2005); *Cable Tel. Servs., Inc. v. Overland Contracting, Inc.*, 574 S.E.2d 31 (N.C. App. 2002). One case that argued that enforcement of the clause would be unconstitutional is *Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So.2d 954 (Miss. 1999).

For arguments that full faith and credit puts a limit on choice-of-law clauses, see Richard K. Greenstein, *Is the Proposed U.C.C. Choice of Law Provision Unconstitutional?*, 73 TEMP. L. REV. 1159, 1171-72 (2000); Kirt O'Neill, Note, *Contractual Choice of Law: The Case for a New Determination of Full Faith and Credit Limitations*, 71 TEX. L. REV. 1019, 1042-51 (1993); Barry W. Rashkover, Note, *Title 14, New York Choice of Law Rule for Contractual Disputes: Avoiding the Unreasonable Results*, 71 CORNELL L. REV. 227 (1985). For a criticism of this view see Graves, *supra* note 108, at 115-17.

110. I would argue that the situation is different if a disinterested state court is choosing between its own law and the law of a foreign nation. See *supra* note 104. In such a case, the parties' failure to offer evidence of foreign law would license the court to apply the law of the forum. An example, albeit in federal court, is *Walton v. Arabian American Oil Co.*, 233 F.2d 541 (2d Cir. 1956). An Arkansas plaintiff sued a Delaware corporation for negligence in federal court in New York in connection with an accident in Saudi Arabia involving a truck driven by the defendant's employee. Relying upon New York law on the pleading and proof of foreign law, the court took the plaintiff's failure to offer any evidence that Saudi law recognized respondeat superior as a reason to dismiss the action. *Id.* at 542, 545-46. Setting aside Arkansas and Delaware law, I would argue that a New

### B. *The Predictive Method Horizontally Applied*

In short, a disinterested state court's duty to protect sister states' regulatory interests is the horizontal analogue of the duty a federal court sitting in diversity has to protect the regulatory interests of the states. It follows that a disinterested state court will be bound by the same interpretive obligations that we have attributed to a federal court sitting in diversity. It must take judicial notice of sister-state law and do its best to decide as the sister state's supreme court would, even if the parties fail to offer sufficient evidence on the matter. It may not presume that sister-state law is the same as its own.

As we shall see, party failure to provide evidence of sister-state law was particularly common in the past, when access to foreign legal materials was difficult.<sup>111</sup> Actions were often allowed to proceed under the presumption that sister-state law was the same as the law of the forum, on the theory that any right to a legal standard different from the forum's had been waived.<sup>112</sup> As we now know, this argument has no merit if the forum lacks a legitimate interest.

Some might object, however, that there is a disanalogy between presuming similarity to federal law and presuming similarity to forum-state law. Federal law applies only in the limited areas where Congress or federal courts have lawmaking power. Beyond these areas, federal law cannot be coherently employed. For example, if federal courts create a federal common law rule governing contracts with the United States—where a federal interest exists—it makes no sense to rely on this rule in a diversity action involving a contract between private individuals. After all, none of the parties is the United States.

If the objection is simply that a private contract is not within the scope of the federal common law rule, the situation is analogous horizontally. If two Californians enter into a gambling contract in California, with payment to occur in California, Nevada law no more applies to their dispute than federal law does. After all, neither of the parties is a Nevadan and the contract was not entered into, and is not to be performed in, Nevada.

The objection might be, however, that the federal common law rule was crafted with the presence of the United States as a contracting party in mind. Given its peculiar content, it will make no sense even by federal lights for the federal standard to be applied to private contracts. But here too the

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York state court would have been constitutionally permitted to apply forum law, despite the fact that New York was disinterested, since it had no constitutional duty to protect Saudi lawmaking power and the defendant had waived its right to Saudi law by failing to offer evidence of this law. For discussions of *Walton*, see Currie, *supra* note 54; Kramer, *supra* note 106, at 1303; Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 697–702 (1967). I hope to explore horizontal *Erie* in an international context in a later article.

111. See *infra* text accompanying notes 132–155.

112. Robert von Moschzisker, *Presumptions as to Foreign Law*, 11 MINN. L. REV. 1, 10–11 (1926); *e.g.*, *Watford v. Ala. & Fla. Lumber Co.*, 44 So. 567 (Ala. 1907); *Peet v. Hatcher*, 21 So. 711, 713–14 (Ala. 1896); *Leary v. Gledhill*, 84 A.2d 725 (N.J. 1951); *Watts v. Swiss Bank Corp.*, 265 N.E.2d 739 (N.Y. 1970); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. h (1971).

situation could be analogous horizontally. Nevada law on private gambling contracts might have been crafted with circumstances unique to Nevada in mind, such as the prevalence of gambling in the state. It may make no sense even by Nevada lights to apply the Nevada standard to Californians contracting in California.

In the end, however, the question is not whether the court finds the application of the forum's standard irrational or not. Even if it thinks its standard could be applied without perverse consequences, it still lacks law-making power. Not all federal law has distinctive content that would make its application beyond areas of federal regulatory authority irrational. That does not change the fact that a federal court sitting in diversity may not presume that state law is similar to federal law.

Of course, a presumption of similarity to forum-state law will be *easier* to employ than a presumption of similarity to federal law, because the forum state will offer a richer set of laws to draw upon. For example, if the issue is whether the defendant committed intentional infliction of emotional distress, the forum state will likely have law on the matter, whereas there may simply be no federal alternative. But the ease of employing a presumption of similarity to forum-state law does not make its application any more constitutional.

One might worry that the argument above puts an unreasonable burden on state courts to investigate sister-state law without the parties' participation. But the fact that a court has an affirmative obligation to interpret state law with fidelity does not mean it must expend unlimited judicial resources seeking to abide by this obligation. Practical reliance on the parties concerning the content of sister-state law can still be justified, just as reliance on the parties is justified concerning the content of forum law.<sup>113</sup> But disinterested state courts are not permitted to point to the parties' failure to provide evidence of sister-state law as *freeing* them of their constitutional obligations to protect sister-state interests. For example, in a situation where they have recognized that they are obligated to apply sister-state law and the parties fail to offer sufficient evidence of the law's content, they would have the same obligation as a federal court sitting in diversity. They would remain obligated to decide, as best they can, as the relevant state's supreme court would.

### C. Sun Oil Co. v. Wortman

Although persuasive arguments favor imposing horizontal *Erie* obligations on a disinterested state court, the Supreme Court has refrained from doing so. In *Sun Oil Co. v. Wortman*,<sup>114</sup> a Kansas court that the Supreme Court had held constitutionally obligated to apply the law of sister states

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113. See *supra* note 57.

114. 486 U.S. 717 (1988).

under *Phillips Petroleum Co. v. Shutts*<sup>115</sup> apparently circumvented this obligation by treating the content of sister-state law as the same as its own. The Supreme Court nevertheless upheld the Kansas court's interpretation. Justice Scalia stated, without argument,<sup>116</sup> that "[t]o constitute a violation of the Full Faith and Credit Clause or the Due Process Clause" an interpretation of sister-state law "must contradict law of the other State that is clearly established and that has been brought to the court's attention."<sup>117</sup>

It means little to tell a Kansas court that it must apply the law of Texas when it remains free to interpret Texas law to look like Kansas law. As Justice O'Connor put the matter in her dissent:

Faced with the constitutional obligation to apply the substantive law of another State, a court that does not like that law apparently need take only two steps in order to avoid applying it. First, invent a legal theory so novel or strange that the other State has never had an opportunity to reject it; then, on the basis of nothing but unsupported speculation, "predict" that the other State would adopt that theory if it had the chance.<sup>118</sup>

Indeed, the matter is worse than O'Connor suggests, for the Kansas court was not even required to engage in the fiction that it was predicting what the Texas Supreme Court would do. Nothing in *Wortman* stands in the way of

115. 472 U.S. 797, 814–23 (1985). The Court vacated and remanded *Sun Oil Co. v. Wortman*, 474 U.S. 806 (1985), in light of *Shutts*.

116. Scalia simply cited a series of older cases. *Sun Oil*, 486 U.S. at 731 (citing *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917); *W. Life Indem. Co. v. Rupp*, 235 U.S. 261, 275 (1914); *Louisville & Nashville R.R. Co. v. Melton*, 218 U.S. 36, 51–52 (1910); *Banholtzer v. N.Y. Life Ins. Co.*, 178 U.S. 402, 408 (1900)); see also *id.* at 733 n.4 (citing *Texas & New Orleans R.R. Co. v. Miller*, 221 U.S. 408, 416 (1911)). In fact, some of these cases purport to speak not of state courts' constitutional obligations when interpreting sister-state law, but rather only of the circumstances under which the Supreme Court will review any misinterpretation. *E.g.*, *Pa. Fire Ins.*, 243 U.S. at 96 ("[S]omething more than an error of construction is necessary in order to entitle a party to come here under Article IV, § 1."). On the distinction between state courts' constitutional obligations and the Supreme Court's standard for reviewing violations of these obligations, see *infra* text accompanying notes 124–131. Furthermore, the relevance of these cases is doubtful even on the narrower question of when Supreme Court review is appropriate. Notice that at the time the cases were decided, a state court's interpretation of the law of a sister state was treated as a question of fact, not of law. See *infra* Section III.A. This necessarily limited the Supreme Court's power of review. See *Chi. & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 622–23 (1887). Some of the cases Scalia quoted explicitly relied upon the view that a state court should treat the content of sister-state law as a question of fact. *Sun Oil*, 486 U.S. at 733 n.4 (quoting *Western Life Indemnity Co. v. Rupp*, 235 U.S. 261, 275 (1914) ("If such decision existed, it was incumbent upon defendant to plead and prove it as matter of fact.")). Such a justification is no longer available, because state courts now generally take judicial notice of sister-state law. See *infra* note 150 and accompanying text. Kansas state courts were obligated to take judicial notice of sister-state law by the Kansas legislature in 1949. Judicial Notice of Foreign Laws Act, G.S. 60-2878 to -2880 (1949) (current version at KAN. STAT. ANN. § 60-409 to -410 (West 2010)).

117. *Sun Oil*, 486 U.S. at 730–31.

118. *Id.* at 749 (O'Connor, J., dissenting); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 167 n.267 (2009) (noting that forum must "effectively raise[] its middle finger to a coequal sovereign's law that has been thrust before the court's eyes"). O'Connor did not reject the standard articulated in Scalia's opinion, however. She concluded instead that the Kansas court's interpretation violated Scalia's standard. *Sun Oil*, 486 U.S. at 744 (O'Connor, J., concurring in part and dissenting in part).

the Kansas court simply presuming that unsettled Texas law is the same as Kansas law.

One possible reading of *Wortman* is that—contrary to my argument above<sup>119</sup>—the Supreme Court concluded that the Full Faith and Credit and Due Process Clauses obligate a state court to protect only the parties before it rather than the interests of sister states. As we have seen, on such an assumption horizontal *Erie* obligations would not apply. A state court would be free to ignore sister-state law not brought to its attention, because, by failing to introduce sister-state law, the parties would have waived their rights under that law.<sup>120</sup> Likewise, when the sister-state law brought to the court's attention was not clearly established, the court would be permitted to ignore it, because the parties could not have reasonably relied upon such law at the time of the transaction being litigated.

This reading of *Wortman* is implausible, however—and not simply because the Court gave no indication that its conclusion rested upon a novel constitutional premise. Under such a reading, the Kansas court in *Wortman* was not merely free to presume that unsettled Texas law was the same as Kansas law. Since it had no constitutional obligation to apply unsettled Texas law, it was free to apply *Kansas* law instead. But such a reading fails to make sense of the Court's insistence in *Shutts*, upon which *Wortman* casts no doubt, that Kansas law could not be applied.<sup>121</sup>

Another justification for the *Wortman* standard is that the question of a state court's rules for the interpretation of unsettled sister-state law is an evidentiary matter in which the forum state's interests are primary. Such a reading is suggested by the *Restatement (Second) of Conflict of Laws*. Because how a state court interprets the unsettled law of a sister state is treated as evidentiary, forum law on the issue is said to apply.<sup>122</sup>

It is certainly true that horizontal *Erie* puts greater procedural burdens on state courts than the *Wortman* standard. But if a disinterested state court's power over evidence frees it from having to predict how the sister state's supreme court would decide, the same thing should be true of a federal court sitting in diversity. It should be constitutionally permitted to presume that unsettled state law is the same as federal law. But this is clearly false. Although some of the details of the predictive method may not be demanded by constitutional considerations, the Supreme Court had clearly taken the

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119. See *supra* Section II.A.

120. See *supra* text accompanying note 111.

121. The same criticism applies to the attempt to justify *Wortman* on the grounds that the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, which applies to "the public Acts, Records, and judicial Proceedings of every other State," does not extend to probable, but unrealized, decisions by a sister state's courts. (I thank Scott Dodson for this objection.) If this were true, the Court would have said that if Texas law is not clearly established, Kansas law may be applied.

122. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136(2) (1971). And the legal rule that the *Restatement* describes some states adopting is a presumption of similarity to forum law. *Id.* § 136 cmt. h.

general idea of the method to follow from the duty to respect state lawmaking power.<sup>123</sup>

The most probable motivation for the *Wortman* standard was a worry about an excessive number of appeals from the state court systems.<sup>124</sup> If a disinterested state court is constitutionally obligated to interpret sister-state law as the sister state's supreme court would, any question about the correctness of an interpretation would present a federal constitutional issue reviewable in principle by the United States Supreme Court.<sup>125</sup> The *Wortman* standard, in contrast, sharply limits the number of state court cases that could be reviewed.

But if this is the justification for the *Wortman* standard, it remains a mistake. Federal courts interpreting state law must decide as the state supreme court would.<sup>126</sup> This obligation is stronger than the one spelled out in *Wortman*. Even if no clearly established state law has been brought to their attention, federal courts remain constitutionally obligated under *Erie* to determine as best they can what the state supreme court would do. Given that federal courts have a more exacting obligation, why hasn't the Supreme Court been flooded by state law issues on appeal from the federal courts? After all, every claim that a federal court mispredicted a state supreme court's decision appears to present a constitutional question. The reason the Supreme Court has not been overwhelmed is that it has applied a limiting *standard of review* out of reasonable concerns about its caseload. It will not take a case just because a party argues that *Erie* obligations have not been satisfied.

The Supreme Court has indicated that it will take only two types of case involving federal courts' *Erie* obligations. The first includes cases in which *Erie* obligations are defined. For example, the Supreme Court has taken cases in order to inform federal courts that they should adopt the predictive method.<sup>127</sup>

The second type of case is when it is *manifest* that a federal court is not abiding by its *Erie* obligations, either because it explicitly refuses to employ the appropriate interpretive standard or because, although invoking this standard, its interpretations of state law "amount to 'plain' error."<sup>128</sup> An

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123. See, e.g., *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (stating that predictive method "is but an application of the rule of *Erie R. Co. v. Tompkins*, where state law as announced by the highest court of the State is to be followed" (internal cross-reference omitted)).

124. See Note, *supra* note 9, at 659.

125. *But see Johnson v. N.Y. Life Ins. Co.*, 187 U.S. 491, 496 (1903); *Glenn v. Garth*, 147 U.S. 360, 368 (1893).

126. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 249 (1998) (Kennedy, J., concurring); *Estate of Bosch*, 387 U.S. at 465; *King v. Order of United Commercial Travelers of Am.*, 333 U.S. 153, 161 (1948).

127. E.g., *Estate of Bosch*, 387 U.S. at 465; *King*, 333 U.S. at 161; *cf. Salve Regina Coll. v. Russell*, 499 U.S. 225 (1991) (stating that federal courts of appeals should review district court predictions of state supreme courts de novo).

128. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 880 (1992) (quoting *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943)); see also *United States v. Durham Lumber Co.*, 363 U.S. 522,

example would be precisely that envisioned by the *Wortman* standard; that is, when the interpretation is contradicted by clearly established state law that was brought to the court's attention.

There is no reason that the system in place in the federal courts should not also apply to state courts. When a state court is constitutionally obligated under full faith and credit to apply sister-state law, it is also obligated to decide as the sister state's supreme court would.<sup>129</sup> State courts are no more free than federal courts to abandon the predictive task when no clearly established state law has been brought to their attention. On the other hand, having articulated what this horizontal *Erie* obligation is, the Supreme Court need not take cases alleging that the obligation has not been satisfied. It can review only cases in which state courts refuse to use the predictive method or in which their interpretation of sister-state law amounts to plain error.<sup>130</sup>

The *Wortman* standard appears to be the result of the Court's confusing state courts' horizontal *Erie* obligations with its standard of review for assessing violations of these obligations. Distinguishing between the two is crucial, because we have no reason to believe that state courts take their constitutional obligations less seriously than federal courts, even when they know that violations will not be sanctioned by the Supreme Court. It will make a difference to state courts to know that, like federal courts, they must decide unsettled issues of sister-state law as the sister state's supreme court would.<sup>131</sup>

### III. THE PRESUMPTION OF FORUM LAW

In this section I will explore the substantial role that the presumption of forum law still plays in the state court systems. I begin with the history of the presumption.

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527 (1960) (asking whether the interpretation is "clearly erroneous"); *The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959) ("clearly wrong"); *Propper v. Clark*, 337 U.S. 472, 486–87 (1949) ("unreasonable").

129. Justice Stevens came closest to getting things right in his opinion in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). There he suggested that state courts have the same obligations as federal courts when interpreting state law. *Id.* at 834–35 (Stevens, J., concurring in part and dissenting in part) (noting that Full Faith and Credit Clause requires that states "acknowledge the validity and finality of [sister-state] laws and attempt in good faith to apply them when necessary as they would be applied by home state courts"). And although he spoke of "an unambiguous conflict with the established law of another State" as required to show that full faith and credit has been violated, *id.* at 841–42 (emphasis omitted), he generally made it clear that this is a condition for review by the Supreme Court, not the limit of state courts' full faith and credit obligations per se. *Id.* at 845 (holding that state court decisions "are unreviewable here absent demonstration of an unambiguous conflict in the established laws of connected States").

130. Notice that in saying that Scalia got state courts' interpretive obligations under the Full Faith and Credit Clause wrong, I do not mean that the Kansas state court's decision in *Wortman* should have been overturned. Because the Kansas state court apparently tried to predict how sister-state supreme courts would have decided and its predictions probably were not plain error, the Supreme Court had no power of review.

131. The Supreme Court's decision in *Wortman* is an example of the fallacy, common among the legal realists, of equating the content of a legal obligation with the conditions for sanctions for the obligation's violation. See H.L.A. HART, *THE CONCEPT OF LAW* 136–47 (2d ed. 1994); Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1987–93 (2005).

A. *Some History*

Traditionally, state courts treated foreign law, including the law of sister states, as a question of fact.<sup>132</sup> Like other questions of fact, it had to be pleaded by the party relying upon it. The party did not merely have to plead that foreign law applied—she also had to plead the content of foreign law, the way she had to plead any other fact entitling her to relief.

Because the issue of foreign law was treated as a question of fact, it had to be proved on the basis of materials subject to the rules of evidence.<sup>133</sup> This made the process of establishing the content of foreign law cumbersome. In addition, a jury was often used to decide questions of foreign law,<sup>134</sup> and the opportunity for appellate review was generally as limited as it is with respect to other findings of fact.<sup>135</sup>

Although there were jurisprudential theories underlying the fact approach to foreign law,<sup>136</sup> it was also motivated by courts' limited access to legal materials from foreign jurisdictions.<sup>137</sup> Because independently investigating the content of foreign law was as hard for the court as independently investigating the plaintiff's factual allegations, it made some sense to treat them similarly.

Let us assume that a plaintiff's complaint alleged foreign facts. The defendant or the court noted that foreign law applied, but the plaintiff could offer no evidence of the content of this law. What happened? One would expect the result to be the same as any other situation in which the plaintiff failed to offer evidence for a factual element of her cause of action. Her complaint would be dismissed, with prejudice. At times this was the approach taken.<sup>138</sup> But because it was often difficult for the plaintiff to obtain evidence of foreign law, dismissal was commonly thought to be unfair.<sup>139</sup> The plaintiff's action was allowed to proceed. This presented a problem,

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132. Miller, *supra* note 110, at 617–18.

133. *Id.* at 621–23; Arthur Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1023–24 (1941).

134. Miller, *supra* note 110, at 622–23.

135. *See id.* at 623–24.

136. For example, Joseph Beale thought that a court that awarded relief to a plaintiff for a wrong committed in another state was not applying foreign law but rather a remedial right under forum law that was conditioned upon the fact that a wrong occurred under foreign law. 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 8A.28, at 85–86 (1935); Roosevelt, *supra* note 86, at 2456–57.

137. Miller, *supra* note 110, at 619.

138. *E.g., id.* at 633–34. This approach was rare, however. Nussbaum, *supra* note 133, at 1036–37. Examples from state courts include *Rositzky v. Rositzky*, 46 S.W.2d 591, 595 (Mo. 1931), *Riley v. Pierce Oil Corp.*, 156 N.E. 647 (N.Y. 1927), *Whitford v. Panama Railroad*, 23 N.Y. 465 (1861), *Christie v. Cerro De Pasco Copper Corp.*, 211 N.Y.S. 143 (App. Div. 1925), and *Langdon v. Young*, 33 Vt. 136 (1860). Several federal courts have taken this approach with respect to the law of a foreign nation. *See Cuba R.R. v. Crosby*, 222 U.S. 473 (1912); *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2d Cir. 1956). The same approach has also been used to refuse to recognize defenses when no evidence is offered that the defense is available under foreign law. *E.g., W. Union Tel. Co. v. Way*, 4 So. 844 (Ala. 1887).

139. Miller, *supra* note 110, at 634–35.



however. The parties and the court were in ignorance of the content of foreign law. What legal principles should be used?

Two types of presumption were used to solve this problem. The first type amounted to the use of indirect evidence to guess at the probable content of foreign law.<sup>140</sup> For example, if the legal principle was a rudimentary one that was likely to exist in every civilized legal system, the court often presumed that the principle applied in the foreign jurisdiction.<sup>141</sup> It made sense to allow the plaintiff to sue a defendant who breached a simple contract or caused harm through his negligence.<sup>142</sup> It was more probable than not that the foreign jurisdiction allowed such actions.

Notice that such a presumption was not that the law of the foreign jurisdiction was similar to *forum* law. It was a presumption that the foreign law was like the law of *every civilized jurisdiction*. Forum law was relevant only as an example, among many, of what civilized jurisdictions said about the matter.

Another presumption of the first type was that the common law still applied in a legal system based upon the common law.<sup>143</sup> This, too, was not a presumption of similarity to forum law, for when the forum had deviated from the common law by statute, the common law and not the forum's statute was attributed to the foreign jurisdiction.<sup>144</sup> Although one might argue that the prevalence of statutory law in common law jurisdictions makes this presumption unjustified,<sup>145</sup> it might not have been in the past, when statutory abrogation of the common law was rarer. It may indeed have been more probable than not that a particular common law rule still applied in a common law legal system.<sup>146</sup>

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140. *Id.*; Gregory S. Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 NW. U. L. REV. 602, 608 (1976); Albert Martin Kales, *Presumption of the Foreign Law*, 19 HARV. L. REV. 401, 409 (1906).

141. Miller, *supra* note 110, at 635.

142. *Compagnie Generale Transatlantique v. Rivers*, 211 F. 294, 298 (2d Cir. 1914); *Parrot v. Mexican Cent. Ry.*, 93 N.E. 590, 594 (Mass. 1911); *Mackey v. Mexican Cent. Ry.*, 78 N.Y.S. 966 (City Ct. 1902) (mem.).

143. *Dempster v. Stephen*, 63 Ill. App. 126, 128 (1896); *Stewart's Adm'x v. Bacon*, 70 S.W.2d 522, 523 (Ky. 1934); *Shepherd v. Ward*, 74 A.2d 279, 286 (N.J. 1950); *Waln v. Waln*, 22 A. 203, 204-05 (N.J. 1891).

144. *Reidman v. Macht*, 183 N.E. 807, 809 (Ind. App. 1932); Currie, *supra* note 54, at 980; Nussbaum, *supra* note 133, at 1038 n.120; von Moschzisker, *supra* note 112, at 3.

145. *Leary v. Gledhill*, 84 A.2d 725, 729 (N.J. 1952); Currie, *supra* note 54, at 980-81; von Moschzisker, *supra* note 112, at 4.

146. The conditions for applying this presumption to sister states were often very detailed. For example, it was sometimes extended only to a sister state that was one of the original thirteen colonies or, like Illinois, Kentucky, or Tennessee, composed of territory that belonged to these colonies. *E.g.*, Kales, *supra* note 140, at 402-03. Some state courts extended the presumption to states, such as Iowa, Kansas, or Colorado, carved out of territory acquired after the Revolution, provided that the first legal system the state had was a common law system formed by settlers from the original states. *E.g.*, *Crouch v. Hall*, 15 Ill. 263, 265-66 (1853); *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427 (1902). Other states refused to extend the presumption in this fashion. *E.g.*, *Silver v. Kan. City, St. Louis & Colo. R.R. Co.*, 21 Mo. App. 5 (1886) (choosing as dispositive criterion whether a state was formerly subject to the common law of England). *See generally* Kales, *supra* note 140, at 402-04. But the presumption was not extended to states, such as Florida, Texas, Louisiana, and California,

The presumptions discussed above, although sometimes questionable in their details, were motivated by the desire to come to an accurate determination of the content of foreign law given the restrictions of the fact approach and the scarcity of legal materials from foreign jurisdictions. They are therefore in the spirit of horizontal *Erie*.

The presumption of similarity to forum law was different. This allowed the forum to presume that foreign law was the same as the forum's, even when indirect evidence suggested that those laws were different. For example, the forum would presume that its statutory law applied in a foreign jurisdiction or that its common law rule applied in a foreign jurisdiction whose legal system was based on the civil law.<sup>147</sup> Perhaps the most extreme example is *Louknitsky v. Louknitsky*,<sup>148</sup> in which a California state court presumed that Chinese law pertaining to spousal rights in marital property was the same as California's community property system. This could not be justified on the basis of a desire to predict the probable content of Chinese law.

The presumption of similarity to forum law was often justified in such cases on the grounds that the defendant's failure to offer evidence of foreign law amounted to implied consent to the law of the forum.<sup>149</sup> As we now know, however, this argument cannot succeed when the forum is disinterested and the displaced foreign law is that of an interested sister state.

In general, the presumption is used less now, because legal materials concerning foreign jurisdictions are more readily available and state courts have largely abandoned the fact approach to foreign, and particularly sister-state, law in favor of approaches that allow, or require, them to take judicial notice of such law.<sup>150</sup> But we should not conclude from the fact that state courts take judicial notice of sister-state law that they are satisfying all their obligations under horizontal *Erie*.

In fact, the unconstitutional use of the presumption still occurs when the parties fail to offer sufficient evidence to allow the court to discern the content of sister-state law and the court is unable or unwilling to do the investigation itself.<sup>151</sup> The most common modern scenario occurs when the

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that had preexisting civil law legal systems, even if they later passed reception statutes adopting the common law. *E.g.*, *Krouse v. Krouse*, 95 N.E. 262, 263 (Ind. App. 1911); *E.B. Hayes Mach. Co. v. Eastham*, 84 So. 898, 899 (La. 1920). If the plaintiff sued under the law of a sister state to which the presumption did not apply and failed to offer evidence of that law, his action was often dismissed. *Kales, supra* note 140, at 406–09.

147. *E.g.*, *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 n.3 (2d Cir. 1968); *Nussbaum, supra* note 133, at 1037–38; *von Moschzisker, supra* note 112, at 2.

148. 266 P.2d 910 (Cal. Dist. Ct. App. 1954).

149. *Von Moschzisker, supra* note 112, at 10–11; *e.g.*, *Watford v. Ala. & Fla. Lumber Co.*, 44 So. 567 (Ala. 1907); *Peet v. Hatcher*, 21 So. 711, 713 (Ala. 1896); *Leary*, 84 A.2d 725 (N.J. 1951); *Watts v. Swiss Bank Corp.*, 265 N.E.2d 739 (N.Y. 1970); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. h (1971).

150. *SCOLES ET AL., supra* note 96, § 12.17; *Miller, supra* note 110, at 624–28.

151. Another situation when the presumption is currently employed is when the parties fail to mention the applicability of sister-state law. In such cases, state courts routinely apply the law of the forum, often without even thinking of the matter. *E.g.*, *Cont'l Cas. Co. v. City of Jacksonville*, 550 F. Supp. 2d 1312, 1331 (M.D. Fla. 2007); *Prime Start Ltd. v. Maher Forest Products, Ltd.*, 442 F. Supp. 2d 1113, 1119 (W.D. Wash. 2006); *Joeckel v. Disabled Am. Veterans*, 793 A.2d 1279, 1282 (D.C.

legal issue is unsettled, in the sense that there are no sister-state decisions on the matter (not even decisions by lower sister-state courts), or when the decisions of the sister-state courts are contradictory. These areas of sister-state law are treated as the same as the law of the forum. Some states, such as Illinois,<sup>152</sup> New York,<sup>153</sup> Maine,<sup>154</sup> and Nebraska,<sup>155</sup> have explicitly adopted a presumption of similarity to forum law in such cases.<sup>156</sup> It is easy to underestimate the use of the presumption, however, because many state courts are likely to employ it without making its role in their reasoning explicit. Such a lax attitude toward the interpretation of sister-state law is encouraged by *Wortman*, which treats a state court as incapable of violating full faith and credit when interpreting unsettled sister-state law. But if the forum is disinterested, the use of the presumption is an unconstitutional violation of horizontal *Erie*.

Under vertical *Erie*, a federal court dealing with an unsettled area of state law remains obligated to predict how the state supreme court would decide.<sup>157</sup> It may not presume that the unsettled issue of state law is the same as federal law. It is true that a federal court seeking to divine what a state supreme court would say can look to the decisions of federal courts as well as the courts of other states.<sup>158</sup> But these federal decisions are relevant only as evidence of how the state supreme court would decide the same matter. Similarity to federal law is not presumed, because federal decisions lose their evidentiary significance when they take a minority approach to the is-

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2002); *Roxas v. Marcos*, 969 P.2d 1209, 1236 (Haw. 1998); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. h (1971). The extent to which this happens is easy to underestimate, because the case will generally proceed without anyone mentioning sister-state law at all. The presumption tends to get discussed only when a party invokes sister-state law on appeal. In such cases, she is claimed to have consented to or waived any right to sister-state law, which suggests that the parties' failure to invoke sister-state law licensed the trial court to apply the law of the forum. *E.g.*, *Marine Envtl. Partners, Inc. v. Johnson*, 863 So.2d 423 (Fla. Dist. Ct. App. 2003); *Touche Ross Ltd. v. Filipek*, 778 P.2d 721 (Haw. Ct. App. 1989). But this argument fails when the forum is disinterested and the law displaced is that of an interested sister state (as opposed to a foreign nation). See *supra* Part II. It is important to note, however, that the fact that a disinterested state trial court is constitutionally obligated to apply the law of an interested sister state does not mean that its failure to satisfy its obligation must be corrected on appeal.

152. See *infra* note 189 (compiling Illinois cases).

153. *Knieriemien v. Bache Halsey Stuart Shields Inc.*, 427 N.Y.S.2d 10, 15 (N.Y. App. Div. 1980); *Banco do Brasil, S.A. v. Calhoon*, 270 N.Y.S.2d 691, 696 (N.Y. Sup. Ct. 1966). But see *Rogers v. Grimaldi*, 875 F.2d 994, 1003 (2d Cir. 1989) (discussing whether presumption is still in place under New York law is unclear).

154. *ROC-Century Assocs. v. Giunta*, 658 A.2d 223, 226 (Me. 1995).

155. *Am. Honda Fin. Corp. v. Bennett*, 439 N.W.2d 459, 460 (Neb. 1989).

156. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. h (1971) gives a qualified endorsement of the presumption, stating that "where either no information, or else insufficient information, has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law except when to do so would not meet the needs of the case or would not be in the interests of justice."

157. The types of evidence a court should use are catalogued in *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 663 (3d Cir. 1980).

158. See *id.* at 662. In most of these federal cases the court is engaging in a predictive enterprise concerning state law. But they can also include cases deciding issues of federal common law or the interpretation of federal statutes.

sue or the general assumptions standing behind them are different from those of the state whose law the federal court is interpreting.

The same point is true horizontally. The disinterested state court can look to forum decisions, insofar as they constitute evidence of the direction the sister state's supreme court will take. But they lose their evidentiary significance when the forum takes a minority approach or the general assumptions standing behind forum decisions are different from those of the sister state. The court may not presume that sister-state law is the same as its own.

### B. A Rebuttable Presumption?

One might argue, however, that I have shown only that it is improper to presume that unsettled sister-state law is the same as the forum's in the face of indirect evidence that the sister state's supreme court would decide differently. What about a truly rebuttable presumption, which always yields to such evidence?<sup>159</sup>

First of all, the situations in which such a presumption could be used would be comparatively rare. The available evidence—including indirect evidence—would have to leave the court in equipoise. If the evidence were against the sister state's supreme court coming to the same decision as the forum's, the presumption would be overridden. If the evidence were in favor of similarity, the presumption would be unnecessary—the court could simply appeal to the evidence.

Furthermore, the forum's decision can itself constitute indirect evidence of the sister state court's likely decision. Consider an idealized case, in which the only evidence of the sister state's decision is the bare fact that a court of the forum state had decided the same issue in a particular way. Here the presumption of similarity to forum law is unnecessary. The only decision with a data point in its favor is the forum's. In order for the presumption to have a use, there would have to be something about the forum's decision—such as the reasoning employed—that made it of no evidentiary value in predicting the sister state's decision. Lacking any evidence, the court would be in equipoise. Another situation where the presumption could be used is when the relevant evidence suggests that two or more possible decisions, one of which is the forum's, are equally probable.

Let us set aside the fact that such a rebuttable presumption does not look like the presumption that has actually been employed by state courts, which recommends similarity to forum law even in the face of contrary indirect evidence.<sup>160</sup> I believe that the presumption would still be contrary to horizontal *Erie*. Granted, if the state court is truly in equipoise, it must set aside the predictive task, since the possibilities are equally probable. The question remains, however, why the court chooses forum law. Why not choose what

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159. I thank Scott Dodson for noting this point.

160. For an example, see *infra* text accompanying notes 165–166.

the judge herself thinks is the most appropriate resolution of the case? Using forum law is problematic because it may have been drafted with an eye to local conditions inapplicable to the sister state. The judge's personal resolution could take sister-state conditions into account. To favor forum law over her own views suggests that she is seeking to serve the interests of the forum state. But this is unconstitutional. The forum state has no legitimate regulatory interest to be served.

One might argue, however, that because the court is in equipoise, its *procedural* interests can take primacy. And a presumption of forum law makes things easier for the forum, because it allows the court to escape the fate of Buridan's ass<sup>161</sup> and come to a decision using the legal principle that is most ready at hand. The purposes standing behind the presumption would not be the desire to vindicate the regulatory interests of the forum, but merely to vindicate the forum's procedural interests in coming to a decision.

In considering such a justification of the presumption, however, we need to be mindful of the inappropriateness of applying forum law that was drafted with local conditions in mind. If this is not a concern, a rebuttable presumption of similarity to forum law might be appropriate, but only to the same extent that a rebuttable presumption of similarity to federal law would be appropriate in a diversity case.<sup>162</sup>

### C. *The Presumption and Class Action Certification*

State courts' unconstitutional use of the presumption of similarity to forum law has been particularly important in nationwide class actions, where, as we have seen, the forum state often lacks sufficient contacts to have law-making power. Those proposing class certification bear the burden of showing that questions of law and fact common to the class predominate over questions affecting the individual members.<sup>163</sup> If the members of the class have causes of action that arise under a number of states' laws, the differences between these laws can frustrate class certification.<sup>164</sup> But if the presumption is used, it will be the party opposing class certification, usually the defendant, who must show that the sister states' laws differ from the law of the forum. In those cases in which sister states' laws are unsettled, the

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161. Nicholas Rescher, *Choice Without Preference: A Study of the History and of the Logic of the Problem of "Buridan's Ass"*, 51 KANT-STUDIEN 142, 142 (1960) (Ger.) (conveying medieval logician's tale of the donkey equidistant from two identical piles of hay, which starves to death due to the absence of any reason to choose between the two).

162. I set aside here the additional problem that a presumption of similarity to federal law would be contrary to the nonconstitutional *Erie* doctrine, because the federal court would interpret state law differently from the courts of the forum state. See *infra* Part IV.

163. E.g., Woolley, *supra* note 10, at 1739.

164. E.g., Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2002-05 (2008).

defendant will not be able to overcome the presumption, making class certification easier.<sup>165</sup>

This problem was pointed to in the Senate Report on the Class Action Fairness Act of 2005 as a reason for allowing removal of more class actions to federal court.<sup>166</sup> The case it discussed was *Rosen v. PRIMUS Automotive Financial Services, Inc.*<sup>167</sup>:

A few years ago, a state trial court in Minnesota approved for class treatment a case involving millions of claimants from 44 states that would have had the effect of dictating the commercial codes of all those states. . . . In certifying a class in that case, the court adopted an understanding of Minnesota's version of the Uniform Commercial Code that was contrary to the interpretation of every other state to have considered the issue under their own versions of the UCC. And by certifying the class, the court decided that its unprecedented interpretation of the UCC would bind the remaining 43 States that had yet to decide the question . . . . In essence, the action of the Minnesota court proposed to dictate the interpretation of 43 other states' UCC provisions even though the other states might well have reached a different conclusion in applying their own state's laws.<sup>168</sup>

Let us assume, as is likely, that the Minnesota court in *Rosen* did not have sufficient contacts to apply Minnesota law to every member of the plaintiff class. It was required under *Allstate* to apply sister-state law. Nevertheless, the *Wortman* rule allowed it to treat the laws of forty-three states as the same as its own. The court excluded six states where there was direct evidence presented that the issue had been decided differently. With respect to the remaining forty-three, however, the issue was still unsettled, and the presumption was applied.<sup>169</sup>

*Rosen* was an unconstitutional violation of horizontal *Erie*. Indirect evidence, in particular the fact that Minnesota's approach was unusual, made it unlikely that all these sister states would agree with Minnesota's approach.

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165. See *Ellerbrake v. Campbell-Hausfeld*, No. 01L-540, 2003 WL 23409813, at \*2 (Ill. Cir. Ct. July 2, 2003); *Carder Buick-Olds Co. v. Reynolds & Reynolds, Inc.*, 775 N.E.2d 531, 543 (Ohio Ct. App. 2002); *Lobo Exploration Co. v. Amoco Prod. Co.*, 991 P.2d 1048, 1052-53 (Okla. Civ. App. 1999); *Parsky v. First Union Corp.*, 51 Pa. D. & C.4th 468, 481-88 (2001). There was a strong tradition of using the presumption in class action certification in Texas state courts. *E.g.*, *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 613 (Tex. App. 1995); *Osborn v. Kinnington*, 787 S.W.2d 417, 419 (Tex. App. 1990). However, recently the Texas Supreme Court held that the burden is on the class proponent to show that state laws do not conflict. *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 673 (Tex. 2004) ("As guardian[s] of absent claimants' rights, courts have an independent duty to determine uniformity [of various states' laws] sua sponte, even if neither party raises it.") (internal quotation marks omitted) (first alteration in original). The Montana Supreme Court came to the same conclusion in *Sieglock v. Burlington Northern Santa Fe Railway Co.*, 81 P.3d 495 (Mont. 2003). Two defenders of the use of the presumption in class actions, including when these actions are brought in federal court, are Russell Weintraub and Patrick Woolley. See Weintraub, *supra* note 10; Woolley, *supra* note 10; Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rule of Civil Procedure 23(b)(3)*, 2004 MICH. ST. L. REV. 799.

166. S. REP. NO. 109-14, at 26 (2005).

167. C1-99-943, 1999 Minn. LEXIS 538 (Minn. D. Ct., 4th Jud. Dist., May 4, 1999).

168. S. REP. NO. 109-14, at 26.

169. Woolley, *supra* note 10, at 1729 (discussing *Rosen*).

To certify the class in defiance of this indirect evidence showed an unconstitutional lack of respect for the lawmaking authority of these sister states.<sup>170</sup>

#### IV. ERIE MEETS KLAXON

So far, I have discussed both vertical and horizontal *Erie* obligations on the assumption that the transaction being litigated is subject to the exclusive lawmaking authority of a particular state. If a federal court in New York is interpreting Pennsylvania law, I have discussed its vertical *Erie* obligations assuming that only Pennsylvania law could have been applied to the transaction being litigated. And if a New York state court is interpreting Pennsylvania law, I have discussed its horizontal *Erie* obligations assuming, once again, that only Pennsylvania has lawmaking power. It is often the case, however, that more than one state has lawmaking power under *Allstate*. We must now face the effect of overlapping lawmaking power on both horizontal and vertical *Erie*.

Consider a Californian and a Nevadan who enter into a gambling contract in Nevada, with payment to occur in California. Private gambling contracts are enforceable under Nevada law, but the California Supreme Court has held that they are not enforceable under California law. The Californian loses the bet but refuses to pay, and the Nevadan sues him in Nevada state court. Although the Nevada state court could apply forum law, what if it chooses to apply California law instead? Does horizontal *Erie* govern? Is it obligated to respect the decision of the California Supreme Court? Or can any misinterpretation of California law be understood as a permissible exercise of Nevada's lawmaking power? Could it conclude, for example, that under California law, private gambling contracts are enforceable?

If horizontal *Erie* does not limit state courts with lawmaking power, there will be significant consequences. One, of course, is that our Nevada court would be free to misinterpret California law. But there will also be important effects on courts *without* lawmaking power, including federal courts.

Assume a state court in Oregon is entertaining the action. Under *Allstate*, Oregon cannot apply its own law. It must choose the law of a state with lawmaking power—in this case Nevada or California.<sup>171</sup> If we under-

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170. Woolley has criticized federal courts for failing to distinguish between the burden of showing predominance, which rests upon those seeking class certification, and the burden of showing that the content of sister-state law is different from the forum's, which the presumption puts upon the party opposing class certification. Woolley, *supra* note 165, at 807–09. Assuming that the presumption is constitutional and, via *Klaxon*, applies in federal court, Woolley's argument is persuasive. But the presumption is unconstitutional.

171. *Allstate* speaks solely of the constitutional restrictions on a state court's application of forum law. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981). The Supreme Court has not addressed the question of whether a state court can be constitutionally prohibited from applying the law of a sister state. But it has generally been assumed, rightly, that the same constitutional requirements exist here as well. *E.g.*, *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 626 (Okla. 2003). *But see Insteel Indus., Inc. v. Costanza Contracting Co.*, 276 F. Supp. 2d 479, 488–89 (E.D. Va. 2003). I make the same assumption here.

stand a Nevada court's misinterpretation of California law as the permissible exercise of Nevada's lawmaking power, the Oregon state court could apply Nevada "law" by misinterpreting California law the way a Nevada court would. The absence of horizontal *Erie* obligations on states with lawmaking power makes a difference to the horizontal *Erie* obligations of states *without* such power. Those states are permitted to misinterpret the law of a sister state, provided that the misinterpretation would be engaged in by the courts of another sister state with lawmaking power.<sup>172</sup>

The same point would be true of federal courts. A federal court entertaining the gambling contract action is like an Oregon state court, in the sense that it does not have lawmaking power and so must choose the law of a state with such power. Once again, if a Nevada court's misinterpretation of California law is an assertion of Nevada's lawmaking power, a federal court would be constitutionally permitted to decide in favor of Nevada "law" by misinterpreting California law the way a Nevada state court would.

Unlike an Oregon state court, however, a federal court's interpretation of California law would be further limited by the nonconstitutional *Erie* doctrine. In *Klaxon v. Stentor Electric Manufacturing Co.*,<sup>173</sup> the Supreme Court held that a federal court should use the choice-of-law approach of the state where the federal court is located. It justified this conclusion on the basis of the nonconstitutional *Erie* doctrine. For example, if a federal court in Oregon chose Nevada law when a state court in Oregon would have chosen California law, the result would be vertical forum shopping. The plaintiff would sue in federal court in Oregon, where the contract would be held enforceable. And if he made the mistake of suing in Oregon state court, the defendant would refrain from removing the case to federal court in order ensure that California's ban on gambling contracts applied. Furthermore, there would be inequitable administration of the laws, since only those parties who were diverse would have the power to choose law in this fashion. As the Court in *Klaxon* put it, if a federal court had a different choice-of-law approach from the state where the federal court was located, "the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side."<sup>174</sup>

The nonconstitutional *Erie* doctrine in *Klaxon* recommends that a federal court use the forum state's rules for *interpreting* sister-state law as well, assuming that these rules are constitutional.<sup>175</sup> If a federal court in Oregon would interpret California law as enforcing gambling contracts, while an

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172. Of course, it is very unlikely that an Oregon state court would ever apply a Nevada "law" that consisted of Nevada courts' misinterpretation of California law. It would not consider this misinterpretation to be a Nevada law that might be employed by a sister state court. But this supports the position of this Article that horizontal *Erie* applies even to courts of states with lawmaking power. See *infra* Part V. When a Nevada court, despite having lawmaking power, chooses to apply California law, the law applied is genuinely the law of California, not Nevada. Since it is California law, horizontal *Erie* should govern.

173. 313 U.S. 487 (1941).

174. *Klaxon*, 313 U.S. at 496.

175. For courts that have accepted this conclusion, see *infra* note 179 (collecting cases).



Oregon state court would interpret California law as refusing to enforce such contracts, the difference would cause vertical forum shopping and the inequitable administration of the laws. A federal court in Oregon must therefore interpret California law the way the Oregon Supreme Court would.

But *Klaxon* does not prevent federal court distortion of state law. It merely obligates a federal court to engage in the same interpretation, or misinterpretation, of state law that the forum state's supreme court would. Indeed, *Klaxon* can make things worse. Without *Klaxon* a federal court is at least *permitted* to interpret California law with fidelity. In the wake of *Klaxon*, it *must* distort California law, if that is what the forum state's supreme court would do.

This is not a merely theoretical puzzle. Because many states employ a presumption of similarity to forum law, it is a very real problem that has troubled federal courts. Let us return to our Californian and Nevadan who entered into a gambling contract in Nevada, with payment to occur in California. Imagine that instead of prohibiting private gambling contracts, California law on the matter is unsettled, although it is likely that the California Supreme Court would hold such contracts unenforceable. The Nevadan sues the Californian in state court in Nevada. Assume that the Nevada state court would apply California law but would presume that any unsettled California law is the same as its own. The California defendant removes the action to federal court in Nevada. How should this federal court interpret California law? It appears to be subject to conflicting obligations. On the one hand, it has been told that its vertical *Erie* obligation is to predict how the California Supreme Court would decide the issue, which would mean not enforcing the contract. On the other hand, if it uses the predictive method, *Klaxon* will be violated. After all, a Nevada state court would presume that California law is the same as Nevada law and so enforce the contract. The difference in interpretive approaches will result in vertical forum shopping and the inequitable administration of the laws.

This puzzle has usually been discussed by federal courts in New York, since New York state courts are among the most vocal proponents of the presumption of similarity to forum law.<sup>176</sup> As Judge Friendly, emphasizing *Klaxon*, put it, a federal court in New York interpreting California law should determine not what California courts would think but rather "what the New York courts would think . . . California courts would think . . ."<sup>177</sup> Indeed, Friendly's rule is still too deferential to California courts. Because when California law is unsettled New York courts don't *care* what California courts would think, a federal court in New York shouldn't care either.

Friendly's rule must be qualified, of course, to exclude cases in which New York lacks lawmaking power. If a federal court in New York is interpreting California law in connection with a gambling contract entered into in California between two Californians with performance in California, it must interpret California law the way the California Supreme Court would.

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176. See *supra* note 153.

177. Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960).

It adds nothing to speak of interpreting California law as the New York Court of Appeals would, since under horizontal *Erie* the New York Court of Appeals must also respect the California Supreme Court's likely decision.<sup>178</sup> But if New York has lawmaking power, Friendly's rule is correct—provided that lawmaking power releases state courts from their horizontal *Erie* obligations.

Federal courts in New York have had a difficult time resolving the conflict between *Klaxon* and what they thought was their obligation under vertical *Erie* to interpret a state's law as that state's supreme court would. Some have sided in favor of *Klaxon* and have used the presumption of similarity to New York law.<sup>179</sup> Others have sided in favor of their apparent vertical *Erie* obligation and have adopted the predictive method.<sup>180</sup> And some have suppressed the problem by pretending that there is no difference between the two approaches. An example of this last strategy is *Rogers v. Grimaldi*.<sup>181</sup>

The *Rogers* court began by noting New York federal courts' varying responses to the puzzle:

[O]ur own cases have not taken a consistent approach to New York's presumption of similarity [to forum] law in diversity cases in which New York is the forum state. On occasion, we have applied the presumption, apparently viewing it as a substantive rule of interpretation; in other cases, we have ignored it and made our own determination of what we think will emerge as the law of a foreign state.<sup>182</sup>

Although one can appreciate the bind that the court finds itself in, its resolution of the problem is unsatisfying:

We believe that New York courts would, as a matter of substantive interpretation, presume that the unsettled common law of another state would resemble New York's but that they would examine the law of the other

178. Friendly's rule would also not apply if New York does not have lawmaking power but there is a state other than California, such as Nevada, that shares lawmaking power with California. An example would be a New York federal court interpreting California law in connection with our gambling contract entered into in Nevada between a Californian and a Nevadan. In such a case the federal court must interpret California law the way that either the supreme court of California or the supreme court of Nevada would. Here too it adds nothing to speak about interpreting California law as the New York Court of Appeals would, since under horizontal *Erie* the New York Court of Appeals also must respect the likely decision of the supreme court of a state with lawmaking power.

179. *E.g.*, *Sagamore Corp. v. Diamond W. Energy Corp.*, 806 F.2d 373, 377 (2d Cir. 1986); *Colgate Palmolive Co. v. S/S Dart Can.*, 724 F.2d 313, 317 (2d Cir. 1983); *Johnson v. E. Air Lines, Inc.*, 177 F.2d 713, 714 (2d Cir. 1949). For examples outside New York, see *Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 27 (D. Mass. 2003); *Barker v. FSC Sec. Corp.*, 133 F.R.D. 548, 555 (W.D. Ark. 1989); *Roberts v. Heim*, 670 F. Supp. 1466, 1494 (N.D. Cal. 1987).

180. *E.g.*, *Plummer v. Lederle Labs.*, 819 F.2d 349, 355 (2d Cir. 1987) (employing no presumption); *Metz v. United Techs. Corp.*, 754 F.2d 63, 66 (2d Cir. 1985) (no presumption).

181. 875 F.2d 994 (2d Cir. 1989).

182. *Rogers*, 875 F.2d at 1003. Federal courts in other states have struggled with the same problem. *E.g.*, *Waggaman v. Gen. Fin. Co.*, 116 F.2d 254 (3d Cir. 1940) (employing presumption); *Brown v. Ford Motor Co.*, 48 F.2d 732 (10th Cir. 1931) (no presumption); *Tarbert v. Ingraham Co.*, 190 F. Supp. 402 (D. Conn. 1960) (no presumption); *Petersen v. Chicago, Great W. Ry. Co.*, 3 F.R.D. 346 (D. Neb. 1943) (no presumption).

jurisdiction and that of other states, as well as their own, in making an ultimate determination as to the likely future content of the other jurisdiction's law.<sup>183</sup>

If the court is examining the law of the sister state and other states, as well as New York law, in order to make "an ultimate determination as to the likely future content of the other jurisdiction's law," it is not employing New York's presumption. It is abiding by the predictive method.

We can see a similar conflict in connection with class action certification in federal court. For example, in *Wadleigh v. Rhone-Poulenc Rorer, Inc.*,<sup>184</sup> the question was the certification of a class action brought by hemophiliacs against manufacturers of blood products that had been contaminated by HIV. The defendants had argued that class certification would be inappropriate "because . . . the negligence law of each of fifty-one jurisdictions would have to be applied by the jury, making a joint trial impossible."<sup>185</sup> The federal district court in Illinois allowed for partial certification, because the defendants had failed to demonstrate that the laws of the sister states were different from the jury instructions devised by the court.<sup>186</sup>

But Judge Posner reversed, arguing that the district court's approach was incompatible with its obligations under vertical *Erie*:

If one instruction on negligence will serve to instruct the jury on the legal standard of every state of the United States applicable to a novel claim, implying that the claim despite its controversiality would be decided identically in all 50 states and the District of Columbia, one wonders what the Supreme Court thought it was doing in the *Erie* case when it held that it was *unconstitutional* for federal courts in diversity cases to apply general common law rather than the common law of the state whose law would apply if the case were being tried in state rather than federal court.<sup>187</sup>

On the one hand, Posner seemed to ignore the fact that the district court *was* deciding according to the common law that would apply "if the case were being tried in state rather than federal court." The district court was deciding the case the way it would have been decided in *Illinois* state court. The instructions were drawn from Illinois law,<sup>188</sup> and Illinois state courts employ the presumption that unsettled sister-state law is the same as their own.<sup>189</sup>

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183. *Grimaldi*, 875 F.2d at 1003.

184. 157 F.R.D. 410 (N.D. Ill. 1994).

185. *Wadleigh*, 157 F.R.D. at 418.

186. *Id.* at 419.

187. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).

188. *Wadleigh*, 157 F.R.D. at 419.

189. *E.g.*, *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1254 (Ill. App. Ct. 2001); *Soc'y of Mount Carmel v. Nat'l Ben Franklin Ins. Co. of Ill.*, 643 N.E.2d 1280, 1293 n.4 (Ill. App. Ct. 1994); *Ellerbrake v. Campbell-Hausfeld*, No. 01L-540, 2003 WL 23409813, at \*2 (Ill. Cir. Ct. July 2, 2003). The district court did not explicitly appeal to Illinois's presumption of similarity to forum law, but the fact that it put the burden on the defendants to provide evidence that the law of

Posner's argument ignored *Klaxon*, as Patrick Woolley has recently argued: "Without so much as citing *Klaxon*, [Posner] wrapped [himself] in the mantle of *Erie* and invoked the spectre of 'general common law' to insist that the law of all fifty states must be applied to the claims asserted in *Wadleigh*."<sup>190</sup> *Klaxon* was also ignored by the Senate Report on the Class Action Fairness Act.<sup>191</sup> The Senate Report assumes that the presumption of similarity to forum law can be escaped by removal to federal court. It did not consider why *Klaxon* would not compel federal courts to use the forum state's presumption as well.

On the other hand, if Posner ignored *Klaxon*, the district court ignored vertical *Erie*. Illinois's presumption of similarity to forum law is incompatible with a federal court's obligation to respect the authority that courts in states other than Illinois have with respect to *their own* law. And it is unlikely that the courts of these states would all have adopted Illinois's standard.

Since an Illinois state court entertaining *Wadleigh* would not have had lawmaking power concerning all the plaintiffs' actions, Posner's decision is correct—even if he failed to explain why it was compatible with *Klaxon*. The federal court in *Wadleigh* was not permitted to presume that the laws of other states are the same as Illinois's, because a state court in Illinois could not. But the question remains whether state courts with lawmaking power have horizontal *Erie* obligations. If they do not, then what federal courts thought were their vertical *Erie* obligations become transformed. They must interpret a state's law, not necessarily the way *that state's* supreme court would, but instead the way the supreme court of *a* state with lawmaking power would. And the effect of *Klaxon* is solely to obligate the federal court to engage in the same interpretation, or misinterpretation, of state law as the forum state's supreme court would.

It is important to recognize how devastating the refusal to apply horizontal *Erie* to state courts with lawmaking power would be for vertical *Erie*. A federal court would be obligated by *Klaxon* not merely to adopt the forum state's presumption that unsettled sister-state law is the same as its own. It would also be obligated to ignore the explicit decisions of the sister state's supreme court, if that is what the forum state's courts would do.

Consider Georgia, whose state courts, astonishingly, still accept a *Swifzian* view of the common law.<sup>192</sup> Although Georgia state courts will apply a sister state's statute to events in the sister state and respect how its courts have interpreted the statute,<sup>193</sup> if the matter is governed by the common law, they will ignore the decisions of the sister state's courts entirely and come to their own judgment about what this common law is. What are *federal* courts

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sister states was different from the jury instructions suggests that it was employing the presumption. See *Wadleigh*, 157 F.R.D. at 419.

190. Woolley, *supra* note 10, at 1738. Technically, the issue was not whether the law of all fifty states should be applied, but rather how the laws of these states should be interpreted.

191. See *supra* text accompanying notes 166–169.

192. See *supra* note 7.

193. *E.g.*, Calhoun v. Cullum's Lumber Mill, Inc., 545 S.E.2d 41, 44 (Ga. Ct. App. 2001).

in Georgia supposed to do when they interpret the common law of states other than Georgia? Remarkably, they have generally decided the conflict between vertical *Erie* and *Klaxon* in favor of *Klaxon*.<sup>194</sup> To be sure, they have largely recognized that Georgia's approach should be limited by constitutional considerations. It cannot be used unless Georgia has lawmaking power under *Allstate*.<sup>195</sup> But they have apparently assumed that when Georgia has such power, its courts may freely misinterpret sister-state law. Following *Klaxon*, they have engaged in the same misinterpretations.

Granted, these federal courts probably understand themselves as applying Georgia common law, rather than as misinterpreting the common law of another state.<sup>196</sup> But this fails to appreciate the *Swiftian* nature of Georgia's approach. For example, under Georgia choice-of-law rules for torts, the *lex loci delicti*—the law of the place of the accident—applies.<sup>197</sup> If the accident occurs in a sister state, Georgia law cannot apply. The law applied must instead be the law of the sister state where the accident occurred. Nevertheless, if the sister state's law is common law, Georgia courts exercise their own judgment about what this common law is, completely ignoring the decisions of the sister state's supreme court.<sup>198</sup>

#### V. "DISCRETIONARY" *ERIE*

With the fate of the vertical *Erie* doctrine in mind, we must now face the question of state courts' horizontal *Erie* obligations when they choose to apply sister-state law over forum law. Do they have a duty to interpret sister-state law with fidelity, or is any misinterpretation permissible, given that they could have applied forum law anyway?<sup>199</sup> I will argue that horizontal *Erie* can apply even to state courts with lawmaking power. At this point, my argument will be limited to showing that such courts may not ignore the explicit decisions of the sister state's supreme court. I will save for the Conclusion the effect my argument has on the permissibility of the presumption of similarity to forum law.

The question of the horizontal *Erie* obligations of state courts with lawmaking power is important not merely because of the consequences for

194. See, e.g., *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 n.6 (11th Cir. 1987); *Frank Briscoe Co. v. Ga. Sprinkler Co.*, 713 F.2d 1500, 1503 (11th Cir. 1983); *In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 677 (N.D. Ga. 2003).

195. *Kirkpatrick*, 827 F.2d at 725 n.6; *In re Tri-State Crematory Litig.*, 215 F.R.D. at 677.

196. See especially *Frank Briscoe Co.*, 713 F.2d at 1503 (noting that under Georgia's approach, "Georgia law must control").

197. *Dowis v. Mud Slingers, Inc.*, 621 S.E.2d 413 (Ga. 2005); *Bagnell v. Ford Motor Co.*, 678 S.E.2d 489, 492 (Ga. Ct. App. 2009).

198. For example, in *Risdon Enterprises, Inc. v. Colemill Enterprises, Inc.*, 324 S.E.2d 738 (Ga. Ct. App. 1984), the court reaffirmed that the *lex loci delicti* applied to a tort action concerning an airplane crash in South Carolina. *Id.* at 740. But since the matter was governed not by a South Carolina statute but by the common law, the court was "not bound by the interpretation placed upon the common law by [South Carolina] courts . . ." *Id.* at 741 (internal quotation marks omitted).

199. For the view that lawmaking power frees state courts of the duty to interpret sister-state law with fidelity, see Note, *supra* note 9, at 653.

vertical *Erie*. If state courts with lawmaking power lack horizontal *Erie* obligations, the duty to interpret sister-state law with fidelity will be a comparatively rare phenomenon outside of nationwide class actions. For it is usually the case that a state court that has jurisdiction over the parties and that has chosen not to dismiss on *forum non conveniens* grounds has the power under *Allstate* to apply forum law.<sup>200</sup>

#### A. Vertical Erie with Lawmaking Power

To determine the effect of lawmaking power on horizontal *Erie*, let us first consider a vertical analogue. As we have seen, when a federal court is constitutionally obligated to apply state law, it is bound by vertical *Erie*. It must respect the state supreme court's decisions. But what if it has the power to make federal common law and chooses to use state law anyway? Must it interpret state law with fidelity, or does lawmaking power release it of its vertical *Erie* obligations? Can it simply ignore state supreme court decisions on the ground that any misinterpretation of state law is the permissible exercise of its own lawmaking power?

An example where it should not be bound by the decisions of the state supreme court is when it uses state law standards in order to serve federal regulatory purposes. There are many reasons why a federal court might find that using state standards advances federal interests. Because state laws are drafted with an eye to local conditions, using state standards might allow the content of federal law to change as local conditions change.<sup>201</sup> It also avoids the confusion that an independent federal standard would produce among citizens who are accustomed to their state's laws.<sup>202</sup> Furthermore, since state standards are relatively well developed, using them relieves the federal court of the difficult and uncertain work of articulating a uniform federal standard.<sup>203</sup>

A federal court choosing state standards for these reasons will not be bound by vertical *Erie*. It will be allowed to interpret state standards in any manner that best serves federal purposes, even if this is contrary to state supreme court decisions.<sup>204</sup> Of course, federal purposes might suggest that the best interpretive method is to follow the relevant state supreme court. But it would remain *constitutionally* free to choose interpretations that diverge from the state supreme court's. Indeed, the duty of deference would be reversed. If a Pennsylvania state court entertains a federal cause of action

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200. See *supra* text accompanying notes 76–78.

201. See *Reconstruction Fin. Corp. v. Beaver Cnty.*, 328 U.S. 204, 208–09 (1946); Weinberg, *supra* note 7, at 837.

202. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98–99 (1991); Field, *supra* note 30, at 959 n.341 (offering *DeSylva v. Ballentine*, 351 U.S. 570 (1956), as an example).

203. Field, *supra* note 30, at 958–60.

204. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966); Field, *supra* note 30, at 963–64; Mishkin, *supra* note 30, at 808–10; Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1651 (2008).

incorporating a standard drawn from Pennsylvania law, it should be bound by *federal courts'* interpretations of the standard.<sup>205</sup> To refuse to respect these interpretations would be a violation of its obligation under the Supremacy Clause.<sup>206</sup> It could diverge from past federal interpretations only if it thought that any interpretation it adopted would advance federal interests and so be followed by federal courts.

In the past, the Supreme Court was comfortable with characterizing state law standards as incorporated into federal law, which served to indicate federal courts' freedom from vertical *Erie*.<sup>207</sup> Recently, however, it has begun to express some doubts about the meaningfulness of such a characterization. In *Boyle v. United Technologies Corp.*, for example, Justice Scalia restricted cases in which state law was preempted by federal law solely to those areas where a uniform federal standard was chosen, on the ground that there is "nothing to be gained by expanding the theoretical scope of the federal preemption beyond its practical effect."<sup>208</sup> But characterizing a state law standard employed by a federal court as federal law *can* have a practical effect, because it indicates that the federal court is free from its *Erie* obligations. Indeed, if it were really true that federal preemption can never occur when a state law standard is applied by a federal court, *Erie* obligations would always apply to such standards, needlessly hampering the federal interests that recommended their incorporation.

But simply because the *narrow* view of the scope of federal law should be rejected does not mean that we should embrace the *broad* view that any state law standard used by a federal court with lawmaking power is actually federal and thus frees the federal court of the obligations of vertical *Erie*. We need not conclude that the power to create federal common law, like Midas's touch,<sup>209</sup> makes federal law of any state standard with which it comes in contact.

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205. Field, *supra* note 30, at 964; Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964).

206. It is worth noting that Congress, in explicitly incorporating state law standards into a federal statute, might command federal courts to treat the state law as if it were operating by its own force. In this case, the obligations of *Erie* apply to federal courts, not constitutionally, but rather by statutory demand. Field, *supra* note 30, at 978.

207. *Kamen*, 500 U.S. at 97–98; *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979) (adopting "the readymade body of state law as the federal rule of decision"); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 594 (1973); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) ("In our choice of the applicable federal rule we have occasionally selected state law").

208. 487 U.S. 500, 507 n.3 (1988); *see also* O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994) (noting the difference between applying state law of its own force and adopting it as the federal rule of decision "is of only theoretical interest"). It is unclear how seriously we should take Scalia's statement in *Boyle*, however, given that he accepted the idea that federal law could incorporate state standards in *Semtek International, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001).

209. *Cf. Cuyler v. Adams*, 449 U.S. 433, 454 (1981) (Rehnquist, J., dissenting) (warning against creation of a "judicial Midas meandering through the state statute books, turning everything it touches into federal law").

As Martha Field has argued, the broad view, combined with a generous interpretation of federal courts' lawmaking power, threatens the very possibility of state law operating of its own force.<sup>210</sup> Assume that a federal court has the power to create common law whenever Congress could have regulated the matter. That means that the federal court in *Erie* had lawmaking power, because Congress could have regulated the duty of care of businesses, like railroads, engaged in interstate commerce. And if the mere existence of this power turns any state standard applied into federal law, the Pennsylvania standard ultimately applied by the federal court in *Erie* was actually *federal*, freeing the court from any constitutional duty to defer to the decisions of Pennsylvania state courts. The same would be true of most state law applied in diversity cases. Vertical *Erie* would all but disappear.

The solution to this problem is not merely to limit the scope of federal courts' lawmaking power, although it is probably wrong that their power is as wide as Congress's.<sup>211</sup> The scope of federal courts' vertical *Erie* obligations should not be beholden to highly contested theories about federal courts' power to make federal common law.<sup>212</sup> We must reject the broad view that a state law standard applied by a federal court is federal simply by virtue of the federal court having lawmaking power.

We need to embrace a middle view. It is possible for there to be federal incorporation of state standards, freeing the federal court of vertical *Erie*. But it is also possible that a federal court with lawmaking power might refrain from exercising this power, leaving the matter to be regulated by the states. In such a case, vertical *Erie* obligations would apply. The federal court would then need to respect the decisions of the relevant state supreme court. Absent an explicit statement by the federal court, the question of whether incorporation has occurred should be decided on the basis of the reasons the court used state standards.

Let us begin with a case in which it is clear that incorporation has occurred. If a federal law lacks a statute of limitations, a federal court will generally borrow an analogous limitation period from the law of the state where the court is located.<sup>213</sup> It is easy to see why the state limitation used is

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210. Field, *supra* note 30, at 973–77.

211. As the Supreme Court has noted:

In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress.

*Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966). But this language might be understood not as referring to the federal courts' power to create common law but only to the subsequent question of whether that power should be exercised.

212. For the level of disagreement about the scope of federal courts' power to make federal common law, see *supra* note 37.

213. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703–04 (1966). It will generally do so unless the state limitation will “frustrate or significantly interfere with federal policies.” *Reed v. United Transp. Union*, 488 U.S. 319, 327 (1989).



really federal. It is not chosen by the federal court out of any deference to the regulatory interests of the state. Indeed, the state probably did not enact the limitation with the intention of regulating the federal statute—and had it done so, its efforts would likely have been unconstitutional.<sup>214</sup> The reasons for the federal court's use of the state limitation are fully federal. It is chosen for convenience and because of the feeling that it is awkward, and strangely unjudicial, for a federal court to make up a limitation period out of whole cloth. It is understandable, therefore, that the Supreme Court has described the borrowed limitation as federal law.<sup>215</sup> And, once again, this has a practical effect. A federal court may ignore the state supreme court's interpretation of the limitation.<sup>216</sup>

At the other end of the spectrum is a federal court with lawmaking power that concludes that it should allow state law to apply because the use of state law will not significantly impede federal interests.<sup>217</sup> Here, the court is protecting the regulatory interests of the states and vertical *Erie* should apply. An alternative way to read these cases is that the federal court lacks lawmaking power. Because such power depends upon federal interests, the fact that federal interests do not recommend displacement of state law might mean that there is no power to displace state law in the first place. But it certainly appears possible for there to be gray areas in which a federal court has some discretion to create federal common law but chooses not to out of deference to states' regulatory interests.<sup>218</sup> Since the federal court has chosen not to exercise federal power, vertical *Erie* should come into play. If it subsequently misinterprets state law, it has violated its *Erie* obligations, even if there would have been no violation if it had chosen to exercise its lawmaking power.

Granted, it is a bit odd to speak of this obligation to defer to state courts as an *Erie* obligation, because—unlike traditional *Erie*—it does not have its source in any limitation on the lawmaking power of federal courts, but rather in their decision about whether to exercise this power. The discretionary *Erie* obligation exists only as long as the federal courts make it exist. They may change their mind and choose to reassert their lawmaking power, thereby freeing themselves of their obligations to defer to state courts.

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214. Time limitations on federal rights are not within the scope of a state's regulatory power. Indeed, in reverse-*Erie* cases, state courts entertaining actions under federal law have held that they are obligated to apply any applicable federal statutes of limitations. *E.g.*, *David L. Smith & Assocs. v. Advanced Placement Team, Inc.*, 169 S.W.3d 816, 822 (Tex. App. 2005); *Chair King, Inc. v. GTE Mobilnet, Inc.*, 135 S.W.3d 365, 389–92 (Tex. App. 2004).

215. *E.g.*, *Hoosier Cardinal Corp.*, 383 U.S. at 706 (holding that characterization of action for purpose of applying appropriate Indiana statute of limitations is “ultimately a question of federal law”).

216. *Id.*; *see also* *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983).

217. Weinberg, *supra* note 7, at 837.

218. The best examples are those in which the federal court settles on state law after balancing federal and state interests and finding the latter superior. *See, e.g.*, *Ga. Power Co. v. Sanders*, 617 F.2d 1112 (5th Cir. 1980) (en banc).

But we should not take the fact that these *Erie* obligations are discretionary to mean that they cannot be violated. The fact that a federal court has misinterpreted state law does not on its own free it from its *Erie* obligations. Otherwise there would be no sense in which federal courts with lawmaking power could *choose* to apply state law. To make such a choice is to create the possibility of error. But error is impossible if the very act of misinterpreting state law releases federal courts from the duty to interpret correctly. One way of putting the matter is that even when federal courts have no duty to apply state law, state law commands respect as a binding standard on those federal courts that have chosen it.

Federal courts' obligation to assert, or reassert, lawmaking power before ignoring state court decisions does not merely have its source in respect for state law as a rule of decision. It can also be justified by separation of powers considerations. Congress may override federal common law through legislation. It can do so, however, only if federal courts are forthright when creating federal common law. If they claim to be applying state law while ignoring the relevant state supreme court, they are exercising de facto lawmaking power in a manner that is insulated from congressional oversight.<sup>219</sup>

The obligation can also be justified by the interests of the parties before the court. To be sure, it is unlikely to have its source in concerns about frustrating expectations they had at the time of the event being adjudicated. Given that federal courts have lawmaking power, the parties should have known that they were vulnerable to federal courts' choice to exercise this power in a manner that would displace state law. Since they could not have reasonably relied upon the applicability of state law, a federal court's misinterpretation of state law could not violate their settled expectations.

The obligation has more to do with fundamental rule-of-law considerations.<sup>220</sup> One such consideration is that law be publicly promulgated.<sup>221</sup> The creation of federal law must be made manifest to those to whom it applies, as well as to the states. This is not the case if the federal court asserting de facto lawmaking power claims to be applying state law. The other consideration is the right of parties that a court abide by the rules it has laid down for itself.<sup>222</sup> Even if the parties would not be surprised by a federal court's application of federal common law, once the court has claimed that it is adjudicating according to state law, it must be true to its choice.

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219. I thank Neal Devins for mentioning this point.

220. See generally Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997).

221. See LON L. FULLER, THE MORALITY OF LAW 39 (1st ed. 1964).

222. *Id.* (rule of law requires that there be a congruence between the rules "as announced" and their actual administration); see also Fallon, *supra* note 220, at 3 ("If courts . . . could make law in the guise of applying it, we would have the very 'rule of men' with which the Rule of Law is supposed to contrast:").

### B. *Horizontal Erie with Lawmaking Power*

We can translate these lessons into a horizontal context. Here, too, it would be a mistake to adopt a broad approach under which a forum state's lawmaking power, like Midas's touch, makes forum law of all sister-state standards with which it comes into contact. The broad approach would be similar to the "local law theory" expressed by Learned Hand in *Guinness v. Miller*:

[N]o court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs.<sup>223</sup>

Hand's argument appears to depend upon the idea that the plaintiff can invoke only those foreign laws recognized at the discretion of the forum. Because the forum always retains the power to refuse to apply foreign law, any law it applies must, in the end, be *forum* law.

One reason to reject the local law theory is that its premise about the power of the forum is false. A court is not free to apply forum law whenever it wishes. A federal court can be constitutionally compelled to apply state law, and when it does, the law applied is truly state law, not federal law that incorporates state standards. Likewise, a state court can be constitutionally compelled by the Supremacy Clause to apply federal law, not state law that incorporates a federal law's content. Indeed, if the local law theory applied to federal law in state court, the Supremacy Clause could not compel the state court to do anything. The compulsion would instead come from state law that incorporated the Supremacy Clause's demands.<sup>224</sup> Finally, a state court can be constitutionally compelled to apply the law of a sister state. When it is so compelled, the law it applies is sister-state law.

But the local law theory is mistaken for a second reason. Simply because a state has lawmaking power does not mean that it has chosen to exercise it. Legal regulation is a discretionary activity of governments. The forum might apply sister-state law out of deference to the sister state's regulatory interests. In such a case, its choice will create a discretionary horizontal *Erie* obligation to interpret sister-state law with fidelity.<sup>225</sup>

This horizontal *Erie* obligation is discretionary because it exists only as long as the state courts make it exist. They may change their mind and choose to reassert their lawmaking power, thereby freeing themselves of

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223. 291 F. 769, 770 (S.D.N.Y. 1923).

224. For a conception of federal law as fundamentally state law, see Michael Steven Green, *Legal Revolutions: Six Mistakes About Discontinuity in the Legal Order*, 83 N.C. L. REV. 331, 348–51 (2005).

225. We do not want to repeat the fallacy of *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), however, and conflate a state court's horizontal *Erie* obligation with the conditions under which violations of this obligation will be reviewed. See *supra* Section II.C. That it has violated its horizontal *Erie* obligation does not mean that Supreme Court review is possible.

their interpretive obligation. But here too we should not conclude from the fact that the obligation is discretionary that it cannot be violated. Misinterpreting sister-state law does not on its own free a state court of its obligation. If the court intends not to be bound by horizontal *Erie*, it must reassert its lawmaking power.<sup>226</sup> Otherwise there would be no sense in which state courts with lawmaking power could *choose* to apply sister-state law. Even though they have no *duty* to apply sister-state law, sister-state law commands respect as a standard that binds those state courts that have chosen it.

Once again, this obligation to interpret sister-state law with fidelity does not merely have its source in respect for sister-state law as a rule of decision. It is also supported by separation of powers considerations (although they would have their source in state rather than federal constitutional principles). A state court that refuses to defer to a sister state's supreme court when interpreting sister-state law is asserting de facto lawmaking power. Common law can be overridden by statute, but the forum state's legislature cannot exercise this power if the state court is not forthright about its creation of common law. Finally, the rights of the parties before the court that law be publicly promulgated and consistently administered would also be violated if a state court's assertion of lawmaking power could be disguised as the application of sister-state law.<sup>227</sup>

Just as we should reject Hand's *broad* theory of the scope of forum law, however, so we should reject a *narrow* theory, under which any sister-state standard used by a state court is sister-state law and horizontal *Erie* obligations exist. This approach will needlessly hamper domestic interests when they are the reason that sister-state standards are used.

In general, the forum's choice-of-law rules will serve as the primary indicator of when it has asserted its lawmaking power. If these rules state that another jurisdiction's law applies, that suggests that the forum has

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226. That misinterpretation of sister-state law does not mean that the forum has chosen to assert its lawmaking power is evidenced by the fact that the misinterpretation would not be treated as forum law by a third state. Assume a New Yorker sues a Pennsylvanian in Vermont state court for damages from a brawl the two got into in Pennsylvania. In an earlier case, a New York court, adjudicating similar facts, had applied Pennsylvania law, but misinterpreted the content of this law. If this misinterpretation really were the assertion of New York's lawmaking power, the Vermont court should be permitted to apply New York "law" by applying the New York court's misinterpretation of Pennsylvania law. The fact that we find this implausible suggests that we do not think that the New York court chose to exercise its lawmaking power at all.

227. Here too I don't think that the obligation to interpret sister-state law with fidelity can have its source in concerns about the parties' reasonable expectations at the time of the event being adjudicated. Given that the forum state has lawmaking power, the parties should have known that they were vulnerable to its choice to exercise this power in a manner that would displace sister-state law. Since they could not have reasonably relied upon sister-state law applying, the state court's misinterpretation of sister-state law could not violate their expectations.

Furthermore, even if party expectations could be violated by the misinterpretation of sister-state law, this would not justify horizontal *Erie* obligations to decide as the sister state's supreme court would. A state court would be obligated only to refrain from violating these expectations—and this obligation would be waivable by the parties. The result would be something like the *Wortman* standard, in which a state court is obligated only to avoid contradicting clearly established sister-state law that has been brought to its attention. *See supra* text accompanying notes 116–118.

relinquished any lawmaking power it has in favor of the power of the other jurisdiction. But the evidence provided by choice-of-law rules is not dispositive. Just as it is possible for federal law to incorporate state law standards, so it is possible for state law to incorporate the standards of a sister state.<sup>228</sup>

In the absence of an explicit statement by a state court that sister-state legal standards are incorporated into local law, the best test is the purposes that justify the use of sister-state standards. If they are used to serve *forum* purposes, there is an assertion of domestic lawmaking power and no horizontal *Erie* obligation will exist.<sup>229</sup>

Once again, statutes of limitations provide a clear example of incorporation. The traditional approach is that the statute of limitations of the forum applies even to sister-state causes of action.<sup>230</sup> But if the forum state has a generous limitation period, it risks being flooded by actions brought by plaintiffs who have waited too long under the limitation period of the sister state where the relevant transaction occurred. In order to solve this problem, many states have enacted borrowing statutes, which select the sister state's limitation period.<sup>231</sup> This is not done out of respect for the lawmaking power of the sister state. The sister state's period is chosen without inquiring into whether the sister state intends its limitation to follow its cause of action into another jurisdiction's courts.<sup>232</sup> Rather, the standard is borrowed to serve forum purposes. It makes sense, therefore, that the borrowed limitation period has been characterized as the law of the forum.<sup>233</sup> And although some commentators have dismissed talk of incorporation,<sup>234</sup> such a characterization has a practical effect. Horizontal *Erie* does not apply. The forum state is not obligated to respect how the sister state's courts interpret the limitation period.<sup>235</sup>

228. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 69–72 (1963); Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1200 (1987); Roosevelt, *supra* note 10, at 1874–75. For a discussion of a similar issue in French and Italian conflicts law, see Jacob Dolinger, *Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law*, 12 ARIZ. J. INT'L & COMP. L. 225, 240–41 (1995).

229. Of course, when a state court defers to another jurisdiction, it will do so in order to serve forum purposes *in some sense*. For example, a state court might choose to apply the law of a sister state when the sister state's interests are stronger, in order to encourage the sister state to relinquish its lawmaking power in cases where the forum's interests are stronger. By "forum purposes," I mean reasons that the forum has to *regulate* the transaction being litigated, not reasons to refrain from regulating it.

230. See RESTATEMENT OF CONFLICT OF LAWS §§ 603–04 (1934).

231. See examples cited in Donna Mae Endreson, Comment, *Wisconsin's Borrowing Statute: Did We Shortchange Ourselves?*, 70 MARQ. L. REV. 120, 122–27 (1986).

232. If it did so intend, then the limitation period would be applicable in the forum even if no borrowing statute had been in place.

233. See *Trzecki v. Gruenewald*, 532 S.W.2d 209, 211 (Mo. 1976) (en banc).

234. E.g., Ibrahim J. Wani, *Borrowing Statutes, Statutes of Limitations, and Modern Choice of Law*, 57 UMKC L. REV. 681, 689–90 (1989) (describing incorporation as a "fiction").

235. See *Goldsmith v. Learjet, Inc.*, 917 P.2d 810, 819–20 (Kan. 1996); *Alropa Corp. v. Kirchwehm*, 33 N.E.2d 655 (Ohio 1941).

Another example of the assertion of domestic lawmaking power through the incorporation of sister-state standards is *Miller v. Lucks*.<sup>236</sup> An African-American woman died intestate, and her surviving husband, a white man, claimed his share of Mississippi property as her spouse. Although they had both been Mississippi residents, where interracial marriage was forbidden, they moved to Illinois, where it was permitted, and married there. The Mississippi Supreme Court recognized the marriage solely for the purpose of determining intestate succession. It did so out of a desire to serve Mississippi interests in the orderly distribution of property, and because Mississippi's (putative) purposes in prohibiting interracial marriages were not affected. The court was not ceding lawmaking authority to Illinois, for it refused to interpret the legal effects of the marriage as would the Illinois Supreme Court. For example, had the two moved back to Mississippi, it would have allowed them to be prosecuted for unlawful cohabitation. The Illinois standard applied was, in effect, Mississippi law, to be interpreted by Mississippi courts.

Discretionary *Erie* is much more common horizontally than vertically. Because the limits on a state's lawmaking power are light,<sup>237</sup> it is usually the case that a state court with jurisdiction could apply forum law. That means that the primary limitations on its power to interpret sister-state law will be self-imposed. Whether it has an obligation to defer to the sister state's highest court will depend not upon constitutional limits on choice of law, but upon the extent to which the court has sought to exercise its lawmaking power.<sup>238</sup> But the fact that these obligations are self-imposed does not make them meaningless.

#### CONCLUSION

Horizontal *Erie* applies widely, therefore, to run-of-the-mill cases in which a state court, despite possessing lawmaking power, chooses to apply sister-state law. Having made the choice, it must respect the decisions of the sister state's courts. We do not yet know, however, whether state courts with lawmaking power can use a presumption of similarity to forum law when sister-state law is unsettled. For the employment of the presumption might itself be understood as the reassertion of domestic lawmaking power. After all, there would be nothing problematic about a state with lawmaking power having a choice-of-law rule that said that forum law should be applied when the content of sister-state law is too difficult to determine.

In some cases, it is reasonably clear that the use of the presumption is indeed nothing more than the choice to apply forum law. Consider

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236. 36 So. 2d 140 (Miss. 1948).

237. See *supra* text accompanying notes 72–86.

238. Notice that this horizontal discretionary *Erie* obligation can compel a state court to interpret the law of a *foreign nation* as that foreign nation's courts would. Horizontal nondiscretionary *Erie*, in contrast, can apply only when a disinterested state court interprets the law of an interested *sister state*. See *supra* note 104.

*Louknitsky v. Louknitsky*,<sup>239</sup> in which a California state court presumed that Chinese law pertaining to spousal rights in marital property was the same as California's community property system. Because the presumption was applied in response to the court's complete ignorance about the content of Chinese law, its use amounted to applying California law. The court clearly wished to decide the property rights of the parties, who were now California residents. It desired, in short, to legally regulate the matter. And it satisfied this desire by employing a standard drawn from California law. This amounts to an assertion of domestic lawmaking power.<sup>240</sup>

On the other hand, consider *Rosen v. PRIMUS Automotive Financial Services*.<sup>241</sup> The issue in *Rosen* was how an identical provision in the Uniform Commercial Codes ("U.C.C.s") of fifty different states should be interpreted. The courts of only seven states had decided the matter, with Minnesota courts arriving at one interpretation and the courts of six other states arriving at a different interpretation. The Minnesota state court in *Rosen* certified a class including actions under Minnesota's U.C.C. and the U.C.C.s of the forty-three states whose courts had yet to decide the matter, by presuming that these courts would agree with Minnesota. In my earlier discussion of *Rosen*, I assumed, as is likely, that Minnesota law could not have permissibly been applied to all the actions in the plaintiff class. But would it have mattered if it could have? After all, the court chose to apply the *sister states'* versions of the U.C.C., not Minnesota's. It chose *not* to assert domestic lawmaking power. Having made this choice, it was bound by a horizontal *Erie* obligation to interpret these provisions as the sister states' courts would. It could not presume that their interpretations would be the same as Minnesota's.

To be sure, the fact that a Minnesota state court applies sister-state law to some elements of a transaction does not preclude it from applying Minnesota law to other elements.<sup>242</sup> It is therefore possible, albeit considerably strained, to argue that the court in *Rosen*, although applying sister states' versions of the U.C.C. in general, applied a little bit of Minnesota law when deciding the unsettled interpretive question. After all, assuming that the court had lawmaking power, there would be nothing objectionable, as a constitutional matter, about its using a choice-of-law rule that explicitly directed that bits of Minnesota law be applied when the content of sister-state law became difficult to determine.

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239. 266 P.2d 910 (Cal. Dist. Ct. App. 1954).

240. The application of California law was constitutionally permissible in *Louknitsky*, not merely because at the time of the litigation California was the domicile of the parties. Even if California was disinterested, California courts have no obligation to protect Chinese lawmaking power. Their duty to apply Chinese law, therefore, has its source solely in the due process rights of the parties, which may be waived by their failure to introduce evidence of Chinese law. *See supra* notes 104, 110.

241. C1-99-943, 1999 Minn. LEXIS 538 (Minn. D. Ct., 4th Jud. Dist., May 4, 1999).

242. Among choice-of-law scholars, such an approach is known as *dépeçage*. *See generally* Willis L.M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973).

In the absence of a statement that Minnesota has such a grotesque choice-of-law rule, however, we should take the *Rosen* court at its word that the sister states' versions of the U.C.C., unadulterated by fragments of Minnesota law, applied. Demanding that state courts with lawmaking power abide by the rules they have laid down for themselves is particularly important given the consequences for federal courts. If state courts may say that they are applying sister-state law, while surreptitiously applying forum-state law instead, federal courts must do the same.

*Rosen* stands in contrast to cases where state courts take advantage of the scope of their lawmaking power under *Allstate* to genuinely apply their law to a nationwide class.<sup>243</sup> In one such case, the New Jersey Appellate Division applied New Jersey consumer fraud law to all the claims against a New Jersey corporation in a nationwide class action.<sup>244</sup> The fact that the corporate headquarters were located in New Jersey provided sufficient contacts for the requirements of due process and full faith and credit to be satisfied. If a state court wants to overcome choice-of-law problems when certifying a nationwide class, this is how it should be done.<sup>245</sup>

But even if I am wrong on this matter and a presumption of similarity to forum law may be employed by the courts of states with lawmaking power, the same cannot be said of a disinterested state court that is constitutionally obligated under full faith and credit to apply the law of a sister state. Such situations are common in nationwide class actions. When they arise, the forum may not presume that unsettled sister-state law is the same as its own. It must decide as the sister state's supreme court would. It is time for this fundamental and intuitive principle of interpretive fidelity to be recognized by the Supreme Court.

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243. By the same token, the presumption that forum law applies when the parties have failed to mention the applicability of sister-state law is clearly constitutionally permissible when the forum state has lawmaking power. For a discussion of this presumption, see *supra* note 151. Even if the choice-of-law rules usually employed by the forum would recommend sister-state law, this deference to sister-state interests was at the forum's discretion. And since the parties have made deference difficult by failing to mention sister-state law, there is no reason that the forum should not be permitted to reassert its lawmaking power.

244. *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co.*, 894 A.2d 1136, 1146–54 (N.J. Super. Ct. App. Div. 2006).

245. I set aside the problem of a court using a different choice-of-law approach in class actions than it would use in other circumstances. *Cf.* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 549 (1996).