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## Erie's Suppressed Premise

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## Article

### *Erie's Suppressed Premise*

Michael Steven Green<sup>†</sup>

#### INTRODUCTION

Some originalists believe that interpreting the Constitution with fidelity means following the Framers' specific intent—that is, deciding constitutional questions as the Framers themselves would have if asked.<sup>1</sup> For example, the death penalty cannot be judged to be cruel and unusual—and so contrary to the Eighth Amendment—unless the Framers would have said that the death penalty is cruel and unusual.

But what if the Framers did not want judges to follow their specific intent?<sup>2</sup> What if they wanted their intent to be followed only in the general sense that a judge interpreting the Eighth Amendment should do her best to identify what actually is cruel and unusual, whatever the Framers might have thought

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1. *E.g.*, RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 402–10 (2d ed. 1997) (advocating the interpretation of the Constitution on the basis of the Framers' original intention); Edwin Meese III, Attorney Gen., Speech Before the American Bar Association (July 9, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 1 (Paul G. Cassel ed., 1986). I ignore here further refinements of the originalist approach. For a short history of the evolution of originalism, see Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *NW. U. L. REV.* 923, 927–38 (2009).

2. *E.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *HARV. L. REV.* 885, 948 (1985) (denying “intentionalism was the original presupposition of American constitutional discourse”); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, *NEW REPUBLIC*, Aug. 27, 2008, at 32, 33.

about the matter?<sup>3</sup> Would that mean that specific-intent originalism as a theory of constitutional interpretation is bankrupt?

Not necessarily. There might be an argument for following the Framers' specific intent even if they did not want their specific intent to be followed.<sup>4</sup> Such an approach might be justified, for example, because it cabins the power of judicial review. If judges are allowed to exercise their own judgment about what types of punishment are cruel and unusual, they will have too much power to overturn the actions of the political branches of government. But if such an argument works,<sup>5</sup> originalism would, in a sense, be turned on its head. Instead of being a doctrine devoted to following the Framers' intent, it would fundamentally refuse to respect their intent.

This Article is about a similar phenomenon in connection with the *Erie* doctrine.<sup>6</sup> In the first year of law school, our civil procedure professors told us that *Erie Railroad Co. v. Tompkins*<sup>7</sup> overruled *Swift v. Tyson*.<sup>8</sup> Under *Swift*, the common law was conceived of as a "brooding omnipresence"<sup>9</sup> about which federal and state courts could come to differing judgments. *Erie* changed all that. A federal court could not come to its own conclusions about the common law in Pennsylvania.<sup>10</sup> It had to defer to the decisions of the Pennsylvania Supreme Court.<sup>11</sup>

Our civil procedure professors did not tell us, however, what a federal court should do if the Pennsylvania Supreme Court did not *want* deference. What if it thought the common law in Pennsylvania was a matter about which federal courts could come to their own judgment? Why would the respect for state courts demanded by *Erie* not compel federal courts, paradoxically, to adopt *Swift* concerning Pennsylvania common law?

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3. On the distinction between specific and general intent in constitutional interpretation, see David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105, 121–24 (1988).

4. *E.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 181 (1999) ("Originalism neither depends on the interpretive intent of the founders nor employs that intent.").

5. I take no stand on whether it does.

6. I thank Neal Devins for recognizing the analogy with originalism.

7. 304 U.S. 64 (1938).

8. 41 U.S. (16 Pet.) 1 (1842).

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

10. *See Erie*, 304 U.S. at 79–80.

11. *See id.* at 80 (following *Falchetti v. Pennsylvania R. Co.*, 307 Pa. 203 (1932)).

This is not a purely theoretical worry. At the time that *Swift* was decided, most state courts had their own *Swiftian* conception of the common law.<sup>12</sup> If they entertained a common-law action arising in a sister state, they came to their own conclusions about what the common law in the sister state was, without deferring to the sister state's courts.<sup>13</sup> This suggests that they conceived of their own common law as something about which sister-state and federal courts could come to an independent judgment. Furthermore, even when *Erie* was decided in 1938, some states remained committed to this *Swiftian* view of the common law. Indeed, at least one state—Georgia—appears to *still* understand the common law in *Swiftian* terms.<sup>14</sup>

By claiming that state decisions bind a federal court, without considering state court views on the matter, Justice Brandeis's opinion in *Erie* appears to violate his own command to respect the authority of state courts concerning state law. If we are to save Brandeis's argument, *Erie* must be turned on its head. A premise must be added that limits state courts' power to determine the binding effect of their decisions. My goal is to make this suppressed premise in Brandeis's argument explicit and to explore its effects.

I begin by describing in greater detail the gap in Brandeis's argument.<sup>15</sup> In particular, I will show that it cannot be filled by *Erie*'s positivist mandate that all law—including the common law—"does not exist without some definite authority behind it."<sup>16</sup> Positivism is compatible with the *Swiftian* notion that a state's common-law standards are a factual question about which the courts of other sovereigns, including federal courts, may come to their own judgment.<sup>17</sup>

In the light of positivism's failure to explain Brandeis's conclusion in *Erie*, I offer what I believe is the suppressed premise in his argument—namely, a constitutionally mandated nondiscrimination principle.<sup>18</sup> A state supreme court may not free federal courts of the duty to follow its decisions concerning

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12. See *infra* Part I.B.

13. *Id.*

14. See *infra* text accompanying notes 89–90.

15. See *infra* Part I.

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

17. See *infra* note 105.

18. See *infra* Part II.

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state law unless it is willing to free its own courts of the same duty. It may not vary the binding effect of its decisions depending on whether the effect is in a domestic or a federal court. Since the Georgia Supreme Court takes its common-law decisions to bind Georgia state courts, they must bind federal courts as well.<sup>19</sup> I also argue that there is an analogous horizontal nondiscrimination principle, derivable from the Full Faith and Credit Clause, that prohibits state supreme courts from varying the binding effect of their decisions depending on whether the effect is in a domestic or a *sister-state* court.

I then explore the suppressed premise in Brandeis's argument in connection with the predictive method—that is, the view that a federal court interpreting unsettled state law must predict how the state supreme court would decide.<sup>20</sup> The Supreme Court has suggested that the predictive method follows from the deference to state supreme courts demanded by *Erie*.<sup>21</sup> But here, too, we encounter our puzzle. The Supreme Court has imposed an interpretive method on federal courts without considering what the state supreme court thinks about the matter. What if the state supreme court does not care whether federal courts use the predictive method in deciding unsettled questions of its law?

Once again, this is not a purely theoretical problem. The courts of some states—such as New York—do not use the predictive method when interpreting the unsettled law of sister states.<sup>22</sup> New York courts simply presume that unsettled sister-state law is the same as New York law, without trying to predict how the sister-state supreme court would decide.<sup>23</sup> This suggests that the New York Court of Appeals does not think that unsettled questions of New York law must be decided by federal (or sister-state) courts according to the predictive method. If that is so, why has the Supreme Court claimed that the predictive method is constitutionally mandated? How can it tell the New York Court of Appeals how unsettled questions of New York law must be decided? The solution to this puzzle, I argue, is the vertical nondiscrimination principle latent in *Erie*. The New York Court of Appeals may not free federal courts of their duty to interpret unsettled New York law according to the pre-

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19. See *infra* notes 88–89 and accompanying text.

20. See *infra* Part III.

21. See *infra* note 176 and accompanying text.

22. See *infra* notes 179–84 and accompanying text.

23. See *infra* note 190 and accompanying text.

dictive method, except by changing (dramatically) the way such law is interpreted in New York state courts.

I end by briefly describing the effect of the nondiscrimination principles in *Erie* and the Full Faith and Credit Clause on horizontal (state-state) choice of law.<sup>24</sup> A growing number of scholars have recommended that choice-of-law principles be reformed in the light of *Erie*.<sup>25</sup> If the Pennsylvania Supreme Court has decided that Pennsylvania law does not apply to certain interstate facts, federal and sister-state courts must take its decision as binding. But here, too, our puzzle arises. What if the Pennsylvania Supreme Court does not think its choice-of-law decisions bind federal or sister-state courts?<sup>26</sup> What if it understands the territorial scope of Pennsylvania law in *Swift*-ian terms, as a matter about which federal and sister-state courts may come to their own judgment? And here, too, the problem is not purely theoretical. Under every choice-of-law approach currently in use, the choice-of-law decisions of a sister state are ignored when determining whether sister-state law applies.<sup>27</sup> This suggests that every state supreme court thinks that its own choice-of-law decisions can be ignored by sister-state and federal courts.

Nondiscrimination explains how deference to a state supreme court's choice-of-law decisions can be justified even when such deference is contrary to its wishes. Since the Pennsylvania Supreme Court takes its choice-of-law decisions to bind lower Pennsylvania state courts, they must be binding throughout the American legal system.

## I. THE PUZZLE

### A. *SWIFT* AND *ERIE*

In 1836, George Tysen purchased land in Maine from Nathaniel Norton and Jairus Keith.<sup>28</sup> To secure payment for the land, Norton and Keith drew up in Maine a bill of exchange of

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24. See *infra* Part IV.

25. See *infra* text accompanying notes 211–15.

26. See *infra* text accompanying notes 204–10.

27. See *infra* text accompanying notes 206–10.

28. Tyson's name was actually Tysen. It was misspelled in the Supreme Court's opinion. Herbert Hovenkamp, *Federalism Revised*, 34 HASTINGS L.J. 201, 204 n.20 (1982) (reviewing TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM (1981)). When referring to Mr. Tysen himself, I'll use his correct name. When referring to the Supreme Court case, I'll use the spelling that occurred in the Court's opinion.

\$1,540.30, payable six months later to Norton or his endorsee.<sup>29</sup> Tysen accepted the bill in New York.<sup>30</sup> Norton then endorsed the bill to John Swift in partial satisfaction of a debt that Norton and Keith owed to Swift in connection with a previous purchase of land.<sup>31</sup>

As it turned out, Tysen had been duped. Norton and Keith did not own the land (which was worthless swamp anyway).<sup>32</sup> When Swift sought to collect on the bill at maturity, Tysen refused to pay, on the grounds that Norton and Keith had fraudulently induced him to accept.<sup>33</sup> Swift then sued Tysen to enforce the bill in federal court in the Southern District of New York under diversity jurisdiction.<sup>34</sup>

It was agreed that Swift took the bill without any knowledge of Norton and Keith's fraud.<sup>35</sup> Accordingly, if he was a bona fide purchaser of the bill for valid consideration, he should be entitled to enforce it against Tysen.<sup>36</sup> The question was whether Swift's promise to discharge a preexisting debt to Norton and Keith was valid consideration.<sup>37</sup> Tysen argued that, according to New York common law, it was not.<sup>38</sup>

The Supreme Court, in an opinion by Justice Story, held that the matter was one of "general commercial law"<sup>39</sup> that could be decided by a federal court without deference to New York decisions. Standing in the way of such a conclusion, however, was section 34 of the Judiciary Act of 1789. This section, also known as the Rules of Decision Act, stated that "[t]he 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

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29. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 14–15 (1842).

30. *Id.* at 14.

31. *Id.* at 14–15. For a detailed account of the case, see FREYER, *supra* note 28, at 4–17.

32. *Swift*, 41 U.S. (16 Pet.) at 15.

33. *Id.*

34. Swift was a citizen of Maine and Tysen was a citizen of New York.

35. *Swift*, 41 U.S. (16 Pet.) at 14–15.

36. *Id.* at 15.

37. *See id.* at 16 ("[I]t is further contended, that . . . a pre-existing debt does not constitute . . . consideration.").

38. If a state's decisional law were applicable, the relevant state would be New York, since under the choice-of-law rules assumed by the Supreme Court, the law of the state where the bill was accepted applied. *Id.*

39. *Id.* at 18.

the courts of the United States in cases where they apply.”<sup>40</sup> It would appear, therefore, that the Act would compel a federal court to apply the “laws of the several states”—in particular New York common law—to the facts.

Story admitted that the Act required federal courts sitting in diversity to abide by any relevant state statutes.<sup>41</sup> Furthermore, they were bound by state court decisions concerning local usages, that is, common law concerning things “immovable and intraterritorial in their nature and character.”<sup>42</sup> But the Act did not apply “to questions of a more general nature . . . as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law.”<sup>43</sup> If the common-law matter was general rather than local, federal and state courts could each come to their own judgment about the common law’s content.<sup>44</sup>

Almost a century later, a federal court in the Southern District of New York entertained another diversity action that was to end the *Swift* regime.<sup>45</sup> *Erie Railroad Co. v. Tompkins* concerned an accident in Pennsylvania, in which Harry Tompkins was hit by something protruding from a passing train operated by the Erie Railroad Company.<sup>46</sup> Tompkins sued Erie for negligence in federal court in New York, relying on diversity subject-matter jurisdiction.<sup>47</sup> Since Tompkins was a trespasser on Erie’s property when the accident occurred, an important question was Erie’s common law standard of care.<sup>48</sup>

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

41. See *Swift*, 41 U.S. (16 Pet.) at 19.

42. *Id.* at 18.

43. *Id.* at 18–19.

44. See *id.* at 19 (“[T]he decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed.”).

45. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

46. *Id.* at 69.

47. 28 U.S.C. § 1332 (2006). Tompkins was a Pennsylvania citizen. Erie was considered a New York citizen by virtue of being incorporated in that state. This was prior to the amendment of the diversity statute in 1958 to treat a corporation as a citizen of its state (or states) of incorporation *and* the state “where it has its principal place of business.” *Id.* § 1332(c)(1).

48. See *Erie*, 304 U.S. at 70.



Both Erie's and Tompkins's arguments relied upon *Swift's* distinction between local and general common law. Erie argued that the question was local and pointed to decisions of the Pennsylvania Supreme Court holding that it could be found liable only if it acted with wanton or willful negligence.<sup>49</sup> Tompkins argued that the question was general, allowing the court to come to its own decision about Erie's standard of care.<sup>50</sup> Tompkins had a point: there was a long line of federal cases holding that a railroad's common-law duty of care to its passengers and employees was general, as one might expect given the interstate character of train travel.<sup>51</sup> On the other hand, Tompkins was neither a passenger nor an employee—indeed, he wasn't *on* a train at all when the accident occurred, so the case was difficult to characterize.

The trial court treated the matter as general and chose a simple negligence standard, and the Second Circuit affirmed.<sup>52</sup> But the Supreme Court reversed, choosing to overrule *Swift*, even though the issue had not been briefed by the parties.<sup>53</sup>

Part of Justice Brandeis's opinion in *Erie* pointed to the practical disadvantages of the *Swift* regime.<sup>54</sup> Since states refused to follow federal courts' lead concerning the content of the general common law, two common-law standards could be applied to any transaction, depending upon whether enforcement was sought in federal or state court.<sup>55</sup> What is more, the advantage of having the choice between these two standards was granted in a discriminatory fashion.<sup>56</sup> If the plaintiff was from a different state than the defendant, she could choose between these two standards by choosing between a state and a federal forum. But a plaintiff from the same state as the defendant was

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49. *Id.*

50. *Id.*

51. See, e.g., *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 370 (1893) (holding that the applicability of the fellow-servant rule to a railroad was a matter of general common law); *Lake Shore Ry. Co. v. Prentice*, 147 U.S. 101, 106–07 (1893) (holding that a passenger's right to punitive damages against a railroad was a matter of general common law).

52. *Tompkins v. Erie R.R. Co.*, 90 F.2d 603, 604 (2d Cir. 1937).

53. See *Erie*, 304 U.S. at 82 (Butler, J., dissenting) (“No constitutional question was suggested or argued below or here.”).

54. *Id.* at 74–78 (noting that the application of *Swift* “had revealed its defects”).

55. See *id.* at 74 (“Persistence of state courts in their own opinions on questions of common law prevented uniformity.”).

56. See *id.* (“*Swift v. Tyson* introduced grave discrimination by noncitizens against citizens.”).

stuck with the common law as interpreted by the state court.<sup>57</sup> The incentive to forum shop was great, often so great that a plaintiff might change her citizenship solely to take advantage of diversity jurisdiction.<sup>58</sup>

Another part of Brandeis's opinion argued that the term "laws of the several states" in the Rules of Decision Act was intended to include the general common law.<sup>59</sup> So understood, *Erie* was merely about statutory interpretation.

But Brandeis took his reading of the Act to be compelled by two more fundamental considerations. The first was jurisprudential. He rejected *Swift's* conception of the 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>60</sup> Law, he argued, including the common law, exists only as the creation of some definite authority. It followed that the common law to be applied in *Erie* was either *federal* common law, rather than the brooding omnipresence in *Swift*, or the common law of a *state*. It is at this point that constitutional considerations came into play. Federal courts had no power, Brandeis argued, to create common law governing the transaction in *Erie*.<sup>61</sup> In particular, a grant of lawmaking power could not be found in the decision to give them jurisdiction over diversity cases.<sup>62</sup> As a result, the federal court in *Erie* was consti-

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57. Or if the party making the choice was the defendant deciding whether to remove from state court, only defendants who were from a different state than the plaintiff had this option. At the time *Erie* was decided, a defendant diverse from a plaintiff could remove under diversity even if the defendant was a citizen of the state where the action was originally filed. This is no longer permitted. 28 U.S.C. § 1441(b) (2006).

58. See *Erie*, 304 U.S. at 73 (discussing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), in which a taxi company chose to reincorporate in Tennessee for diversity purposes).

59. See *id.* at 72–73. In arguing that Congress intended the Act 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. See 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).

60. See *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co.*, 276 U.S. at 533 (Holmes, J., dissenting)).

61. *Id.* at 78 ("[N]o clause in the Constitution purports to confer such a power [to create common law] upon the federal courts.").

62. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973) (stating that a principle of *Erie* is that the constitutional grant of diversity jurisdiction does not give federal courts the power to develop a "concomitant

tutionally obligated to apply state common law, as decided by the state's courts.<sup>63</sup>

Notice that *Erie* held that a federal court does not have lawmaking power by virtue of having subject-matter jurisdiction.<sup>64</sup> That does not mean that it cannot have lawmaking pow-

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body of general federal law"); see also 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, 798–99 (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).

63. *Erie*, 304 U.S. at 78–79. Brandeis appeared to assume that the only common law available was Pennsylvania's. He did not consider a federal court's *Erie* obligations when two or more states' laws (for example, the laws of Pennsylvania and New York) could permissibly be applied. For a discussion of some puzzles that arise when a federal court may permissibly choose between two states' laws, see Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. (forthcoming 2011).

64. In fact, even this principle must be qualified, for the grant of jurisdiction will give federal courts some power to create *procedural* common law, understood as common law that regulates the means by which substantive rights are litigated in a court system. Cf. *Erie*, 304 U.S. at 91–92 (Reed, J., concurring) ("The line between procedural and substantive law is hazy but no one doubts federal power over procedure."); Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 846–52 (2008) (discussing the sources of federal court's authority over their own procedure). On the scope of this constitutional power, see *infra* text accompanying notes 168–75.

But there is another *Erie* doctrine of nonconstitutional origin that limits federal courts' power to create federal procedural common law. Federal courts are constrained by a "policy," *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945), that recommends uniformity between federal procedural common law and the procedural law of the state where the federal court is located, if this is needed to discourage vertical forum shopping and to avoid the inequitable administration of the laws. *Hanna v. Plumer*, 380 U.S. 460, 466–69 (1965). The bulk of the cases described as *Erie* problems by federal courts, as well as the bulk of the *Erie* cases read in a first-year civil procedure course, concern this nonconstitutional question. *E.g.*, *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426–31 (1996); *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 534–38 (1958); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555–56 (1949); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949); *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 532 (1949); *Guar. Trust Co.*, 326 U.S. at 109.

To make matters worse, there is yet another "*Erie*" doctrine that concerns the validity of the Federal Rules of Civil Procedure, which are not subject to the same limitations as federal procedural common law. The validity of a Federal Rule of Civil Procedure depends upon two considerations: whether it is within Congress's power to regulate the procedure of federal courts, and whether it satisfies the limitations of the Rules Enabling Act, 28 U.S.C. § 2072 (2006), in which Congress delegated its regulatory power to the Supreme Court. *Hanna*, 380 U.S. at 469–74. For a recent discussion, see *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 130 S. Ct. 1431, 1442–44 (2010).

er for *other* reasons. Federal courts not only create interstitial common law when required to fill in gaps in federal statutes,<sup>65</sup> they sometimes create federal common law without any clear statutory authorization. Some examples are cases involving the rights and obligations of the United States<sup>66</sup> and international relations.<sup>67</sup>

This federal common law is arguably compatible with *Erie*, since it satisfies the requirements in Brandeis's opinion. 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.<sup>68</sup> But federal courts have the power to create this common law not because of federal jurisdiction, but instead because of sufficient "federal interests."<sup>69</sup>

#### B. WHAT IF STATE COURTS DON'T WANT YOU TO FOLLOW THEIR DECISIONS?

To modern eyes, *Swift* looks like federal encroachment upon New York courts' lawmaking powers. But it did not appear that way at the time. The reason is not merely that Justice Story's opinion simply restated what was already an established practice in federal courts, which had a history of deciding general common-law cases without deference to state decisions.<sup>70</sup> More importantly, this practice probably did not usurp powers that New York courts were claiming for themselves. As Story noted, they would also have treated the issue in *Swift* as a question of general common law: "It is observable that the

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65. *E.g.*, *Carey v. Phipus*, 435 U.S. 247, 253–57 (1978).

66. *E.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

67. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426–27 (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).

68. I will not discuss here the scope of federal courts' power to make substantive common law. Some examples of the enormous literature on this topic are Field, *supra* note 62; Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263 (1992); 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); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989).

69. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988).

70. FREYER, *supra* note 28, at 17–43; Fletcher, *supra* note 59, at 1516–21; Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1265 (1985) ("Long before *Swift v. Tyson* was decided, federal courts recognized the division between general and local law . . .").

Courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage: but they deduce the doctrine from the general principles of commercial law.”<sup>71</sup> New York state courts, he suggested, did not consider their own decisions about the general principles of commercial law to be binding upon federal courts.<sup>72</sup>

I think that Justice Story was probably right. The best evidence is the way that New York state courts would have adjudicated events in sister states. At the time that *Swift* was decided, most state courts followed the decisions of sister-state courts only concerning local usages and the interpretations of sister-state statutes. If the matter concerned the general common law—such as commercial law or the law merchant<sup>73</sup>—they would opine about this law without any special deference to what the sister state’s courts had said.<sup>74</sup>

Granted, if one looks to cases around the time *Swift* was decided, it is hard to find an example of a state court explicitly refusing to abide by a sister-state decision concerning the general common law. But this is because it was so hard for state courts to get information about the decisional (or, indeed, statutory) law of sister states.<sup>75</sup> Lacking such information, they rarely knew whether they were contradicting a sister-state de-

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71. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842).

72. *See id.* at 16–19.

73. I speak of the law merchant as common law, although they originally had different sources. For the story of how the law merchant became part of the common law, a process in which Justice Story played a role, see Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351, 352–67 (1983).

74. *See Crisson v. Williamson*, 8 Ky. (1 A.K. Marsh.) 454, 455–56 (Ky. Ct. App. 1819); *Bradford v. Cooper*, 1 La. Ann. 325, 326 (1846) (“It is a fact of which we deem it to be our duty to take judicial notice, that the law-merchant prevails throughout the States of this Union, except so far as the same may be modified in particular States by statute.”); *Brown v. Ferguson*, 31 Va. (4 Leigh) 37, 42–44 (1832). I have not been able to find clear evidence from New York courts themselves at the time that *Swift* was decided, but evidence can be found in later cases. *See St. Nicholas Bank v. State Nat’l Bank*, 27 N.E. 849, 851 (N.Y. 1891); *Faulkner v. Hart*, 82 N.Y. 413, 418–19 (1880).

Tony Freyer claims that New York rejected *Swift* in *Stalker v. McDonald*, 6 Hill 93 (N.Y. Sup. Ct. 1843). FREYER, *supra* note 28, at 46. In fact, all that *Stalker* did was refuse to respect *Swift*’s conclusion about the relevant general common-law standard. That is entirely compatible with its accepting *Swift*’s position that the general common-law standard exists independently of the decisions of state or federal courts. *See Stalker*, 6 Hill at 95.

75. Weinberg, *supra* note 68, at 822–23.

cision. But the fact remains that they did not care whether they were.<sup>76</sup>

Evidence that state courts were committed to the general common law is even stronger after *Swift* was decided, since many state courts, citing *Swift*, adopted their own horizontal version of the doctrine—stating unambiguously that if a general common-law issue arose concerning an event in a sister state, they could decide the matter without deference to the decisions of the sister state's courts.<sup>77</sup>

Such cases provide critical evidence of how these state courts believed *their own* decisions should be treated by sister-state (and federal) courts. An example is *Slaton v. Hall*, decided only nine years before *Erie*, in which the Georgia Supreme Court reaffirmed its commitment to *Swift*:

The common law is presumed to be the same in all the American states where it prevails. Though courts in the different states may place a different construction upon a principle of common law, that does not change the law. There is still only one right construction. If all the American states were to construe the same principle of common law incorrectly, the common law would be unchanged.<sup>78</sup>

Because *Slaton* concerned an accident in Alabama, strictly speaking it held only that Alabama decisions could be ignored when interpreting the common law in Alabama. But its reasoning clearly applies to the common law in Georgia as well. The Georgia Supreme Court must think that its *own* decisions can be ignored by sister-state courts when they interpret the common law in Georgia.

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76. *Id.*

77. *Pattillo v. Alexander*, 105 Ga. 482, 482 (1898); *Franklin v. Twogood*, 25 Iowa 520, 531 (1868); *Roads v. Webb*, 91 Me. 406, 412–13 (1898); *Fellows v. Harris*, 20 Miss. (12 S. & M.) 462, 466–67 (1849); *St. Nicholas Bank*, 27 N.E. at 851–52; *Faulkner*, 82 N.Y. at 418–19; *Third Nat'l Bank of Springfield v. Nat'l Bank of Commerce*, 139 S.W. 665, 670 (Tex. Civ. App. 1911); Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 541, 598 (1958). This *Swiftian* approach to the common law should be distinguished from state courts' use of a rebuttable presumption that the law of a sister state is the same as the forum's. In the absence of evidence of the sister state's law, a state court employing the rebuttable presumption might apply even its statutory law to the sister state. But this presumption would yield to concrete evidence of the sister state's law. For a discussion of this presumption, see Green, *supra* note 63, at pt. III.A. In contrast, under the *Swiftian* approach, if the sister state's common law was at issue, the court would refuse to defer even to concrete evidence of the decisions of the sister state's courts provided by the parties. See, e.g., *Pattillo*, 105 Ga. at 482.

78. *Slaton v. Hall*, 148 S.E. 741, 743 (Ga. 1929).

It is likely, therefore, that New York state courts thought that their decisions about the common law in New York could be ignored by federal courts, since they would have ignored the decisions of a sister state's courts when interpreting the common law in the sister state.<sup>79</sup> Story was treating the question in *Swift* the way New York state courts wanted it to be treated. Indeed, it is tempting to argue that *Swift* was compatible with *Erie*, in the sense that *Swift* satisfied Brandeis's demand that federal courts respect state decisions concerning state law. After all, New York decisions were given exactly the effect in federal court that their creators intended them to have. Under such a reading, the decision in *Erie* became necessary, not because the Supreme Court suddenly realized that it should respect state decisions, but because state courts began to understand their decisions as binding on federal (and sister-state) courts. Constitutional law did not change. State law did. Such an interpretation has recently been offered by Bradford Clark:

So long as state courts saw themselves as ascertaining and applying a general body of law reflected by the decisions of multiple jurisdictions, federal courts sitting in diversity were free to do the same. It was only after states abandoned this approach in favor of state-specific rules that the federal courts' persistence in applying general commercial law in diversity cases triggered serious constitutional concerns.<sup>80</sup>

But there is a problem with Clark's interpretation. At the time *Swift* was decided, not every state shared Story's conception of the general common law. Even with respect to questions of commercial law of the sort at issue in *Swift*, Connecticut appeared to treat the common law applicable in a sister state as constituted by the decisions of the sister state's courts, suggesting that it thought the same about the common law in Connecticut.<sup>81</sup> If Story had been truly sensitive to state courts' views about the binding effect of their decisions, he would have made an exception in *Swift* for Connecticut.

Furthermore, in the years between *Swift* and *Erie* other states rejected the general common law in more pointed terms. In *Forepaugh v. Delaware Railroad*,<sup>82</sup> the Pennsylvania Su-

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79. See *supra* note 74.

80. Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 708 (2008); see also Bradford R. Clark, *Erie's Constitutional Source*, 95 CALIF. L. REV. 1289, 1292-94 (2007) [hereinafter Clark, *Constitutional*]; Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1276-92 (1996).

81. *Roe v. Jerome*, 18 Conn. 138, 158-60 (1846); *Brush v. Scribner*, 11 Conn. 388, 407 (1836).

82. 128 Pa. 217 (1889).

preme Court was asked to interpret the common law applying to a contract entered into in New York. The plaintiff argued that because the question concerned commercial law, New York decisions could be ignored. Justice Mitchell's response was scathing:

It is not probable that the doctrine [of the general common law] would ever have got a foothold in jurisprudence, and it would certainly have been long ago abandoned, had it not been for the unfortunate misstep that was made in the opinion in *Swift v. Tyson*. . . . Since then the courts of the United States have persisted in the recognition of a mythical commercial law, and have professed to decide so-called commercial questions by it, in entire disregard of the law of the state where the question arose.<sup>83</sup>

Although the narrow holding in *Forepaugh* was that Pennsylvania courts should defer to New York decisions concerning the common law in New York, it spoke in general terms of the common law of all states, including Pennsylvania.<sup>84</sup> According to the Pennsylvania Supreme Court, its decisions concerning the common law in Pennsylvania are binding everywhere. And yet after 1889 (the year *Forepaugh* was decided), federal courts made no exception to the rule in *Swift* for Pennsylvania common law. They applied *Swift* to the common law of *all* states.<sup>85</sup>

Indeed, Clark appears to have things exactly backwards. Instead of coming to the happy conclusion that both *Swift* and *Erie* respected state courts' views about the binding effect of their decisions, we should instead be worrying that *neither* did. Like *Swift*, *Erie* answered the question of whether state court decisions are binding *categorically*, rather than on a state-by-state basis. Under *Erie*, a federal court deciding a common-law case arising in Georgia is bound by the decisions of the Georgia Supreme Court, even though the Georgia Supreme Court does not *want* the federal court to be bound. In taking this categorical stance, Brandeis's argument in *Erie* appears to violate his own command to respect state courts on matters of state law.<sup>86</sup>

One solution to this puzzle is to bite the bullet and conclude that Brandeis was wrong to take a categorical approach. The binding effect of state courts' common-law decisions should be answered by reference to state law. Indeed, the state-law so-

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83. *Id.* at 228–29.

84. *Id.* at 227 (“The law of Pennsylvania consists of . . . the common law, not of any or all other countries, but of Pennsylvania.”).

85. See *supra* notes 63–64 and accompanying text.

86. One person who has recognized this problem is Michael Dorf. See Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 709 (1995). For further discussion of Dorf's article, see *infra* note 178.



lution is suggested in Justice Holmes's dissent in *Black & White Taxicab & Transfer Co.*:

If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain. But when the constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words, so far as it is not interfered with by the superior power of the United States. The Supreme Court of a State does something more than make a scientific inquiry into a fact outside of and independent of it. It says, with an authority that no one denies, except when a citizen of another State is able to invoke an exceptional jurisdiction, that thus the law is and shall be.<sup>87</sup>

Holmes assumed that under each state's law, the decisions of the state's supreme court are binding upon federal courts. This was a reasonable assumption, but with respect to states like Georgia it was false. Had he recognized this, Holmes would apparently have agreed that a federal court deciding Georgia common law should come to its own conclusion about what this law is.

One might think that adoption of the state-law solution would make little practical difference now. Haven't all states given up the *Swiftian* view of the common law? The truth, as strange as it may sound, is that *Slaton v. Hall* is *still* good law in Georgia. Georgia state courts still conceive of the common law in *Swiftian* terms. Although they will apply a sister state's statute to events in the sister state and respect how its courts have interpreted the statute,<sup>88</sup> if the matter is governed by the common law (including apparently local common law), they come to their own judgment about what this common law is.<sup>89</sup>

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87. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 534–35 (Holmes, J., dissenting).

88. *E.g.*, *Calhoun v. Cullum's Lumber Mill, Inc.*, 545 S.E.2d 41, 44–45 (Ga. Ct. App. 2001).

89. *E.g.*, *Trs. of Jesse Parker Williams Hosp. v. Nisbet*, 189 Ga. 807, 811 (1940); *Calhoun*, 545 S.E.2d at 45; *Leavell v. Bank of Commerce*, 314 S.E.2d 678, 678 (Ga. Ct. App. 1984); *see also* John B. Rees, Jr., *Choice of Law in Georgia: Time to Consider a Change?*, 34 MERCER L. REV. 787, 789–90 (1983); Weinberg, *supra* note 70, at 821 n.85. One might read these cases as simply applying *Georgia* common law to events in sister states. Rather than conceiving of the common-law standard as transcending the decisions of any state, Georgia would instead have an imperialist conception of its common-law standard as applying in all sister states. A few cases do put the matter this way. *E.g.*, *White v. Borders*, 123 S.E.2d 170, 172 (Ga. Ct. App. 1961) (“[T]he common law of Georgia rather than that of Tennessee will control in an action

This suggests that they do not think that their own common-law decisions bind sister-state—or federal—courts. According to the state-law solution, a federal court deciding a common-law case arising in Georgia should still exercise its own judgment about what Georgia common law is.<sup>90</sup>

### C. POSITIVISM?

To avoid the state-law solution, we need to add a premise to Brandeis's argument in *Erie*—one that limits state courts' power to control the binding effect of their decisions. The common-law decisions of the Georgia Supreme Court must bind federal courts even if it does not want them to.

My guess is that most would argue that no premise needs to be added. It is already there in *Erie*'s positivist mandate—that is, the view that law “does not exist without some definite authority behind it.”<sup>91</sup> Legal positivism, in this sense, is the

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brought in Georgia courts even though the injury occurred in Tennessee.”). But this is an inaccurate description of Georgia's approach. Under Georgia choice-of-law rules for tort, the *lex loci delicti*—the law of the place of the accident—applies. *Dowis v. Mud Slingers, Inc.*, 621 S.E.2d 413, 418–19 (Ga. 2005); *Bagnell v. Ford Motor Co.*, 678 S.E.2d 489, 492 (Ga. Ct. App. 2009). If the accident occurs in a sister state, Georgia law cannot apply. The law applied must instead be the law of the place of the accident. But if the question is not covered by a statute of the sister state, Georgia courts will exercise their own judgment about what the common law applying in that sister state is. For example, in *Risdon Enterprises v. Colemill Enterprises*, 324 S.E.2d 738 (Ga. Ct. App. 1984), the Georgia Court of Appeals 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 not governed by a South Carolina statute, but by the common law, it insisted that it was “not bound by the interpretation placed upon the common law by the [South Carolina] courts.” *Id.* at 741.

Because Georgia state courts use this *Swiftian* interpretive approach concerning sister-state law, federal courts in Georgia feel themselves compelled under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941), to do the same. *E.g.*, *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 n.6 (11th Cir. 1987); *In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 677 (N.D. Ga. 2003); *Briggs & Stratton Corp. v. Royal Globe Ins. Co.*, 64 F. Supp. 2d 1340, 1343–44 (M.D. Ga. 1999). For a discussion, see Green, *supra* note 63, at pt. IV.

90. The state-law solution would have serious costs even if I am wrong about Georgia courts' *Swiftian* view of the common law, or they abandon this view. The solution would also recommend looking to state law to decide how unsettled issues of state law should be interpreted. This threatens federal courts' commitment to the predictive method, since the courts of some states do not think that their unsettled law must be interpreted according to this method. *See infra* Part III. The state-law solution would also have important consequences for choice of law. *See infra* Part IV.

91. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532–36 (1928) (Holmes, J., dissenting)). Louise Weinberg has argued

view that the law in a jurisdiction is ultimately determined by the jurisdiction's officials.<sup>92</sup> In *Slaton*, the Georgia Supreme Court arguably treated the common law as a brooding omnipresence that exists independently of its own or anyone else's authority. It took the common law to be binding in Georgia the way that *morality* is binding in Georgia, that is, whether any authority recognizes it or not. Since this conception of the common law was rejected in *Erie*, federal courts may ignore *Slaton* and take the Georgia Supreme Court's decisions as binding, whatever the Georgia Supreme Court itself might think of the matter.

But positivism cannot be *Erie's* suppressed premise, because the *Swiftian* view of the common law is compatible with positivism.<sup>93</sup> A state supreme court can believe that the standard in the common law is binding domestically only because it—or some other appropriate state authority—says so, while insisting that the content of this standard is a question of fact, concerning which federal courts can come to their own judgment. To see why this was the case, let's begin with Larry Lessig's positivist account of *Swift*.

Lessig emphasizes that the common law at issue in *Swift* was the *law merchant*—understood as the custom of parties to

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that *Erie's* positivism applies to state as well as to federal courts. Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM. 523, 550–51 (2004).

92. Current philosophers of law generally identify legal positivism by means of two theses. According to the *social fact thesis*, the law of a jurisdiction is fundamentally identified by social facts (largely concerning the officials in the jurisdiction). According to the *separability thesis*, the content of the law need not overlap with the content of morality, although it often does so as a contingent matter. See, e.g., Jules L. Coleman & Brian Leiter, *Legal Positivism*, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 241, 241 (Dennis Patterson ed., 1996).

93. Much of my argument in this section echoes Jack Goldsmith and Steven Walt's excellent *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998). Like me, Goldsmith and Walt argue that *Swift* was compatible with positivism and thus that *Erie's* conclusion that federal courts should defer to state courts concerning state law cannot be justified by positivism alone. But they understand this positivist *Swift* in one of two ways: *Swift* took Article III to authorize federal courts to make an independent judgment about the content of state law, or it concluded that federal courts have the power to enforce a national common law. E.g., *id.* at 695. see also Steven Walt, *Before the Jurisprudential Turn: Corbin and the Mid-Century Opposition to Erie*, 2 Wash. U. Jur. Rev. 75, 126 (2010). Because they ignore states' own horizontal version of *Swift*, they do not consider the possibility that federal courts were justified in making their own judgment about the common law in a state because the state's courts wanted them to.

commercial transactions.<sup>94</sup> Since commercial custom is a matter of fact, he argues that it was not odd that Story thought that courts of different sovereigns could exercise their own judgment about what the law merchant was. Each court was simply trying to discover the common understanding of the parties to the contract being litigated. That a contract is entered into under New York law does not mean that the facts about the intentions of the parties to the contract cannot be decided by the courts (or juries) of another sovereign that has jurisdiction of the case.<sup>95</sup>

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94. Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1790–91 (1997); see also 1 WILLIAM BLACKSTONE, COMMENTARIES \*1, \*67 (stating that the common law is derived from “maxims and customs . . . of higher antiquity than memory or history can reach”).

95. Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 427–28 (1995) (“Federal judges are as competent as state judges in this scientific search for facts.”). As I have described Lessig’s position, Story applied New York law in *Swift*. The federal court had the power to decide what the law merchant was only because New York authorities made commercial custom a relevant fact to the case. Some defenders of *Swift* did understand it as applying state law. Goldsmith & Walt, *supra* note 93, at 682–85. But others saw the law merchant as a form of national law that federal courts were authorized to enforce by virtue of the grant of federal jurisdiction for diversity cases. *Id.* at 685 & n.51. Even this national law merchant was positivist, however, insofar as it was binding in the United States by virtue of its recognition by federal courts. Furthermore, federal courts understood the commercial custom recognized by the national law as a question of fact. State courts were free to come to their own conclusions about what commercial custom was. For example, in *Stalker v. M'Donald*, 6 Hill 93 (N.Y. Sup. Ct. 1843), decided one year after *Swift*, a New York court again denied that a promise to discharge a preexisting debt was valid consideration when purchasing a bill of exchange, and thereby rejected the Supreme Court’s interpretation in *Swift*. The Supreme Court treated *Stalker* as a mere disagreement, not as a violation of the Supremacy Clause. *Goodman v. Simonds*, 61 U.S. (20 How.) 343 (1857).

It might seem odd that the question of whether the law being enforced in *Swift* had its source in state or federal authority was left open. But nothing rode on answering the question. Under each interpretation commercial custom was to be enforced, and under each the courts of other sovereigns could come to their own judgment about what commercial custom was.

It is understandable, therefore, that Lessig, like Clark, claims that *Swift* “created no affront to state sovereignty.” Lessig, *supra* note 95, at 428; see also Lessig, *supra* note 94, at 1788 (“[*Swift*] ratified a practice that was wholly unremarkable, both at the state and federal level.”). Either *Swift* applied New York law exactly the way New York courts wanted it to be applied, or it applied national law that came to exactly the same result that the application of New York law would have. But *Swift* created no affront to *New York’s* sovereignty. Like Clark, Lessig ignores the fact that even at the time *Swift* was decided, Connecticut courts appeared to treat their decisions about the law merchant in Connecticut as binding everywhere. See *supra* text accompanying note 81. Had he been concerned about respecting state courts’ views about the

Because the content of the law merchant was understood as a question of fact, Lessig believes that Story's conception of the common law was positivist:

Justice Story was speaking of the source of the common law, or more precisely, the source of its substance. He was not speaking of the source of its power. As any jurist from the time would have said, the power of the common law comes from its adoption, or recognition, by a domestic court.<sup>96</sup>

This is precisely how we understand the matter to this day. Although the customs that inform the mutual understandings of the parties to a New York contract are a question of fact about which federal or sister-state courts may make their own judgment, neither the customs nor the mutual understandings on their own have the force of law. For that we need a legal authority in New York that recognizes them.

Lessig's positivist reading of the law merchant is supported by a state legislature's power to override the enforceability of the law merchant by statute. The New York legislature is able to make commercial custom in New York a legal nullity at will. To the extent that commercial custom is legally binding, it is only because the New York legislature permits it to be.

One might question, however, why commercial custom was thought legally binding *until* overridden by statute. It is unlikely, however, that this threshold legal enforceability was thought to have its source outside any legal authority. Otherwise there would have been no reason for the thirteen colonies upon independence to enact statutes or constitutional provisions *receiving* the common law.<sup>97</sup> Later admitted states also adopted the common law through statutes or constitutional provisions.<sup>98</sup> These efforts would have been unnecessary if the

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binding effect of their decisions, Story would have answered the question on a state-by-state basis. But he stated categorically that a state court's decisions concerning the law merchant are not binding on a federal court. A federal court must treat the law merchant as fact even if the relevant state wants it treated as law.

96. Lessig, *supra* note 94, at 1790.

97. Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 798-99 (1951). Most states did so almost immediately after independence. Two laggards were Rhode Island, which did not receive the common law until 1798, and Connecticut, which passed a reception statute in 1818. ELIZABETH GASPAR BROWN, *BRITISH STATUTES IN AMERICAN LAW: 1776-1836*, at 24 (1964). For a discussion of the reception of the common law in the United States, see *Seminole Tribe v. Florida*, 517 U.S. 44, 132-37 (1996) (Souter, J., dissenting).

98. Hall, *supra* note 97, at 801-05. Furthermore, to the extent that courts used common-law principles prior to the passage of a reception statute, they

common law were legally applicable without any authority in the state saying so.<sup>99</sup>

The example of the law merchant is enough to show that positivism cannot explain Brandeis's conclusion in *Erie*. According to Brandeis, a state supreme court's common-law decisions are always binding on federal courts sitting in diversity. No exception is drawn for law merchant cases. Federal courts must treat the law merchant as law even if the relevant state supreme court wants it treated as fact.<sup>100</sup> The reason cannot be *Erie*'s positivist mandate, for, as we have seen, conceiving of the law merchant as fact is compatible with positivism—and indeed states probably understood the law merchant positivistically.

But the gap in Brandeis's argument extends beyond the law merchant to the expanded common law that arose later in the nineteenth century. According to Lessig, this new common law “was no longer reflective, or mirroring private understandings; it had become directive, or normative over those private understandings.”<sup>101</sup> It was understood as a special set of normative facts discoverable through a putative scientific method—normative facts applicable beyond contracts and commercial law to areas where the common understanding of the

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made it clear that the principles were law by virtue of judicial decision. *Id.* at 800; see also *Fitch v. Brainerd*, 2 Day 163, 166 (Conn. 1805).

99. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1027 (2002). To be sure, reception statutes spoke of adopting the common law of England. Georgia's reception statute, for example, incorporated the “Common Laws of England, and such of the Statute Laws as were usually in force in [Georgia]” as of “the fourteenth day of May in the year of our Lord one thousand seven hundred and seventy-six, so far as they are not contrary to the constitution, laws and form of government now established in this State.” See Act of Feb. 25, 1784, in 1 FIRST LAWS OF THE STATE OF GEORGIA 290 (1981). But this identification of the common law with a particular sovereign only provides further evidence that the common law was understood positivistically.

100. Since state common law of commercial paper has been largely displaced by the Uniform Commercial Code, and before that codified or incorporated by the Uniform Negotiable Instruments Act, Bane, *supra* note 73, at 367–77, it is hard to find a truly common-law commercial paper case after *Erie*. But some common-law duties of banks not to honor checks have not been superseded by the U.C.C. In such cases, federal courts treat the law merchant in the state as law, without concern for whether the state wants it treated as fact. *E.g.*, *Travelers Cas. & Sur. Co. of Am. v. Wells Fargo Bank N.A.*, 374 F.3d 521, 526 (7th Cir. 2004) (Posner, J.) (applying Illinois common law); *Fed. Ins. Co. v. NCNB Nat'l Bank of N.C.*, 958 F.2d 1544, 1550 (11th Cir. 1992) (applying Florida common law).

101. Lessig, *supra* note 94, at 1792.

parties is less relevant, such as torts. It was at this point, Lessig argues, that the common law became antipositivist: “The common law became, then, this self-sustaining body of normative authority, living through the articulations of the federal judiciary alone.”<sup>102</sup>

Finally, in the twentieth century, this antipositivist general common law became increasingly suspect. Brandeis responded to the resurgent positivist vision of the common law in *Erie* by compelling federal courts to defer to state courts concerning the content of the common law in the state. Lessig agrees with the prevailing view, therefore, that the decision in *Erie* was a consequence of a positivist conception of the common law.<sup>103</sup>

The problem with Lessig’s reading is that, like the law merchant, the normative common law can be understood positivistically.<sup>104</sup> The distinction between the standard of the common law (understood as a question of fact) and the reason that this standard applies in the state (understood positivistically as resting in the decisions of the appropriate state authorities) is as applicable to the normative common law as it is to the law merchant. That a state supreme court insists that the standards in the common law are determined by normative facts over which it has no control—and concerning which the federal courts and the courts of sister states may exercise their own judgment—is compatible with its thinking that the reason that these standards legally apply in the state is because it or the state’s legislature said so.<sup>105</sup>

The evidence that states did indeed understand the normative common law positivistically is the same evidence that they

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102. Lessig, *supra* note 95, at 428.

103. Lessig, *supra* note 94, at 1793–94.

104. Goldsmith & Walt, *supra* note 93, at 693 (“[Lessig] does not explain how a theory of law embraced by all parties to the debate and not ostensibly central to it nonetheless played a dispositive causal role.”).

105. My argument here might appear to assume a form of *inclusive* legal positivism, that is, the view that moral norms can be incorporated into a jurisdiction’s law, provided that this incorporation occurs through the decisions of the appropriate legal authorities. Two contemporary inclusive legal positivists are Jules Coleman and Will Waluchow. See, e.g., JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001); W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994). Exclusive legal positivists, in contrast, insist that the law’s “existence and content can be identified by reference to social facts alone, without resort to any evaluative argument.” JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 194–95 (1994). Although I believe that my argument is in fact compatible with exclusive legal positivism, I will not address the matter here.

understood the law merchant positivistically. Like the law merchant, the normative common law could be overridden by state statutes. The state legislature could make this body of normative facts a legal nullity within the state. To the extent that it was enforceable, therefore, it was only because state authorities let it be. Furthermore, reception statutes were appealed to in normative common-law cases as well as law merchant cases, also suggesting that state courts conceived of the normative common law as legally binding within their borders only because of decisions of the relevant state authorities.<sup>106</sup>

Indeed, if state courts truly thought that the normative common law existed in a jurisdiction independent of the jurisdiction's authority, they would have applied it to all foreign jurisdictions. But they did not apply it to civil law jurisdictions,<sup>107</sup> including Louisiana,<sup>108</sup> nor to jurisdictions that were neither common nor civil law, such as Indian tribes.<sup>109</sup> This demonstrates that state courts thought that the applicability of the normative common law in a jurisdiction was fundamentally answered by the decisions of authorities within that jurisdiction, insofar as it depended upon their historical choice of what type of legal system to adopt.

Because the normative common law was positivist, *Erie's* positivist mandate had no effect on it. Those state supreme courts committed to this normative common law probably recognized that it was legally binding only because they or other appropriate state authorities said so. The question remained whether the standards in this common law were fact or law. And cases such as *Slaton* give us the answer. They were considered facts concerning which other courts could come to their own judgment. This may have been a bad idea, but it was not antipositivist.

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106. *E.g.*, *Ector v. Grant*, 37 S.E. 984, 985 (Ga. 1901) (appealing to the Georgia reception statute to answer the common-law question of intestate succession); see Act of Feb. 25, 1784, *supra* note 99, at 290.

107. *E.g.*, *Banco De Sonora v. Bankers' Mut. Cas. Co.*, 100 N.W. 532 (Iowa 1904) (Mexico); *Savage v. O'Neil*, 44 N.Y. 298, 300–03 (1871) (Russia); see also Albert Martin Kales, *Presumption of the Foreign Law*, 19 HARV. L. REV. 401, 402–04 (1906).

108. *Int'l Text-Book Co. v. Connelly*, 99 N.E. 722, 727 (N.Y. 1912) (“In the absence of proof on the subject [such as a statute abrogating the common law], . . . the common law is presumed to prevail in all the states in which it is the foundation of their jurisprudence, such as New York and Pennsylvania, but not including those states which inherited or adopted the civil law, such as Louisiana.”).

109. *Davison v. Gibson*, 56 F. 443, 444–45 (8th Cir. 1893) (Creek Nation).



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A positivist reading of the normative common law is not undermined by skepticism about whether normative facts exist in the same sense that facts about commercial custom do. There might be no such thing as a normative fact—or no such thing as a normative fact of the sort with which the general common law is concerned. Or, assuming that there are such facts, the way courts were supposed to identify them might be fundamentally misguided. None of this makes the normative common law any less positivist, nor does it license federal courts to take a state supreme court's decisions concerning the normative common law as binding.

As an analogy, imagine that the Georgia Supreme Court announces that, in an exercise of its lawmaking authority, the law of Georgia henceforth includes the moral code in the Bible. Imagine as well that it insists that because the content of the Bible is a question of fact, federal courts and the courts of sister states adjudicating events arising in Georgia should come to their own conclusion about what the Bible says. What follows if no coherent moral code can be drawn from the Bible? *Not* that the Georgia Supreme Court's conception of Georgia law is anti-positivist. There still is no doubt that the Bible is legally relevant in Georgia only because the Georgia Supreme Court says so. Nor does it follow that Georgia law is what the Georgia Supreme Court says is in the Bible. The Georgia Supreme Court was clear that Georgia law is what is *in fact* in the Bible, not what it thinks is in the Bible. All that can be concluded from the inability to draw a rule of decision from the Bible is that the content of Georgia law is indeterminate.<sup>110</sup>

Positivism cannot explain Brandeis's conclusion that a state supreme court's common-law decisions always bind federal courts. As a result, Brandeis's argument in *Erie* is still in

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110. Even if one assumes that the common law articulated in *Slaton* is, for some reason, anti-positivist, it still would not follow from *Erie*'s positivist mandate that federal courts should follow Georgia decisions concerning the common law. All that positivism tells us is that the common law that *Slaton* spoke of does not exist. It cannot tell us what the Georgia Supreme Court will do in response. And since a positivist conception of the normative common law is possible, the Georgia Supreme Court might respond to *Slaton*'s demise by using its authority (authority it apparently thinks it should not have) to decree that the normative common law applies in Georgia and that the content of this common law is a question of fact. After all, this would be the best way to continue *Slaton* within the confines of *Erie*'s positivist mandate. It is clear, however, that Brandeis thought it unnecessary to predict the likely responses of state courts to the end of the general common law. He thought it simply followed from his argument that state courts' decisions were binding on federal courts.

trouble. Indeed, the difficulty extends beyond a state's common law to its promulgated law, that is, its statutes, regulations, and constitution. Even at the time of *Swift*, federal courts generally deferred to state court interpretations of such law.<sup>111</sup> But they did not appear to recognize deference as their constitutional obligation.<sup>112</sup> It was rather late, and particularly after *Erie*, that deference was seen as constitutionally required.<sup>113</sup> Once again, when the Court finally did impose this obligation on federal courts,<sup>114</sup> it ignored state law on the matter. It did not consider whether a state court might want federal courts to come to their own judgment about what the state's promulgated law means.

The gap in Brandeis's argument is duplicated in state court cases that adopted *Erie*'s position horizontally. An example is *Forepaugh v. Delaware Railroad*,<sup>115</sup> in which the Pennsylvania Supreme Court held that the decisions of sister states' courts concerning their common law are binding in Pennsylvania. Justice Mitchell appeared to believe that his conclusion followed from positivism. "There is no such thing," he argued, "as a general commercial, or general common law, separate from, and irrespective of a particular state or government whose authority makes it law."<sup>116</sup> But all that follows from positivism is that the common law is legally binding in a sister state only because of the decisions of the sister state's authorities. Once these sister-state authorities have decided to make the common law enforceable, the question remains whether the standard in the common law should be treated as law or fact. Justice Mitchell ignores what the sister states' courts themselves have to say on the matter.

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111. See, e.g., *Udell v. The Ohio*, 24 F. Cas. 497, 498 (S.D.N.Y. 1851).

112. See *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175, 205–07 (1863) (refusing to recognize the holding of the Iowa Supreme Court invalidating bonds under the Iowa Constitution); Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1841 n.69 (2005); Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1388–89 (1992).

113. Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 422 (1964) (attributing to *Erie* the position "that federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states").

114. See *Fid. Union Trust Co. v. Field*, 311 U.S. 169, 177 (1940); *Forsyth v. City of Hammond*, 166 U.S. 506, 518–19 (1897).

115. 128 Pa. 217 (1889).

116. *Id.* at 226.

## II. THE SUPPRESSED PREMISE: NONDISCRIMINATION

To repeat, *Erie* cannot be understood as holding that federal courts must decide questions of state law as the state supreme court wishes them to. Otherwise, the extent to which a state supreme court's decisions bind federal courts would be up to the state supreme court. But Justice Brandeis states categorically in *Erie* that federal courts are bound by a state supreme court's decisions. He does not consider what the state supreme court might have to say about the matter. He must have assumed that state supreme courts' power over the binding effect of their decisions was limited. The question is why.

To identify this suppressed premise in *Erie*, I want to begin with an analogue concerning full faith and credit for judgments. Let us assume that a state court has issued a judgment in a lawsuit. To what extent does this judgment foreclose subsequent litigation? Within the rendering state court system, of course, the effect of the judgment is determined by that state's law of claim and issue preclusion. But the Supreme Court has held—with a small number of exceptions<sup>117</sup>—that the Full Faith and Credit Clause requires the courts of sister states to give the same preclusive effect to a state court judgment that the judgment would have under the laws of the rendering state.<sup>118</sup>

Once again, our puzzle arises. This command to sister-state courts sounds categorical. But what if the rendering state wants sister-state courts to come to their own decision about the judgment's preclusive effect?

### A. NONDISCRIMINATION CONCERNING JUDGMENTS

The Supreme Court has addressed this puzzle in *Thomas v. Washington Gas & Light Co.*<sup>119</sup> *Thomas* concerned full faith and credit for a Virginia judgment awarding benefits under the Virginia Workmen's Compensation Act. A majority of the Supreme Court ultimately concluded that the Virginia award did

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117. *E.g.*, *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 239 n.12 (1998) (holding that a Michigan state court injunction "is not entitled to full faith and credit [in Missouri] . . . because it impermissibly interferes with Missouri's control of litigation brought by parties who were not before the Michigan court"); *Fall v. Eastin*, 215 U.S. 1, 11–12 (1909) (stating that a judgment purporting to determine title to real property need not be recognized by a court in the state of the situs).

118. *Baker*, 522 U.S. at 223; *Fauntleroy v. Lum*, 210 U.S. 230, 237–38 (1908).

119. 448 U.S. 261 (1980).

not preclude subsequent relief in a different court system, even though such relief would not have been available in a Virginia court,<sup>120</sup> in effect creating an exception to full faith and credit.<sup>121</sup> In the course of his opinion, however, Justice Stevens rejected a previous case on the matter, *Industrial Commission v. McCartin*.<sup>122</sup>

In *McCartin*, the employer and employee, both citizens of Illinois, contracted in Illinois for the employee to work in Wisconsin, where he was injured. The parties reached a settlement concerning benefits under the Illinois Workmen's Compensation Act. This settlement, which specifically stated that it did "not affect any rights that [the plaintiff] may have under the Workmen's Compensation Act of the State of Wisconsin,"<sup>123</sup> was then approved by an administrative tribunal in Illinois. The Supreme Court concluded that the Illinois judgment approving the settlement should not be understood to preclude a subsequent award in Wisconsin unless "some unmistakable language by [the Illinois] legislature or judiciary would warrant our accepting such a construction."<sup>124</sup>

Stevens rejected the *McCartin* rule, because it "authorizes a State, by drafting or construing its legislation in 'unmistakable language,' directly to determine the extraterritorial effect of its workmen's compensation awards."<sup>125</sup> The *McCartin* rule "represents an unwarranted delegation to the States of this Court's responsibility for the final arbitration of full faith and credit questions."<sup>126</sup>

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120. Technically, since the question was the full faith and credit obligations of a court in the District of Columbia, rather than a sister state, the relevant obligations had their source in the Full Faith and Credit Statute, 28 U.S.C. § 1738 (2006). But in such situations, the obligations of the statute have been understood as equivalent to those of the Full Faith and Credit Clause. See *Phelps v. Hamilton*, 122 F.3d 1309, 1318 (10th Cir. 1997).

121. *Thomas*, 448 U.S. at 286. The exception to full faith and credit created by *Thomas* is not easy to characterize, even if one concentrates only on Justice Stevens's plurality opinion. But he found it significant that the Virginia Industrial Commission, which awarded the benefits, was statutorily prohibited from applying benefits under the law of sister states. *Id.* at 280–85.

122. 330 U.S. 622 (1947). Although Stevens had only three other Justices joining him in his opinion, Rehnquist and Marshall also signed on to the part in which the discussion of *McCartin* occurred. *Thomas*, 448 U.S. at 290–91 (Rehnquist, J., dissenting).

123. *McCartin*, 330 U.S. at 624.

124. *Id.* at 628.

125. *Thomas*, 448 U.S. at 270.

126. *Id.* at 271.

In support of his argument, Stevens quoted the following passage from an article by Willis Reese and Vincent Johnson:

Full faith and credit is a national policy, not a state policy. Its purpose is not merely to demand respect from one state for another, but rather to give us the benefits of a unified nation by altering the status of otherwise “independent, sovereign states.” Hence it is for federal law, not state law, to prescribe the measure of credit which one state shall give to another’s judgment.<sup>127</sup>

In this passage, Reese and Johnson deny that full faith and credit is simply about respect for the rendering state’s views regarding the preclusive effect of its judgment. It is also about what it means for states to coexist in the same nation—for them to be part of the same legal system. As a result, full faith and credit can restrict the rendering state’s power.

To be sure, the unity of the American legal system is not complete. States retain some measure of sovereignty. This retained sovereignty expresses itself in the fact that the law of preclusion is not fully federalized.<sup>128</sup> Virginia can reject nonmutual collateral estoppel,<sup>129</sup> for example, while California accepts it.<sup>130</sup> But full faith and credit does put an important limitation on a state’s autonomy in this regard. The rendering state cannot control whether sister states must apply its preclusion law to its judgments. As Stevens put it:

The Full Faith and Credit Clause “is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation.” To vest the power of determining the extraterritorial effect of a State’s own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent.<sup>131</sup>

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127. *Id.* at 271 n.15 (quoting Willis L.M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 161–62 (1949)).

128. *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996) (“State courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes.”).

129. *TransDulles Ctr., Inc. v. Sharma*, 472 S.E.2d 274, 275 (Va. 1996) (“[C]ollateral estoppel in Virginia requires mutuality, that is, a party is generally prevented from invoking the preclusive force of a judgment unless that party would have been bound had the prior litigation of the issue reached the opposite result.”).

130. *Vandenberg v. Superior Court*, 982 P.2d 229, 237 (Cal. 1999) (“[B]ecause [collateral] estoppel need not be mutual, it is not necessary that the earlier and later proceedings involve the identical parties or their privies.”).

131. *Thomas*, 448 U.S. at 271–72 (quoting *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948)).

One worry about giving the rendering state the power to determine the extraterritorial effect of its judgments is that it might seek to obligate sister states to use its preclusion law when otherwise no such obligation would exist.<sup>132</sup> This would be an obvious example of “parochial entrenchment on the interests of other States.”<sup>133</sup> But the purpose of the Full Faith and Credit Clause is also frustrated when the rendering state attempts to *release* sister states of their obligations to apply its preclusion law. Indeed, the passage by Reese and Johnson quoted by Stevens concerned “the rare case, such as *McCartin*, where the first state declares explicitly that its judgment is to be conclusive only within its own borders.”<sup>134</sup>

One might wonder what could be bad about a state giving sister states the freedom to apply their preclusion law to its judgments. Shouldn't such self-sacrifice be encouraged? Keep in mind, however, that we are speaking of a state that seeks to release sister states of what would otherwise be their *constitutional obligation* to use its preclusion law. To say that such a constitutional obligation exists means that the Supreme Court has determined that sister states' interests are not sufficient to permit horizontal disuniformity in the treatment of the state's judgments. By seeking to release sister states of this obligation, the rendering state is setting its own judgment against the Supreme Court's concerning this national policy in favor of legal uniformity.

The point is not that sister states' interests can never be strong enough to permit them to apply their own preclusion law to a judgment rendered in another state. The Supreme Court

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132. It is a different question, which I will not discuss here, whether full faith and credit permits the recognizing state at its own discretion to give a judgment *greater* preclusive effect than it has under the rendering state's law. See, e.g., *Hart v. Am. Airlines, Inc.*, 304 N.Y.S.2d 810, 812–14 (N.Y. Sup. Ct. 1969) (applying New York's law of nonmutual collateral estoppel to determine the preclusive effect of decision by a court in Texas, even though Texas's law of collateral estoppel requires mutuality). *But see* *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1217–18 (Del. 1991) (holding that a Delaware court must use Kansas law of collateral estoppel, which requires mutuality, to determine the preclusive effect of a decision by a court in Kansas, even though Delaware abandoned the mutuality requirement). For a discussion of the problem, see Gene R. Shreve, *Judgments from a Choice-of-Law Perspective*, 40 AM. J. COMP. L. 985, 985–89 (1992).

133. *Thomas*, 448 U.S. at 261.

134. Reese & Johnson, *supra* note 135, at 161. I set aside here the complications added by the fact that *McCartin* involved the judicial approval of a *settlement agreement*. In such a case, the effect of the judgment arguably should be understood solely as effectuating the parties' contract.

has recognized cases in which horizontal disuniformity is permissible. Exceptions to full faith and credit do exist.<sup>135</sup> Indeed, *Thomas* is one case in which an exception was recognized. The question is whether it should be up to the rendering state what the exceptions are.

One way of understanding *Thomas* is that the rendering state's right to full faith and credit is *inalienable*. In common parlance, the inalienability of a right indicates its importance or that it is especially protected from being abridged. But, properly speaking, a right is inalienable when the protections of the right cannot be altered by the right-holder.<sup>136</sup> She lacks the power to control her right. Under *Thomas*, if the rendering state has a right that sister states give its judgment full faith and credit, it has no power to change this right.

So far we have understood *Thomas* to prohibit Virginia from controlling sister states' duty to apply its preclusion law. But imagine that Virginia's preclusion law simply assigns different preclusive effects to a Virginia judgment depending upon whether it is being recognized in a Virginia or a sister-state court. In a Virginia court, the normal Virginia standards of claim and issue preclusion apply. But sister-state courts are given power, *under Virginia law*, to come up with whatever preclusion standards they think are best.

In such a case, Virginia might legitimately deny that it was seeking to release sister states of their duty to use Virginia preclusion law. When the sister-state courts came up with their own preclusion standards, they would be using Virginia preclusion law because they would be exercising powers delegated to them by Virginia law. It is clear, however, that Stevens would still find this impermissible, for, as he put it, a state may not "directly . . . determine the extraterritorial effect" of its judgments.<sup>137</sup> Virginia is not merely prohibited from freeing sister states of the duty to use its preclusion law—it is also prohibited from discriminating in its preclusion law on the basis of the jurisdiction of the recognizing court. Virginia can influence the way a sister state treats a Virginia judgment only indirectly, by determining the way the judgment is treated in its own court system.

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135. See *supra* note 117.

136. See generally A. John Simmons, *Inalienable Rights and Locke's Treatises*, 12 PHIL. & PUB. AFF. 175 (1983).

137. *Thomas*, 448 U.S. at 270.

One way of putting the limitation on the Virginia Supreme Court is that it is obligated by the Full Faith and Credit Clause to conceive of sister-state courts as coexisting with its own in a *unified nation*. This prohibits it from varying the preclusive effect of Virginia judgments on the basis of the jurisdiction of the recognizing court. The Virginia Supreme Court is permitted to come up only with *jurisdictionally neutral* standards concerning their preclusive effect—standards that are applicable equally to sister-state courts.

The requirement of horizontal nondiscrimination applies to a state's preclusion law even when sister states have no full faith and credit duty to apply the state's law. Assume, for example, that a Virginia court issues a judgment purporting to determine title to real property in New York. This is one area where the Supreme Court has recognized an exception to full faith and credit.<sup>138</sup> A New York court has no obligation to apply Virginia preclusion law concerning the judgment. But assume it chooses to apply Virginia preclusion law anyway. It would still be prohibited from giving effect to any Virginia rule that discriminated on the basis of jurisdiction, since such a rule violates *Virginia's* obligations under full faith and credit. For a New York court to apply Virginia preclusion law must mean giving a Virginia judgment the legal effect it would have in Virginia courts.<sup>139</sup>

To repeat, there is a constitutional requirement, tied to the Full Faith and Credit Clause, that a state's preclusion law be jurisdictionally neutral *horizontally*. But a similar nondiscrimination requirement applies vertically. Under the Full Faith and Credit Statute,<sup>140</sup> federal courts, with a few exceptions, are also required to use the rendering state's law when determining the preclusive effect of a state court judgment.<sup>141</sup> The stat-

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138. *E.g.*, *Fall v. Eastin*, 215 U.S. 1, 11–14 (1909) (holding that a Nebraska court is not required by the Full Faith and Credit Clause to recognize the decree of a Washington court purporting to alter title to land in Nebraska).

139. One might argue, however, that the New York court would be free to give effect to the discriminatory Virginia rule because that could be re-described as the assertion of its own lawmaking power. I reject such a position at *infra* note 153.

140. 28 U.S.C. § 1738 (2006).

141. *E.g.*, *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) (“It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.”). The question of the full faith and credit obligations of federal courts with respect to state judgments is complicated by the fact that the obligation is statutory. Congress



ute surely incorporates *Thomas's* requirements: the rendering state may not control federal courts' statutory duty to use its preclusion law,<sup>142</sup> and its preclusion law may not discriminate on the basis of whether the recognizing court is domestic or federal.<sup>143</sup> For a federal court to use Virginia preclusion law must mean that it is giving a Virginia judgment the same legal effect it would have in Virginia courts, even if Virginia has said the legal effect should be different.

#### B. EXTENDING NONDISCRIMINATION FROM JUDGMENTS TO LAWS

We have drawn from *Thomas* a requirement of jurisdictional neutrality binding a state's preclusion law. The rendering state must assign its judgments the same preclusive effect throughout the American legal system. We can now fill the gap in Brandeis's argument in *Erie* (and in Justice Mitchell's argument in *Forepaugh*), by expanding this requirement of jurisdictional neutrality to state law in general, including to the common-law decisions of a state's courts.<sup>144</sup> A state supreme court must give its common-law decisions the same legal effect throughout the American legal system.

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might expressly or impliedly repeal the Full Faith and Credit Statute. Repeal is a particular concern if the action brought in federal court is under federal law. The application of the rendering state's preclusion law might frustrate federal interests standing behind the federal law. Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 817–29 (1986); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 996–97 (1998).

142. Indeed, since the recognizing court in *Thomas* was a court in the District of Columbia, strictly speaking, *Thomas* concerned the statute rather than the clause.

143. It is also worth noting that a vertical nondiscrimination principle should apply in the other direction to federal judgments in state courts. Although the exact constitutional source is uncertain, state courts are obligated to give federal judgments the same preclusive effect they would have under the law that would be applied in federal court. *E.g.*, 18B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4468 (2d ed. 2002); Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 749 (1976). It should follow that federal courts cannot release state courts of this duty, nor can they discriminate in their preclusion law on the basis of whether the recognizing court is federal or state. Just what preclusion law will apply to a federal judgment in federal court is a different issue, however, and a complicated one in diversity cases. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 506–09 (2001).

144. The expansion of the nondiscrimination requirement in the Full Faith and Credit Clause to all laws is suggested by Justice Stevens in *Thomas*. *Thomas*, 448 U.S. at 271–72 (noting that the Full Faith and Credit Clause denies a state “the power of determining the extraterritorial effect of [its] own laws and judgments” (emphasis added)).

To make the analogy with *Thomas* clear, it is best to begin with the attempt by a state to release sister states of what otherwise would be their constitutional obligation under the Full Faith and Credit Clause to apply the state's common law. Consider a suit by a Georgian against a Georgian concerning a fight between the two that took place in Georgia. A New York state court entertaining such a case would be obligated to use Georgia law.<sup>145</sup> To be sure, the constitutional limitations on its power to apply New York law are weak. According to *Allstate Insurance Co. v. Hague*, all it needs to satisfy the Full Faith and Credit Clause, as well as the Due Process Clause of the Fourteenth Amendment,<sup>146</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>147</sup> Nevertheless, in this case the requirements in *Allstate* are not satisfied.

Let us assume that the Georgia Supreme Court has a common-law battery rule covering the matter.<sup>148</sup> It has stated, however, that the rule is binding only on Georgia state courts. Sister-state courts are free to apply their own law to the fight. One might think that in freeing sister-state courts of the duty

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145. One might wonder how a New York state court would obtain *jurisdiction* of such a case. Since state courts are courts of general subject-matter jurisdiction, its primary jurisdictional hurdle is obtaining personal jurisdiction over the defendant. But this would exist if the defendant was served within New York while on a business trip there, *Burnham v. Superior Court*, 495 U.S. 604, 628 (1990) ("[T]he Due Process Clause does not prohibit the California courts from exercising jurisdiction over petitioner based on the fact of in-state service of process."), or if the defendant consented. Such contact, although sufficient for personal jurisdiction, would still not satisfy *Allstate*. To be sure, our New York state court is likely to dismiss the action, despite possessing jurisdiction, on *forum non conveniens* grounds. But examples where a court that is constitutionally obligated to apply sister state law would not dismiss for *forum non conveniens* can be found, such as a nationwide class action. Green, *supra* note 63, at pts. II.C, III.C.

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

147. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981).

148. The Full Faith and Credit Clause applies not just to state statutory law, but also to common law. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (speaking of "legislative measures and common law" as the "laws" to which full faith and credit is due); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436 (1943) (referring to full "faith and credit . . . to which local common and statutory law is entitled under the Constitution and laws of the United States"); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 25–27 (1991); Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 29 (1945).

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to apply its law, the Georgia Supreme Court is showing admirable self-sacrifice. It has allowed sister-state courts to take their own interests into account. But we are speaking of an area in which the Supreme Court has concluded that only Georgia has a legitimate regulatory interest. It has decided that sister-state interests cannot justify horizontal disuniformity in the legal standard applied. It is not for the Georgia Supreme Court to undermine this national policy in favor of legal uniformity.

Let us now assume that the Georgia Supreme Court instead insists that the proper common-law standard in battery cases *under Georgia law* is a matter which sister-state courts are permitted to come to their own judgment. Of course, the Georgia Supreme Court is free to decide what its own common-law battery rule is. But, as we saw in connection with full faith and credit for judgments, it cannot discriminate on the basis of jurisdiction to surreptitiously release sister states of their duty to apply its law. And that is just what the Georgia Supreme Court's approach does. It assigns different legal effects to its common-law decisions on the basis of whether the decision is being recognized by a Georgia or a sister-state court.

Notice that the Georgia Supreme Court cannot respond that sister-state courts should be free to decide the standards in Georgia common law because the question is one of fact rather than law. The point is not that it is forbidden from treating what most states would describe as law as fact.<sup>149</sup> The court can claim that the standard for common-law battery in Georgia is a factual question, concerning which the adjudicating court (or its jury) may exercise its own judgment—although it might thereby render Georgia law dangerously indeterminate. But this distinction between law and fact must be applied in a non-discriminatory fashion. It cannot treat the standard as fact for sister-state courts, and as law for Georgia state courts. If the question is truly a factual one, then Georgia state trial courts must treat it as a question of fact as well. They must be permitted to come to their own conclusions about the common law in Georgia, without deference to the decisions of the Georgia Supreme Court.<sup>150</sup> On the other hand, if the Georgia Supreme

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149. For a skeptical view about the ability to distinguish between law and fact in any formal manner, see Lawrence Alexander, *What's Inside and Outside the Law* (unpublished manuscript) (on file with author).

150. Furthermore, it is arguable that there should be no appellate review of their decisions or that such review, rather than being *de novo*, should be ac-

Court insists that its decisions are binding on Georgia state courts, they must be binding on sister-state courts as well.

Let us now expand our argument vertically. If a federal court were adjudicating the Georgia fight, it would—absent some federal statute or federal interest giving it lawmaking power—be obligated under *Erie* also to apply Georgia law.<sup>151</sup> And just as the Georgia Supreme Court cannot permit sister-state courts to apply sister-state law, so it cannot permit federal courts to apply federal law. Here, too, it might at first appear that by permitting federal courts to apply federal law the Georgia Supreme Court is expressing a commendable spirit of self-sacrifice—since it is allowing federal courts to adjudicate the fight in accordance with federal, rather than Georgia, interests. But we are speaking of an area in which the Supreme Court, interpreting *Erie*, has concluded that there are no legitimate federal regulatory interests. It is not for the Georgia Supreme Court to undermine this national policy in favor of vertical uniformity.<sup>152</sup>

And, once again, the Georgia Supreme Court cannot use discrimination in its laws to accomplish what it could not do directly. It cannot assign different legal effects to its common-law decisions on the basis of whether the decision is being considered by a Georgia or a federal court. The Georgia Supreme Court must treat federal courts as coexisting with Georgia state courts in a single legal system. The binding effect of its decisions must be jurisdictionally neutral.

In making this argument, I have concentrated on cases in which federal and sister-state courts are obligated under *Erie* and full faith and credit to apply a particular state's law. But the requirement of jurisdictional neutrality applies even when this is not true. Consider two New Yorkers who get into a fight in Georgia. One New Yorker brings suit against the other in New York state court. Although, under *Allstate*, the court could

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ording to the deferential standard reserved for questions of fact. *See infra* note 155.

151. As for the federal court obtaining jurisdiction for such a case, subject-matter jurisdiction would be the primary constitutional hurdle. Although there would be no federal subject-matter jurisdiction under diversity, a federal court might get jurisdiction over the action under supplemental jurisdiction. 28 U.S.C. § 1367 (2006).

152. Although I will not discuss the matter here, the same principle should apply to federal common law too. Assume that the Supreme Court creates a federal common-law rule. It may not free state courts of their duty, under the Supremacy Clause, to abide by its decision, except by freeing lower federal courts of the same duty.

apply New York common law of battery, assume that it chooses to apply Georgia common law instead. It still must ignore Georgia's *Swiftian* view of Georgia common law. To the extent that the Georgia Supreme Court's views about the legal effect of its common-law decisions are not jurisdictionally neutral, they are invalid under the Full Faith and Credit Clause. For a New York state court to apply Georgia common law can only mean giving Georgia decisions the same legal effect they would have in Georgia courts.<sup>153</sup>

A similar situation could arise, although more rarely, in a vertical context. Sometimes a federal court that has lawmaking power—due to the presence of a sufficient federal interest—makes the decision to use state law anyway.<sup>154</sup> If such a federal court applies Georgia common law, it would not be permitted to give effect to Georgia's *Swiftian* view of this common law. To the extent that the Georgia Supreme Court's views about the legal effect of its common-law decisions are not jurisdictionally neutral vertically, they are invalid under *Erie*. For a federal court to apply Georgia common law can only mean giving Georgia decisions the same legal effect they would have in Georgia courts.

Notice that jurisdictional neutrality is required of *all* Georgia Supreme Court decisions—not just those interpreting its common law. The Georgia Supreme Court may free sister-state and federal courts from the duty to defer to its interpretations of Georgia *statutes* only if it frees lower Georgia courts of the

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153. Could one argue that the New York court is permitted to give virtual effect to the Georgia Supreme Court's *Swiftian* view of Georgia common law and interpret Georgia common law as it sees fit, since that could simply be re-described as the permissible exercise of its own lawmaking power? The answer to this question rests on whether the discretionary choice to apply sister-state law can generate full faith and credit duties to interpret this law with fidelity. If the New York court, having chosen to apply Georgia common law, is obligated to interpret this law correctly, it cannot give effect to the Georgia Supreme Court's *Swiftian* view of Georgia common law since that is not a valid part of Georgia law. Some have argued that lawmaking power frees the forum of any duty to interpret nonforum law with fidelity. Note, *Misconstruction of Sister State Law in Conflict of Laws*, 12 STAN. L. REV. 653, 653 (1960). In Green, *supra* note 63, at pt. V, I argue that if the forum with lawmaking power uses standards drawn from sister-state law in order to foster *its own* regulatory purposes, the law applied should be understood as forum law and no full faith and credit obligations apply. On the other hand, if—as is usually the case—it uses sister-state law out of deference to the regulatory interests of the sister state, the law applied is truly sister-state law and the forum has a duty under full faith and credit to interpret this law correctly.

154. For a discussion, see Green, *supra* note 63, at pt. V.A.

same duty. Since the Georgia Supreme Court considers lower Georgia state courts bound by its interpretations of Georgia statutes, sister-state and federal courts must also be bound.<sup>155</sup>

The requirement of nondiscrimination explains why Brandeis could conclude in *Erie* that the Pennsylvania Supreme Court's decisions were binding on federal courts, whether or not the Pennsylvania Supreme Court said they were binding. It was enough to know that these decisions were binding upon

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155. Indeed, it is not clear that freeing Georgia's lower courts of a duty to follow its decisions would be sufficient for the Georgia Supreme Court to permit sister-state and federal courts to do the same. Consider the example of Louisiana. Owing to Louisiana's civil-law tradition, the Louisiana Supreme Court's decisions interpreting Louisiana statutes are not binding upon lower Louisiana courts, except in the particular case in which the decision was made. *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 128 (La. 2000); *Constr. Materials, Inc. v. Am. Fid. Fire Ins. Co.*, 388 So. 2d 365, 367 (La. 1980). Some have argued that federal courts are therefore permitted to come to their own interpretation of a Louisiana statute, without considering themselves bound by the decisions of the Louisiana Supreme Court. *Black v. Rebstock Drilling Co.*, 837 F. Supp. 200, 204–05 (W.D. La. 1993); Alvin B. Rubin, *Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the Erie Railroad*, 48 LA. L. REV. 1369, 1372–76 (1988). As it turns out, however, federal courts follow the Louisiana Supreme Court's interpretations of Louisiana statutes and, when the matter is unsettled, attempt to predict how it would resolve the matter. *E.g.*, *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 319 (5th Cir. 1999); *Transcon. Gas v. Transp. Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992); *St. Charles Ventures, L.L.C. v. Albertsons, Inc.*, 265 F. Supp. 2d 682, 687 (E.D. La. 2003) (“To determine a state law question, we first look to decisions of the Louisiana Supreme Court. If the Louisiana Supreme Court has not spoken on the issue, it is our duty to determine as best we can what that court would decide.”).

Are federal courts insufficiently sensitive to Louisiana's unique Gallic heritage? Not necessarily. Even though a Louisiana trial court is not bound by Louisiana Supreme Court decisions, the matter can be appealed up to the Louisiana Supreme Court. If it disagrees with the trial court, its decision is binding in the case being adjudicated. Under the predictive method, a federal court interpreting a Louisiana statute should seek to replicate, not a Louisiana trial court's decision on the matter, but how the case would turn out in the Louisiana state court system generally, including the possibility of appeal. *See infra* Part III.A; *cf. Dorf, supra* note 86, at 714 (“[A] federal court sitting in diversity does not see itself anywhere within the state court hierarchy.”). Since a federal court should identify with the Louisiana court system and we assume that there would have been a successful appeal to the Louisiana Supreme Court if the case had been litigated there, a federal court would still be obligated to abide by the Louisiana Supreme Court's decisions. The only way that federal courts might be released of the duty to follow the Louisiana Supreme Court's interpretations of Louisiana statutes is if Louisiana trial courts were not merely free to ignore the Louisiana Supreme Court's interpretations, but also if the interpretations made by Louisiana trial courts were not subject to appeal (or, perhaps, not subject to *de novo* appeal).

Pennsylvania state courts.<sup>156</sup> It followed from nondiscrimination that they must be binding on federal courts.<sup>157</sup>

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156. Technically, the gap in Brandeis's argument is not completely filled, for he still ignored the possibility that the state supreme court released even the courts of its own state of the duty to abide by its common-law decisions. But given that this is exceedingly unlikely—and indeed would probably mean that the state had no common law at all—he cannot be blamed for ignoring this possibility.

157. It might appear that this Article seeks to resurrect an equal protection justification of *Erie*. E.g., Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 998–99 (1996). The only difference in my argument would be that it was *state* (rather than federal) courts that violated equal protection in *Swift*—by discriminating concerning the binding effect of their decisions on the basis of jurisdiction. Thus, the Fourteenth, rather than the Fifth, Amendment would have been violated.

One problem with such an equal protection reading of *Erie*, of course, is that there was no Fourteenth Amendment when *Swift* was decided. We would have to conclude, therefore, that *Swift* was valid when it was decided, and that *Erie* was necessary only after the ratification of the Fourteenth Amendment, something not suggested in Justice Brandeis's opinion. Cf. Clark, *Constitutional*, *supra* note 80, at 1299 (rejecting the Fifth Amendment equal protection reading of *Erie* because “at the time the Court decided *Erie*, it had not yet interpreted the Fifth Amendment's due process clause to (reverse) incorporate an equal protection component applicable to the federal government”). But there are other reasons to reject an equal protection reading of *Erie*. Such a reading would focus on the interests of the parties before the court. But the primary problem with the Georgia Supreme Court treating its common-law decisions as binding only on Georgia state courts is not that it discriminates against certain groups of litigants. Indeed, since Georgia thinks that not only federal but also sister-state courts can come to their own judgment about Georgia common law, it is not clear exactly what group is being discriminated against. A plaintiff does not have to be from a different state than the defendant to get a different interpretation of Georgia common law. All he has to do is sue in another state. The real problem with Georgia's approach is that it fails to respect the place of sister-state and federal courts in the American legal system.

This Article models its argument on *Thomas*, which prohibited a state from discriminating in the preclusive effect of its judgments on the basis of the jurisdiction of the recognizing court. Justice Stevens derived this nondiscrimination principle, not from equal protection, but from the Full Faith and Credit Clause. I argue Stevens's argument can be extended from a state's preclusion law to its law in general—and in particular to the common-law decisions of its courts. Thus, in my argument the prohibition on horizontal discrimination has its source, as it did in *Thomas*, in the Full Faith and Credit Clause. Although the Clause would appear to apply only to sister-state courts—obligating them to obey a state supreme court's common-law decisions—I believe it also puts a duty of jurisdictional neutrality on the state supreme court itself. A state supreme court cannot treat as relevant to the legal effect of its common-law decisions whether the effect is in a domestic or sister-state court. As for the prohibition on vertical discrimination, this has its source, not in equal protection, but in *Erie*. Although *Erie* appears to bind only federal courts—obligating them to obey a state supreme court's common-law decisions—it puts a duty of vertical jurisdictional neutrality on the state supreme court.

That Brandeis relied upon a nondiscrimination principle in *Erie* should not be surprising, for the Court has recognized similar nondiscrimination principles in other circumstances.<sup>158</sup> In *Railway Co. v. Whitton*, for example, the Court held that Wisconsin's wrongful death statute could not prohibit actions under the statute from being entertained by federal courts.<sup>159</sup> The Wisconsin statute was not allowed to discriminate vertically against federal jurisdiction.

A horizontal example, cited by Stevens in *Thomas*, is *Tennessee Coal, Iron & Railroad Co. v. George*.<sup>160</sup> *George* held that a Georgia court could entertain an action under Alabama's workers' compensation statute even though the statute limited jurisdiction to courts in Alabama. Because the Alabama statute horizontally discriminated against sister-state jurisdiction, it violated full faith and credit.<sup>161</sup>

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158. One such case is *Hughes v. Fetter*, 341 U.S. 609 (1951), which is commonly understood as holding that a state court may not refuse to entertain an action simply because it is under the law of a sister state. For a discussion of *Hughes*, see Lea Brilmayer & Stefan Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819, 825–26 (1983); Larry Kramer, *Same Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1980–86 (1997). Notice that our nondiscrimination principle is the mirror image of *Hughes's*. In *Hughes*, there was discrimination in state *jurisdiction* concerning sister-state *law*. We are concerned with discrimination in state *law* concerning sister-state (and federal) *jurisdiction*.

159. *Ry. Co. v. Whitton*, 80 U.S. (13 Wall.) 270, 285–86 (1871).

160. 233 U.S. 354 (1914) (cited in *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 271 n.15).

161. *Id.* at 359–60. It might seem incompatible with a nondiscrimination reading of *George* that the Court relied upon the fact that the Alabama cause of action was *transitory*—as evidenced by the fact that it could be brought in any court in Alabama. The Court suggested that had the Alabama statute made it clear that an action under the statute is nontransitory—for example, by insisting that it can be brought only before a *particular* court in Alabama—the Georgia court would have been forbidden to entertain it. But this is arguably compatible with a nondiscrimination reading. In such a case, Alabama would have decided where actions under the statute could be brought on the basis of a criterion that applied to some Alabama as well as sister-state courts. If there were good reasons for allowing actions under the statute to be brought only before, say, the Alabama workers' compensation board, rather than in a court of general jurisdiction in Alabama, there would arguably be nothing discriminatory about using these same reasons to prohibit the actions in sister-state courts.

In *Crider v. Zurich Insurance Co.*, 380 U.S. 39 (1965), it appeared as if the Supreme Court went even further and concluded that a state may never 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



To be sure, in these cases the discrimination was extreme, since the state sought to totally divest federal and sister-state courts of the ability to entertain actions under its law. Furthermore, the discrimination was negative, since federal and sister-state courts were given less freedom than domestic courts possessed. But since, as these cases show, the Supreme Court can compel a state to allow federal and sister-state jurisdiction for its causes of action, and it has put on the federal and sister-state courts an obligation—under *Erie* and full faith and credit—to respect the decisions of the state's courts when interpreting these causes of action, it is hardly a stretch that Brandeis concluded that the state's supreme court itself has a duty—again under *Erie* and full faith and credit—not to disrupt federal and sister-state courts' interpretive duties through discrimination concerning the binding effect of its decisions.

On the other hand, if I am wrong and state supreme courts may engage in such discrimination, I think we have to conclude Justice Brandeis's argument in *Erie* fails. Whether state supreme court decisions bind federal courts must be answered by reference to state law. Given the continued vitality of *Slaton*, a federal court should exercise its own judgment about what Georgia common law is.

### C. SUBSTANCE AND PROCEDURE

To sum up, I have argued that the *Erie* doctrine and the Full Faith and Credit Clause prohibit state supreme courts from discriminating in the legal effect of their common-law decisions. For federal and sister-state courts to apply a state's common law must mean that they give the decisions of the state's supreme court the same legal effect they have in the state's own courts.

But assume that the Georgia Supreme Court has a common-law rule stating that a plaintiff in a battery suit must provide the defendant with in-hand service of the summons and complaint. It certainly seems permissible for it to release federal and sister-state courts of any duty to apply this service rule,

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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 Georgia law on the jurisdictional limitation with Alabama law—not that Georgia law itself could not make a cause of action nontransitory. 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, provided that the sister state did not violate our nondiscrimination principle.

even when they are applying Georgia battery law. But because lower Georgia courts must apply the service rule, this looks like a violation of the duty of nondiscrimination.

The solution is to draw a distinction between what is regulated by Georgia's battery law and its service rule. The battery law regulates nonlitigation activities (such as people fighting in Georgia). But the service rule does not. It is *procedural* in the sense that it regulates only how suits brought in Georgia state courts proceed. So understood, the service rule would fail to be jurisdictionally neutral only if the Georgia Supreme Court claimed that sister-state and federal courts were permitted to use their own standards when determining whether service in a battery action *in Georgia state court* was adequate.<sup>162</sup>

Notice that we cannot rely upon a state's own characterization of its law as substantive or procedural. Otherwise, it could circumvent its duty of nondiscrimination simply by designating as procedural its decisions about substantive rights under its law. For example, the Georgia Supreme Court could give effect to its *Swiftian* view about Georgia common law by claiming that its common-law decisions are actually procedural rules that are applicable only in Georgia state courts.

The Supreme Court touched upon the problem of a state's duty to treat its law as substantive in *Sun Oil v. Wortman*, which held that a Kansas state court had no constitutional obligation under full faith and credit to apply Texas's statute of limitations, even though it was entertaining a Texas cause of action.<sup>163</sup> Drawing upon international law at the time of the ratification of the Full Faith and Credit Clause, Justice Scalia concluded that "the society which adopted the Constitution did not regard statutes of limitations as substantive provisions, akin to the rules governing the validity and effect of contracts, but rather as procedural restrictions fashioned by each jurisdiction for its own courts."<sup>164</sup> Noting that Texas did not treat its statute of limitations as substantive and thus did not *want* its limitation to follow the Texas action into a Kansas court, Scalia argued that the question the Court was facing was whether

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162. This might arise if a Georgia judgment were being collaterally attacked in federal or sister-state court on grounds of inadequate service.

163. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988).

164. *Id.* at 726; *see also* *Great W. Tel. Co. v. Purdy*, 162 U.S. 329, 338–39 (1896) (holding that full faith and credit for the rendering state's judgment does not require the recognizing state to use the rendering state's statute of limitations for enforcing such judgments).

Texas was constitutionally compelled “to consider [its] statutes of limitations substantive.”<sup>165</sup> He concluded it was not.

Because statutes of limitations (and service rules) may be treated by a state as procedural under *Sun Oil*, Georgia would not be understood as jurisdictionally discriminating concerning its battery law simply because it denied that its battery statute of limitations or service rule was binding on sister-state courts. On the other hand, it should not be able to surreptitiously enforce its *Swiftian* view of Georgia common law by claiming that its common-law decisions are actually procedural rules that are applicable only in Georgia state courts. In such a case, the Supreme Court could identify the decisions as constitutionally substantive, and so binding on sister-state courts, whatever Georgia itself might say about the matter.

I do not want to suggest that it will always be easy to determine when a state has wrongly designated its substantive law as procedural and so has violated our horizontal nondiscrimination principle. After all, it is not always easy to tell whether a forum has abused its power over procedure to escape its full faith and credit obligations to apply a sister state’s substantive law.<sup>166</sup> But the difficulty of answering the latter question has not prevented the Supreme Court from trying.<sup>167</sup>

A constitutional distinction between substance and procedure is also needed in a vertical context, in order to determine whether a state gives its substantive law the same legal effect

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165. *Sun Oil*, 486 U.S. at 729 n.3. In fact, Scalia considered the issue of Texas’s power to designate its statute of limitations as procedural in the context of a challenge under the Due Process Clause, rather than the Full Faith and Credit Clause, although it is not clear what rested upon this categorization. *Id.* For an example in which a state understands its statute of limitations as following its causes of action into foreign courts, see *Davis v. Mills*, 194 U.S. 451, 454 (1904).

166. For an example of a court catching a state legislature attempting to use its control over procedure to wiggle out of its full faith and credit obligations concerning sister-state judgments, see *City of Philadelphia v. Bauer*, 478 A.2d 773, 778–80 (N.J. 1984). In that case, the New Jersey Supreme Court struck down a New Jersey statute that prohibited the enforcement of employment wage tax judgments through the sale of realty. The statute was enacted in response to the passage in Philadelphia of a commuter tax. The court held that the New Jersey statute, although apparently procedural, violated New Jersey’s full faith and credit obligation to respect Pennsylvania commuter tax judgments.

167. *Broderick v. Rosner*, 294 U.S. 629, 643 (1935) (holding that a state “may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject matter and the parties”). For a discussion of *Broderick*, see Kramer, *supra* note 158, at 1984–86.

in federal courts as in its own. Although the Supreme Court has not dealt with this problem, it has dealt with the converse problem of a federal court abusing its power over procedure to escape its obligations under *Erie* to apply a state's substantive law. Here it has drawn constitutional distinctions between substance and procedure that determine the limits of the federal court's obligations.

Notice that I am speaking here of the limits of a federal court's power over procedure due to its *constitutional* obligation under *Erie* to apply state substantive law. There is a very different *Erie* doctrine, of *nonconstitutional* origin, that puts limits on federal courts' ability to create procedural common law when entertaining state law actions. They are constrained by a "policy"<sup>168</sup> that recommends uniformity with the procedural law of the state where the federal court is located if this is needed to discourage vertical forum shopping and to avoid the inequitable administration of the laws.<sup>169</sup> For example, if a federal court in New York were entertaining our Georgia battery action, this policy of uniformity would recommend that the federal court use New York's statute of limitations (or, more accurately, the statute of limitations that would be used by a New York state court), rather than a federal common-law limitation, because a difference between the federal and the New York limitations would promote vertical forum shopping and the inequitable administration of the laws. Most cases described as *Erie* problems by federal courts concern this nonconstitutional question.<sup>170</sup>

One of the few cases in which the Supreme Court has dealt with the *constitutional* distinction between substance and procedure in an *Erie* context is *Byrd v. Blue Ridge Rural Electric Cooperative*.<sup>171</sup> The question in *Byrd* was whether a South Carolina law requiring that an element of a South Carolina cause of action be decided by a judge would apply when the action

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168. *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945).

169. *Hanna v. Plumer*, 380 U.S. 460, 467–68 (1965). Many characterize the nonconstitutional doctrine as having its source in the Rules of Decision Act. See John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 707–18 (1974); Richard D. Freer, *Some Thoughts on 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, 361 (1977). Although I do not think that this can be the statutory source of the policy, I will not take on the matter here.

170. See *supra* note 64.

171. 356 U.S. 525 (1958).

was entertained by a federal court.<sup>172</sup> Justice Brennan noted that as a constitutional matter *Erie* required federal courts sitting in diversity to “respect the definition of state-created rights and obligations by the state courts,” including state practices “bound up with these rights and obligations.”<sup>173</sup> Beyond that area, the “policy” in favor of uniformity between state and federal procedure applied.<sup>174</sup>

To be sure, in *Byrd*, Brennan comes dangerously close to saying that a federal court is constitutionally bound under *Erie* to respect a state’s own views about which elements of the state’s laws and practices are bound up with state-created rights and obligations. The result of such an approach would be that a state would have the power, by claiming that the entirety of its procedural law is bound up with its substantive law, to displace all federal procedural common law when federal courts entertained the state’s actions. Likewise, the Georgia Supreme Court would be permitted, by claiming that its common-law decisions were *not* bound up with substantive rights under its common law, to give effect to its *Swiftian* view of Georgia common law in federal court.

It is more likely that Brennan meant to identify an independent constitutional distinction between substance and procedure of the sort articulated in full faith and credit contexts.<sup>175</sup> Under this standard, Georgia would not be understood as having violated *Erie* simply because it freed federal courts of the duty to apply its service rule or statute of limitations. But it would have violated *Erie* if it treated its common-law decisions as procedural rules binding only on Georgia state courts.

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172. *Id.* at 534.

173. *Id.* at 535.

174. *Id.* at 536. Although some doubt has been expressed about the viability of *Byrd* in light of subsequent Supreme Court cases, such doubts concern an issue independent of that discussed here; namely, whether a federal court, in deciding whether forum state law *not* bound up with state rights and obligations should be applied in a federal court, should look to “countervailing” federal interests. See, e.g., Steinman, *supra* note 62, at 267–69 (questioning whether *Gasperini* endorsed *Byrd*’s examination of countervailing federal interests). This doubt is not directed at *Byrd*’s delineation of the constitutional scope of *Erie*. But see Lindsey C. Boney IV, *Forum-Shopping Through the Federal Rules of Evidence*, 60 ALA. L. REV. 151, 173 n.129 (2008).

175. Indeed, the constitutional *Erie* distinction between substance and procedure is likely the same as the full faith and credit distinction, although I will not argue for this point here.

## III. THE PREDICTIVE METHOD

Up to this point, we have been concerned with the puzzle of a state supreme court that seeks to free federal and sister-state courts of the duty to respect decisions that it has *actually* (and *recently*) issued concerning the state's law. But a similar puzzle arises concerning unsettled state law—which I will understand broadly as legal issues that have not been definitely resolved by the state's supreme court, either because it has never dealt with the matter or because a past resolution might be overruled if revisited.

## A. WHAT IF STATE COURTS DON'T WANT YOU TO PREDICT THEIR DECISIONS?

The Supreme Court has indicated that a federal court addressing an unsettled issue of state law must predict what the state supreme court would do.<sup>176</sup> It should defer to the decision that *would* exist if the unsettled issue had been brought up in the state court system and ultimately been appealed to the state's supreme court. Although the Supreme Court has suggested that the predictive method follows from *Erie*,<sup>177</sup> it did not take into account state law on the matter. What if the state supreme court *does not care* if federal courts use the predictive method concerning its unsettled law? What if it considers the method for interpreting its unsettled law to be a *procedural* question that can be answered by federal courts as they see fit? Wouldn't this mean that, with respect to that state's unsettled law, the use of the predictive method is not a matter of constitutional concern?<sup>178</sup>

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176. *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); see also 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 4501 (2d ed. 1996); Dorf, *supra* note 86, at 705–06. 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, 1495–517 (1997).

177. *Bosch*, 387 U.S. at 465 (noting that the 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”).

178. In *Prediction and the Rule of Law*, Michael Dorf entertains the possibility that the interpretation of state law by federal courts might be determined by state law and thus that the appropriateness of the predictive method might depend upon the state whose law is being interpreted. Dorf, *supra* note 86, at 710–14. But Dorf considers only the possibility that a federal court might look to a state's approach to the interpretation of unsettled state law

This puzzle, although similar to our first, is even more pressing, because the courts of many states—not just a single outlier like Georgia—appear to believe that the predictive method need not be used by sister-state or federal courts to decide unsettled questions of their law. Once again, the evidence is the way these states treat the unsettled law of sister states.

Many states take the position expressed in the Restatement (Second) of Conflict of Laws. How a state court ascertains the content of sister-state law is treated by the Restatement as an evidentiary or procedural issue that can be decided as the forum sees fit, in accordance with its own law.<sup>179</sup> Probably because it is the easiest method when evidence of sister-state law is insufficient, the Restatement recommends that the forum presume in such cases that the law of the sister state is the same as its own.<sup>180</sup> Some states that have adopted this presumption are Illinois,<sup>181</sup> New York,<sup>182</sup> Maine,<sup>183</sup> and Ne-

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within the state's own lower courts. Thus, he suggests that a federal court might be obligated under *Erie* to use the predictive method concerning New York law if lower New York courts also decided cases on the basis of predictions of the New York Court of Appeals's likely decision. *Id.* at 714. In the end, he concludes that relations between a state's lower courts and its highest court of appeals are irrelevant to how a federal court should decide in a diversity case, "because the federal court sitting in diversity does not see itself anywhere within the state court hierarchy." *Id.* But Dorf ignores the possibility that New York might have principles for how *federal* (or sister-state) courts should interpret New York law. Under New York law a federal court deciding an unsettled issue of New York law might be freed of any duty to predict the New York Court of Appeals's decision. That is the puzzle we are now facing.

179. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136(2) (1969).

180. *Id.* § 136 cmt. h. The presumption should not be applied, however, "when to do so would not meet the needs of the case or would not be in the interests of justice," for example, when the expectations of the parties would be frustrated. *Id.* The obligation to respect the expectations of the parties is weaker than the predictive method, however. A federal court sitting in diversity has an obligation to decide as it predicts the relevant state supreme court would even when the parties did not rely on the state supreme court's likely decision. The obligation to interpret state law with fidelity is one to the state itself, not to the parties.

181. *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1254 (Ill. App. Ct. 2001), *aff'd in part and rev'd in part*, 835 N.E.2d 801 (Ill. 2005); *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. July 2, 2003).

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

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

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Such a presumption is incompatible with the predictive method. Under the predictive method, a federal court faced with inadequate evidence of state law remains obligated to predict how the state's supreme court would decide.<sup>185</sup> It may not presume that unsettled state law is the same as federal law. To be sure, a federal court may look to any relevant decisions of federal courts, as well as the courts of sister states, as evidence of the state supreme court's likely decision.<sup>186</sup> But similarity to federal law is not presumed, because federal decisions are irrelevant when federal courts take a minority approach to the issue or the general assumptions standing behind them are different from those of the state whose law the federal court is interpreting.

The presumption of similarity to forum law can be significant for certifying nationwide class actions. Those seeking to certify the class bear the burden of showing that questions of law and fact common to the class predominate over questions affecting the individual members.<sup>187</sup> If the plaintiffs have causes of action that arise under a number of states' laws, the difference between these laws can frustrate certification.<sup>188</sup> But if the presumption is used, it will be the defendant who must show that the sister states' laws differ from the law of the forum. When sister states' laws are unsettled, she will not be able to overcome the presumption, making class certification easier.<sup>189</sup>

Whether a state employs the presumption is often evident, therefore, in the way it approaches certification. For example, Texas had a tradition of assigning to the defendant the burden of showing that the various state laws applying to the members

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184. *Am. Honda Fin. Corp. v. Bennett*, 439 N.W.2d 459, 462 (Neb. 1989).

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

186. *Id.*

187. *E.g.*, Patrick Woolley, *Erie and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1740 (2006).

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

189. For a discussion of the use of the presumption in class action certification, including when these actions are brought in federal court, see Green, *supra* note 63, at pt. III.C; Russell J. Weintraub, *Choice of Law as an Impediment to Certifying a National Class Action*, 46 S. TEX. L. REV. 893 (2005); 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, 801–17; Woolley, *supra* note 187, at 1740.



of the plaintiff class were different from forum law.<sup>190</sup> But recently the Texas Supreme Court held that the burden is on the class proponent to show that state laws are not different.<sup>191</sup> This suggests that Texas does not employ a presumption of similarity to forum law.

As we saw in connection with *Slaton*, the way a state court interprets the law of sister states is evidence of how it believes its own law should or may be interpreted. This is particularly true when its interpretive approach is applied to *all* sister states, without sensitivity to how sister states' courts themselves wish their law to be interpreted. When the Georgia Supreme Court held in *Slaton* that Alabama common law may be interpreted without deference to the decisions of the Alabama Supreme Court, it did not look to particular Alabama decisions that suggested that a lack of deference was what the Alabama Supreme Court wanted. Its reasoning was instead applicable to the common law of all states—including Georgia.

Accordingly, the fact that Texas courts refuse to employ the presumption of similarity to forum law concerning unsettled sister-state law suggests that they think that sister-state and federal courts should not use the presumption concerning unsettled Texas law. By the same token, New York courts must think that their unsettled law may be interpreted in accordance with the presumption. And this generates our puzzle. If New York courts do not care whether unsettled New York law is interpreted using the predictive method, on what grounds can the Supreme Court claim that federal courts are constitutionally obligated to interpret New York law according to this method?

Of course, even if our puzzle is set aside, there are considerable doubts about whether the predictive method is required by *Erie*. Under the predictive method, a federal district court interpreting unsettled state law does not mimic how a trial court in the state would decide the matter. Instead, it seeks to duplicate how the issue would have been decided in the state court system as a whole, with the possibility of appeal. Assume, for example, that the state supreme court issued a decision on

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190. *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 613 (Tex. App. 6th 1995); *Osborn v. Kinnington*, 787 S.W.2d 417, 419 (Tex. App. 8th 1990).

191. *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.” (quoting *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 954 (Tex. 1996))). The Montana Supreme Court came to the same conclusion. See *Sieglock v. Burlington N. Santa Fe Ry. Co.*, 81 P.3d 495, 499 (Mont. 2003).

point long ago that it would likely overrule if it took the case on appeal now. In general, a state trial court must apply the old decision. It is not permitted to apply the rule that it predicts the state supreme court would use now.<sup>192</sup> If a federal court adopted the trial court's perspective, the rule it applied could seriously diverge from the rule that would be applied in the state court system as a whole. It is for this reason that the predictive method looks to the state supreme court's likely decision.

But the predictive method can fail to track how the case would turn out in the state court system as well. After, all, the trial court's decision might not have been appealed to the state supreme court. Or, if appeal had been sought, the state supreme court, although strongly inclined to overrule its old decision, might not have granted appeal at that moment.<sup>193</sup>

I do not take a stand here on whether the predictive method is the best way of satisfying *Erie*. Perhaps things would be better if a federal court were required to act like a state trial court.<sup>194</sup> Or maybe federal courts should always abstain from hearing actions with unsettled questions of state law,<sup>195</sup> or should always certify such questions to the state's supreme court.<sup>196</sup>

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192. *E.g.*, *Namm v. Charles E. Frosst & Co.*, 427 A.2d 1121, 1129 (N.J. Super. Ct. App. Div. 1981); *Himes v. Stalker*, 416 N.Y.S.2d 986 (Sup. Ct. 1979). Lower federal courts are likewise bound by old Supreme Court decisions, even if they predict that the U.S. Supreme Court would decide differently now. *Khan v. State Oil Co.*, 93 F.3d 1358, 1364 (7th Cir. 1996) (Posner, J.) ("We have been told by our judicial superiors not to read the sibylline leaves of the *U.S. Reports* for prophetic clues to overruling."), *vacated*, 522 U.S. 3 (1997).

193. *E.g.*, N.Y. C.P.L.R. 5601 (McKinney 1995) (granting the right of appeal only in a narrow set of cases).

194. This was arguably the approach that the Supreme Court originally took to the matter. *See Stoner v. N.Y. Life Ins. Co.*, 311 U.S. 464, 467 (1940); *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236–37 (1940); *Six Cos. Of Cal. v. Joint Highway Dist. No. 13*, 311 U.S. 180, 188 (1940); *Fid. Union Trust Co. v. Field*, 311 U.S. 169, 178 (1940).

195. The Supreme Court has held, however, 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. *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943).

196. Clark, *supra* note 176, at 1544–63. Indeed, it might even be better if federal courts decided on the basis of principles latent in state decisions, even if they believed that the state supreme court would not be true to these principles if it decided the case. *E.g.*, Dorf, *supra* note 86, at 695–715; Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-Erie World*, 46 WM. & MARY L. REV. 1399, 1423–31 (2005).

But all the alternatives that have been offered share with the predictive method the view that a federal court's interpretation of unsettled state law is a matter of constitutional concern. The alternative approaches are recommended because they are thought to do the best job of satisfying a federal court's duty under *Erie*.<sup>197</sup> No one considers the proper interpretive method to be a purely procedural or evidentiary matter concerning which federal courts are free to adopt any approach they like. And yet that is precisely how many states see the matter. Given that these states have sought to free federal courts of any obligation to use the interpretive method recommended under *Erie* (which I will now assume, for simplicity of argument, is the predictive method), why do federal courts refuse to consider themselves free?

#### B. NONDISCRIMINATION, AGAIN

We are now in a position to solve this puzzle. There are only two ways that a federal court can be free of a constitutional duty to use the predictive method. The first is if the method for interpreting a state's unsettled law is constitutionally procedural—it is, to use Justice Brennan's language in *Byrd*, not “bound up” with state rights and obligations. If that is the case, however, the Supreme Court has been wrong to consider the predictive method a matter of constitutional concern. Federal courts are in fact constitutionally free to adopt any method of interpreting unsettled state law they see fit.<sup>198</sup> They could, for example, presume that unsettled state law is the same as federal law.

On the other hand, let us assume that the method for interpreting a state's unsettled law is constitutionally substantive—it is “bound up” with state rights and obligations.<sup>199</sup> If

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197. *E.g.*, Clark, *supra* note 176, at 1564; Dorf, *supra* note 86, at 710–15.

198. Their choice would, however, be subject to the *nonconstitutional Erie* doctrine. They might be required to choose the method that the courts of the state where they are located use for interpreting unsettled sister-state law, in order to avoid forum shopping and the inequitable administration of the laws. *See* Green, *supra* note 63, at pt. IV; *supra* note 64.

199. In an important new article, Abbe Gluck has recently argued that rules of statutory interpretation should be subject to *Erie*. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as ‘Law’ and the Erie Doctrine*, 120 YALE L.J. (forthcoming 2011). Although she does not distinguish between the constitutional and the nonconstitutional *Erie* doctrines, *see supra* note 64, her argument lends support to the notion that rules of statutory interpretation are constitutionally substantive, that is, bound up with state rights and obligations. If so, not only would a federal court in New York inter-

this is so, a state supreme court might still be able to give federal courts the freedom to come up with their own method of interpreting the state's unsettled law, for example, if it understood the appropriate method as a *factual* question to be decided by each court. But our nondiscrimination principle would apply. If the matter is factual for federal courts, it must be factual for the state's trial courts as well.

For example, to permit federal courts to come up with their own method of interpreting unsettled New York law, the New York Court of Appeals would have to permit New York trial courts to come up with their own methods as well.<sup>200</sup> Since no state has ever given their trial courts such freedom, it is understandable that the Supreme Court has recommended a uniform approach to the interpretation of unsettled issues of state law, without considering state law on the matter.

The same argument applies horizontally. The Full Faith and Credit Clause forbids a state supreme court from freeing sister-state courts of their duty to interpret its unsettled law according to the predictive method—except through inconceivable changes in the way its unsettled law is treated in its own courts. Sister states must use the predictive method concerning a state's unsettled law, whatever the state itself might say about the matter.<sup>201</sup>

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preting a Pennsylvania statute have a constitutional obligation to use Pennsylvania's rules for statutory interpretation, Pennsylvania would be prohibited from freeing the federal court of this obligation.

200. Furthermore, the individualized decision of the New York state trial court would have to not be subject to appeal—or at least *de novo* appeal—in that system. *See supra* note 155.

201. In *Sun Oil Co. v. Wortman*, the Supreme Court held that even when sister-state courts are constitutionally obligated to apply a state's law, they may adopt any interpretation of the state's law that they wish, provided that the interpretation does not "contradict law of the other State that is clearly established and that has been brought to the court's attention." 486 U.S. 717, 731 (1988). This means that sister-state courts are not obligated to use the predictive method concerning unsettled state law and indeed can presume that this law is the same as their own. In Green, *supra* note 63, at pt. II.C, I argue that the Court conflated the interpretive duties of sister-state courts under full faith and credit with the circumstances under which the Supreme Court would review whether those duties have been violated. In that article, I did not consider our puzzle, however. What difference would it make to the sister-state courts' duties if the state whose unsettled law was being interpreted did not care whether its law was interpreted according to the predictive method? In this Article, I fill that gap.

## IV. CHOICE OF LAW

In this Article, I have used the nondiscrimination principles latent in *Erie* and the Full Faith and Credit Clause primarily to put established areas of the law, such as the predictive method, on a firmer and more intellectually satisfying footing. I want to end with a brief suggestion that the principles might compel radical changes to another area: choice of law.

Assume that a Vermont state court is entertaining a negligence action brought by a wife against her husband concerning an accident in Pennsylvania. The couple is domiciled in New York. New York law allows interspousal suits, but Pennsylvania prohibits them unless the defendant was reckless (something not alleged in the wife's complaint). Which state's law should the Vermont court apply? This problem is usually conceived as one to be answered by Vermont's choice-of-law rules. Since the question is whether Pennsylvania or New York law should be chosen, it cannot be answered by the law of Pennsylvania or New York.

But this is a mistake. The question is not yet whether Pennsylvania or New York law should be *chosen*. There is no choice to make if one of the state's laws does not apply to the facts, for example, if Pennsylvania's prohibition on interspousal suits does not apply to non-Pennsylvanians who get in accidents in the state. And how is this question to be answered except by looking to the decisions of the Pennsylvania Supreme Court?<sup>202</sup> Isn't the scope of Pennsylvania law whatever the Pennsylvania Supreme Court would say it is? Wouldn't the Vermont court be violating its obligations under full faith and credit if it held that Pennsylvania law applies when the Pennsylvania Supreme Court would not?

One way of putting this point is that the choice-of-law rules that the Pennsylvania Supreme Court would use to determine whether Pennsylvania law applies can be constitutionally substantive, in the sense that they define the scope of Pennsylva-

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202. See, e.g., Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 569-74 (1996); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 303 (1990); Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 1005-08 (1991) [hereinafter Kramer, *Renvoi*]; Roosevelt, *supra* note 112, at 1884. For older examples, see JOHN WESTLAKE, A TREATISE ON PRIVATE INTERNATIONAL LAW 25-41 (5th ed. 1912); Erwin N. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1186-87 (1938).

nia law.<sup>203</sup> If Pennsylvania's choice-of-law rules are bound up with the state's rights and obligations, it follows that the Vermont court cannot use Vermont choice-of-law rules when deciding whether Pennsylvania law applies. It must use the rules that would be used by the Pennsylvania Supreme Court.

And yet *every* choice-of-law method used by state courts—from the traditional approach, as exemplified in the First Restatement, to more modern interest-analysis approaches—refuses to defer to a sister state's supreme court when determining whether the sister state's law may be applied to interjurisdictional facts. Consider the traditional approach, which employs fairly rigid rules that select a state's law on the basis of whether a localizing event occurred within that state. It would recommend Pennsylvania law, because the *lex loci delicti*—or law of the place of the harm—applies in tort cases.<sup>204</sup> If our Vermont court used the First Restatement, it would choose Pennsylvania law even if the Pennsylvania Supreme Court, using a method different from the First Restatement or disagreeing about whether the case should be characterized as tort, would hold that Pennsylvania's prohibition on interspousal immunity does not apply to non-Pennsylvanians who get into accidents in the state.<sup>205</sup>

Modern interest analysis suffers from the same problem. Although it can take a variety of forms—from the classical interest-analysis approach of Brainerd Currie,<sup>206</sup> to the Second

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203. Kramer, *Renvoi*, *supra* note 202, at 1043–44; Roosevelt, *supra* note 112, at 1883.

204. States still using the traditional *lex loci delicti* rule for torts are Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming. Symeon C. Symeonides, *Choice of Law in American Courts in 2008: Twenty-Second Annual Survey*, 57 AM. J. COMP. L. 269, 279–80 (2009).

205. An example of such a case is *Yates v. Lowe*, 348 S.E.2d 113, 113–14 (Ga. Ct. App. 1986). The Court of Appeals of Georgia applied Florida interspousal immunity law to a Georgia couple who got into an accident in Florida. *Id.* It did not consider the fact that two years earlier a Florida court, using Florida's modern interest analysis approach, had held that its interspousal immunity law does not apply to non-Floridians who get into accidents in Florida. *Pennington v. Dye*, 456 So. 2d 507 (Fla. Dist. Ct. App. 1984).

Indeed, the First Restatement is explicit that the choice-of-law rules of foreign jurisdictions should be ignored by the forum, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 7 (1934), making an exception only in cases of title to land and the validity of a decree of divorce. *Id.* § 8. In these two situations, the doctrine of *renvoi* is used. *See infra* note 212.

206. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963). No state explicitly adopts all of Currie's approach, although all modern

Restatement,<sup>207</sup> to Leflar's choice-influencing considerations,<sup>208</sup> to Baxter's comparative impairment<sup>209</sup>—all modern approaches take seriously the idea of looking to the purposes standing behind a state's law when determining whether it applies to a transaction that crosses state borders. If Vermont used a modern approach, it would likely claim that the purposes of Pennsylvania's interspousal immunity law—such as encouraging marital concord and preventing collusive suits between spouses to collect insurance proceeds—would not be implicated concerning non-Pennsylvania couples. For this reason, it would conclude that Pennsylvania law does not apply, even if the Pennsylvania Supreme Court, using the First Restatement, would have applied Pennsylvania law to the facts.<sup>210</sup>

Although for at least a century a minority of choice-of-law scholars has argued that some choice-of-law rules should be treated as substantive,<sup>211</sup> recently the position has gained momentum.<sup>212</sup> What is distinctive about contemporary propo-

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approaches are heavily influenced by it. Symeonides, *supra* note 204, at 278–80.

207. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1969). This is the most prevalent approach, used by at least twenty-two states for torts. Symeonides, *supra* note 204, at 279–80.

208. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966). This approach (also known as the “better law” approach) is used by Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin for torts. Symeonides, *supra* note 204, at 279–80.

209. William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963). Baxter's approach is arguably used in California. Symeonides, *supra* note 204, at 279; *see also* *Bernhard v. Harrah's Club*, 546 P.2d 719, 721–24 (Cal. 1976).

210. An example from a contract case is *Dillard v. Shaughnessy, Fickel & Scott Architects, Inc.*, 943 S.W.2d 711 (Mo. Ct. App. 1997). The Missouri Court of Appeals, using the Second Restatement, applied Kansas law to interpret a contract entered into in Missouri, on the ground that the subject matter of the contract was a building project in Kansas. *Id.* at 715–19. But Kansas state courts accept the traditional view that the law of the place of contracting controls. A Kansas court, therefore, would have held that Kansas law does not apply. Once again, this fact was considered irrelevant.

211. *E.g.*, WESTLAKE, *supra* note 202, at 34; Griswold, *supra* note 202, at 1186–87. For a meticulous discussion of older cases pro and con, see JOHN PAWLEY BATE, NOTES ON THE DOCTRINE OF RENVOI IN PRIVATE INTERNATIONAL LAW (1904).

212. Discussion of this issue has largely occurred in the context of the so-called renvoi problem in choice of law. But renvoi in fact addresses a different issue. Renvoi had its origin in the traditional approach. To see how it was supposed to work, consider *Yates v. Lowe*, 348 S.E.2d 113, 113–14 (Ga. Ct. App. 1986), in which a Georgia court, using the traditional approach, concluded that Florida law on interspousal immunity applied to a Georgia couple

nents—such as Lea Brilmayer, Larry Kramer, and Kermit Roosevelt—is that they emphasize the *Swiftian* nature of prevailing choice-of-law approaches,<sup>213</sup> and recommend their reformation in the spirit of *Erie* (sometimes via the Full Faith and Credit Clause).<sup>214</sup>

But their *Erie* lacks the suppressed premise. The goal is to show respect for a state supreme court's views about the territorial scope of its law.<sup>215</sup> And if respect is all that is at issue, no reform in choice of law is needed. A state supreme court's choice-of-law decisions can be ignored for the simple reason that it thinks they can be ignored. After all, that is precisely what it does concerning the choice-of-law decisions of sister states.

Consider, once again, Georgia's *Swiftian* approach to the common law. Georgia courts ignore sister-state decisions when deciding what the common law in those sister states is. From this it followed that they think their own decisions concerning

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who got into an accident in Florida. Renvoi begins with a fundamental question: What is meant by "Florida law"? Florida's law prohibiting interspousal suits (the "internal" law of Florida)? Or the law that Florida courts would apply (the "total" law of Florida)? If it is the latter and Florida courts, using a modern choice-of-law approach, would say that Georgia law applies, then applying "Florida law" would mean applying Georgia law (whether internal or total). This is the renvoi ("sending back" or "sending away" in French). Kramer, *Renvoi*, *supra* note 202, at 980 n.3.

With a small number of limited exceptions, the traditional approach rejected renvoi. If the forum's choice-of-law rules say Florida law applies, Florida's internal law is chosen, not the law that Florida courts would apply. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 7–8 (1934). On the one hand, this is a violation of the obligation to respect a state court's views concerning the scope of its law. The forum will apply Florida law even when a Florida court would not. But it is not necessary to adopt renvoi to respect Florida decisions concerning the scope of Florida law. Respecting Florida decisions means taking Florida courts' application of Georgia law to mean that *Florida law does not apply*. Under the doctrine of renvoi, their application of Georgia law is taken to mean that *Georgia law applies*. That is a matter for Georgia courts to decide.

213. E.g., Lea Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555, 563 (1984); Kramer, *Renvoi*, *supra* note 202, at 986–87; Roosevelt, *supra* note 112, at 1840–41, 1863–64, 1889–90.

214. Lea Brilmayer, *The Problem of Provenance: Constructing a Positive Law Foundation for Choice of Law*, in THE ROLE OF ETHICS IN INTERNATIONAL LAW (Donald Earl Childress III ed., forthcoming); Roosevelt, *supra* note 112, at 1841.

215. Kramer and Roosevelt, for example, both draw distinctions between when the sister state's courts wish their choice-of-law decisions to bind the forum and when they do not. Kramer, *Renvoi*, *supra* note 202, at 1028–53; Roosevelt, *supra* note 112, at 1869–87. They do not always agree on the particulars. *Id.* at 1878–84 (disagreeing with Kramer's interpretation of the First Restatement). But they both ignore the evidence provided by the way the sister state's courts treat the choice-of-law decisions of *other* states.



Georgia common law can be ignored by sister-state courts. As far as choice of law is concerned, every state is Georgia. Whether it uses the First Restatement or a modern approach, every state court thinks it can ignore sister-state decisions when determining the territorial scope of sister-state law. From this it follows that every state court thinks its own decisions can be ignored by sister states.

That state courts *do not care* if their choice-of-law decisions are followed is, I believe, the fundamental reason that the Brilmayer-Kramer-Roosevelt position has always been in the minority.<sup>216</sup> It is no help for them to argue that the majority approach fails to recognize that a state's choice-of-law rules can be substantive.<sup>217</sup> Even if that is so, the question remains whether they are binding on sister-state and federal courts. Since the state's own courts do not think they are binding, it seems disrespectful to disagree.

Things would come to a head if a courageous state gave up its *Swiftian* approach to choice of law and demanded that sister-state and federal courts respect some or all of its choice-of-law rules when determining the territorial scope of its law. But since no state has taken this stand,<sup>218</sup> *Erie* and full faith and credit—understood as commanding respect for state courts' views about their law—are trivially satisfied.

The matter is different, however, if *Erie* and full faith and credit include our nondiscrimination principles. A state would no longer be permitted to designate its substantive choice-of-

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216. See, e.g., LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 97 (1991) ("If choice of law is assumed to be superlaw, distinct from the substantive law on which the individual states are free to differ, then there is some sense in saying that the forum will defer to the other state on matters of substantive law but not on the proper application of choice of law rules."); Ernest G. Lorenzen, *The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country,"* 27 YALE L.J. 509, 517–18 (1918) (arguing that nations do not consider their choice-of-law rules to be binding upon foreign courts).

217. Kramer, *Renvoi*, *supra* note 202, at 1043–44; Roosevelt, *supra* note 112, at 1861–64.

218. The only time this is done, which itself evokes *Swift v. Tyson*, is when the territorial scope of a state's statute is specified in the statute itself. Roosevelt, *supra* note 112, at 1858. An example would be a Pennsylvania interspousal immunity statute that limits its application to "Pennsylvania domiciliaries." *Id.* A Vermont court would respect such a limitation, even when its own choice-of-law rules would have come to a different conclusion about the statute's territorial scope.

law rules as binding upon local courts but not upon the courts of other sovereigns.<sup>219</sup>

#### CONCLUSION

The *Erie* doctrine is commonly viewed as a limit on the power of federal courts. And that is indeed its primary function. Under *Erie*, federal courts must defer to state supreme court decisions when interpreting a state's law. The Full Faith and Credit Clause puts a similar obligation on sister-state courts. By granting state supreme courts this power over other American courts the Constitution creates a unified legal system.

But this power also carries with it a duty. A state supreme court may not undermine the legal uniformity demanded by *Erie* and the Full Faith and Credit Clause by varying the legal effect of its decisions on the basis of the jurisdiction of the recognizing court. If its decisions—including its choice-of-law decisions—are binding on domestic courts, they must be binding throughout the American legal system. Nor can it release other American courts of the duty to interpret its unsettled law with fidelity. Since the courts of its own state must interpret its unsettled law with fidelity, so must federal and sister-state courts. That is the price of the power it enjoys as a participant in the American legal system. That it must pay this price is the hidden lesson of *Erie Railroad Co. v. Tompkins*.

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219. What choice of law would look like as a result cannot be explored further here. I hope to discuss the matter in a later article.