

William & Mary Law School

William & Mary Law School Scholarship Repository

Faculty Publications

Faculty and Deans

11-2022

Improving (and Avoiding) Interstate Interpretive Encounters

Aaron-Andrew P. Bruhl

Follow this and additional works at: <https://scholarship.law.wm.edu/facpubs>



Part of the [State and Local Government Law Commons](#)

Copyright c 2022 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/facpubs>

IMPROVING (AND AVOIDING) INTERSTATE INTERPRETIVE ENCOUNTERS

AARON-ANDREW P. BRUHL*

State courts often encounter the statutes of other states. Any encounter with another state’s statutes raises an interesting but inconspicuous question about choice of law. In particular, the interstate encounter presents a choice of interpretive law. Despite some universal practices in statutory interpretation, there are methodological differences across jurisdictions—both at the level of overall approach and in the details of particular interpretive canons. When a state court encounters the statute of a sister state, may the forum state use its own interpretive methods or must it instead use the methods of the enacting state?

The existing doctrine on this choice-of-law question is unclear, primarily because of inattention rather than open disagreement. The inattention is understandable given the historical understandings of interpretive methodology as either universal law, an application of evidence law, or not real law at all. But those old conceptions of interpretive methodology have been changing, with methodology lately coming to be seen as more or less ordinary law that may differ from place to place. Therefore, today’s courts and commentators increasingly view methodology as part of the law that should tag along with state statutes when those statutes come before other courts.

I largely agree that states must honor other states’ interpretive methods, but this Essay seeks to advance our understanding in three ways. First, the Essay grapples with nuances involving whether enacting states mean for their methods—and which aspects of them—to apply in other courts. Second, it addresses situations in which a forum state may have legitimate reasons to resist applying sister-state methodology to a sister-state statute. In such circumstances of true conflict, the best way to honor the sister state may be to avoid adjudicating claims under its law altogether rather than to apply its substantive law in a compromised form. Third, the Essay considers the potential role of the federal courts in modeling and encouraging compliance with the general duty to apply sister-state methodology.

| | |
|--|------|
| Introduction | 1140 |
| I. The General Duty to Apply Enacting-State Methodology.... | 1144 |
| II. The Possibility of True Conflicts over Interpretive Methodology | 1146 |
| III. Resolving the Conflict..... | 1154 |

* Rita Anne Rollins Professor of Law, William & Mary Law School. This Essay benefited from feedback at the May 2022 symposium on “Interpretation in the States” sponsored by the University of Wisconsin Law School’s State Democracy Research Initiative, especially feedback from Nina Varsava, who served as the discussant for this Essay. Michael Green and Zachary Pohlman also provided helpful comments. I thank Brendan Clark, Ethan Gaitz, Sarah Nagle, Robert Nevin, and Rachel Rogers for research assistance.

| | |
|--|------|
| A. When the Forum State Has Legislative Jurisdiction | 1154 |
| B. When the Forum State Lacks Legislative Jurisdiction... 1155 | |
| 1. Three Bad Options | 1156 |
| 2. Avoiding Interstate Interpretation | 1162 |
| C. Summary of Prescriptions..... | 1164 |
| IV. The Potential Federal Role | 1165 |
| Conclusion..... | 1167 |

INTRODUCTION

State courts often encounter the statutes of other states. Many such interjurisdictional encounters are mundane, as when a state court hearing a negligence case about an in-state car accident must interpret the insurance code of the neighboring state where the insurance policy was issued. Other interstate encounters have broader effects, such as when a state court entertains a putative multi-state class action and must examine various states' statutes to discern their meaning and the differences among them. The end of *Roe v. Wade*'s¹ national right to abortion will bring litigation over whether certain states' restrictions apply to attempts to obtain or aid out-of-state abortions.² Although some of those disputes will be litigated in the states that enact the restrictions, other disputes will arise outside of the enacting state, potentially requiring outsiders to interpret the statutes. The Texas statute known as S.B. 8³ creates civil liability for those who perform or aid abortions, possibly including those who do so outside of Texas. S.B. 8 has already required interpretation in sister states.⁴ Political polarization across states means that sharp interjurisdictional clashes over abortion and other topics are unlikely to subside and—if anything—these clashes will increase.⁵

Whether headline-grabbing or not, any encounter with another state's statute requires interpretation to determine the statute's scope and

1. 410 U.S. 113 (1973).

2. See, e.g., Caroline Kitchener, *Missouri Lawmaker Seeks to Stop Residents from Obtaining Abortions out of State*, WASH. POST (Mar. 8, 2022, 2:21 PM), <https://www.washingtonpost.com/politics/2022/03/08/missouri-abortion-ban-texas-supreme-court> [<https://perma.cc/5NNS-V63M>].

3. Texas Heartbeat Act, 2021 Tex. Gen. Laws ch. 62 (codified in TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2021)).

4. See Ann E. Marimow, *Abortion Rights Advocates, in 'Legal Limbo,' Go out of State to Try to Block Texas Law*, WASH. POST (Oct. 5, 2021, 4:47 PM), https://www.washingtonpost.com/politics/courts_law/abortion-braid-texas-illinois/2021/10/05/7e1f67f4-260b-11ec-9de8-156fed3e81bf_story.html [<https://perma.cc/H9LP-8CCT>].

5. See Shawn Hubler & Jill Cowan, *Flurry of New Laws Move Blue and Red States Further Apart*, N.Y. TIMES (Apr. 4, 2022), <https://www.nytimes.com/2022/04/03/us/state-laws-republican-democrat-division.html> [<https://perma.cc/G6HH-5B3T>].

content. Sometimes the interpretation of a statute barely registers as interpretation at all, as when one understands S.B. 8's statutory penalty of "not less than \$10,000"⁶ to mean 10,000 of today's United States dollars, not, say, the current value that corresponds to 10,000 Spanish silver dollars at the time Texas adopted its constitution. Yet, even something as simple as a dollar value can conceal interpretive problems.⁷ Other statutory provisions are so complex, ambiguous, vague, conflicting, or otherwise unclear that the need for interpretation jumps off the page.

The need to interpret requires an interpretive approach. While some universals exist in statutory interpretation—as they do in torts and contracts—there are also differences across jurisdictions. Some states expressly and self-consciously embrace versions of textualism, while others are more purposivist.⁸ Some states, like Wisconsin, have developed an interpretive method that moves from one tier to the next; particular interpretive sources or tools become available only when sources from the prior tier leave lingering ambiguity.⁹ Furthermore, there is diversity at the level of specific rules. States differ in the formulation or existence of substantive canons like the presumption against extraterritoriality.¹⁰ They have different rules about the value of administrative interpretations of statutes.¹¹ State legislatures sometimes expressly aim at changing a specific judicial interpretive practice, such as by telling courts to use legislative history more expansively (Oregon) or more sparingly (Connecticut).¹²

6. TEX. HEALTH & SAFETY CODE § 171.208(b)(2) (2021), <https://statutes.capitol.texas.gov/Docs/HS/htm/HS.171.htm> [<https://perma.cc/NAQ9-C324>].

7. For the hidden interpretive problem involving the "Twenty Dollars" Clause of the Seventh Amendment, which inspires the example in the text, see Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 281–82 (2017).

8. See generally Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1775–811 (2010) (describing approaches in several states).

9. See *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 681 N.W.2d 110, 123–26 (Wis. 2004); Daniel R. Suhr, *Interpreting Wisconsin Statutes*, 100 MARQ. L. REV. 969 (2017).

10. William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389 (2020).

11. See WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1071–74 (6th ed. 2020) (comparing judicial deference doctrines in different state courts).

12. On legislative directives in Oregon and Connecticut, see Gluck, *supra* note 8, at 1782–85, 1791–97. See generally Jacob Scott, *Codified Canons and the Common Law of Statutory Interpretation*, 98 GEO. L.J. 341, 378–82 (2010) (discussing legislative directions).

Because interpretive approaches and rules differ, dealing with another state's statute involves another choice-of-law layer beyond the choice to use the statute. That is, upon choosing to apply another state's statute, which law of interpretation applies to give meaning to that statute? If a court in Texas—where courts avoid legislative history unless a statute is ambiguous—is applying a statute from Oregon—where courts may consider legislative history regardless of ambiguity—which of those rules about the use of legislative history applies?¹³

The existing law on the choice-of-interpretive-law question is unclear, not so much because of sharp, open disagreement but because of inattention. When courts explicitly address whether a state court applying a sister state's statute should follow the enacting state's interpretive approach or use its own, it appears they more often follow the enacting state's approach.¹⁴ But in what must be a much larger number of cases, the choice of interpretive law goes unaddressed, and probably unnoticed, as the court simply interprets the statute as it would in its usual domestic cases.¹⁵ This is understandable, as most states' interpretive approaches traditionally have not been especially systematized or distinctive, and even today many are not. If one views statutory interpretation as merely the application of common sense, or if one views it as a kind of universal law, there is no particular reason to wonder which sovereign to consult for guidance on the correct methodology.¹⁶ The choice of interpretive law will become harder to miss as statutory interpretation becomes more widely regarded as a law-governed activity—one in which the governing interpretive law may meaningfully differ across at least some jurisdictions in some respects.¹⁷

This Essay aims to improve states' encounters with the statutes of sister states, and it proceeds through four steps. As Part I explains, state

13. *Compare State v. Gaines*, 206 P.3d 1042, 1048–51 (Or. 2009), with *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 135–36 (Tex. 2018).

14. See Grace E. Hart, Comment, *Methodological Stare Decisis and Intersystemic Statutory Interpretation in the Choice-of-Law Context*, 124 YALE L.J. 1825, 1830–32 (2015). But see *Weber v. U.S. Sterling Sec., Inc.*, 924 A.2d 816, 823 n.5 (Conn. 2007) (“Although we apply the substantive law of Delaware because [the company at issue] was incorporated there, procedural issues such as how this court interprets statutes are governed by Connecticut law.”).

15. See Zachary B. Pohlman, *State Statutory Interpretation and Horizontal Choice of Law*, 70 KAN. L. REV. 505, 507 (2022); see also Hart, *supra* note 14, at 1830–32.

16. See, e.g., *Walker v. State*, 7 Tex. App. 245, 257–62 (Ct. App. 1879) (drawing principles of interpretation from Texas cases, other states' cases, and various treatises).

17. See, e.g., *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 638–39 (Tex. 2010) (rejecting persuasive force of interpretations of similar statutory language in other states, because those courts and Texas rely on different “rules of statutory construction”).

courts interpreting sister-state statutes should generally apply sister-state interpretive methods. In advocating that proposition, I largely agree with commentators who have recently addressed this question.¹⁸ From there, the remainder of the Essay aims to advance the debate through several contributions, all of which stem from the realization that the proposition just advanced, though a good starting point, must confront certain complexities. As Part II explores, there are circumstances in which a forum state may have legitimate, administrative reasons *not* to apply another state's methods—and in which the enacting state may not even intend for other states to do so. Then, Part III argues that state courts can sometimes improve their encounters with other states' interpretive law by avoiding the encounters, either by using forum substantive law (despite their earlier inclination) or by abstaining from deciding the matter entirely. There may also be a productive role for the federal courts and Congress in improving interstate encounters, as Part IV explores.

Before proceeding, allow me to note a few limitations on this Essay's scope. First, the Essay concerns horizontal choice of interpretive law. I have taken up the federal courts' use of state interpretive law (*i.e.*, statutory interpretation's *Erie*¹⁹ doctrine) in another work.²⁰ Accordingly, I do not address the federal courts here except insofar as they can serve as models for the state courts through their rulings in “diagonal” cases, those in which a federal court sitting in one state interprets the law of a different state.²¹ Second, this Essay concerns *statutory* interpretation; similar principles likely apply to interpretation of other states' constitutions or regulations, but the interpretation of other states' common law presents rather different issues.²² Third, I address states' application of the statutes of their sister states, not their application of the statutes of foreign countries. (Thus, subsequent use of “foreign” should be understood as synonymous with “sister state.”) Similar principles may apply to international encounters, but the constitutional constraints and traditional practices both differ in ways that provide states with greater

18. See Pohlman, *supra* note 15; Hart, *supra* note 14.

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

20. Aaron-Andrew P. Bruhl, *Interpreting State Statutes in Federal Court*, NOTRE DAME L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978040. See also Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898 (2011) (addressing *Erie* and “reverse *Erie*” situations).

21. See *infra* Part IV.

22. See generally Nina Varsava, *Stare Decisis and Intersystemic Adjudication*, 97 NOTRE DAME L. REV. 1207 (2022) (addressing the interpretation of precedent across the federal-state divide).

freedom when confronted with the laws of foreign countries as compared to the laws of their sister states.²³

I. THE GENERAL DUTY TO APPLY ENACTING-STATE METHODOLOGY

Faithful application of a state's choice-of-law rules generally leads to the conclusion that application of a statute from a sister state also requires application of the enacting state's interpretive methods. The precise reasoning that leads to that result depends on the forum state's approach to choice of law. However, to generalize, the reasons to choose the substantive law of the sister state usually serve as reasons to apply the interpretive methods as well.²⁴ That is, a state applying a sister-state statute does so because of the enacting state's interest in regulating primary conduct connected with the enacting state or bringing about some real-world result in which the enacting state is legitimately interested. For the enacting state, accomplishing those policy goals depends not only on the words in its statute book but also on how judges, other officials, attorneys, and ordinary people understand their legal import (*i.e.*, the rights and duties and other legal relations the statutes create). Methods of interpretation provide a bridge between the words on the page and the legal relations, thereby facilitating the achievement of the state's goals.²⁵ This is true in the wholly domestic case, and it is true in the interstate case as well. So, the reasons for applying sister-state law also demand the application of the sister-state interpretive methodology.

The foregoing line of reasoning is consistent with the recommendations of other scholars who have recently addressed the matter. Grace Hart argues that courts should select foreign states' interpretive methods when interpreting their statutes, emphasizing the substantive policy impacts of interpretive methodology.²⁶ A recent article by Zachary Pohlman addresses interjurisdictional statutory interpretation in both its constitutional and subconstitutional dimensions.²⁷ Pohlman believes that the decision to apply enacting-state methodology is not constitutionally compelled and is therefore left to states to decide individually as their conflicts methodologies direct.²⁸ He contends that both the traditional territorial approach of *First Restatement* and the

23. See generally Nicholas M. McLean, Comment, *Intersystemic Statutory Interpretation in Transnational Litigation*, 122 YALE L.J. 303 (2012) (urging courts to apply foreign interpretive methods to foreign statutes).

24. See generally Bruhl, *supra* note 20 (explaining at greater length in the related context of the federal courts' duty to apply state methodology).

25. *Id.*

26. See Hart, *supra* note 14, at 1832–35.

27. Pohlman, *supra* note 13.

28. *Id.* at 508–09, 548–49.

“most significant relationship” approach of the *Second Restatement*, when properly applied, would select enacting-state interpretive methods.²⁹

To briefly explain Pohlman’s reasoning, beginning with territorialism: States have the exclusive right, vis-à-vis other states, to regulate events in their territory.³⁰ If a right arises under a statute, application of a different state’s interpretive method invades the enacting state’s exclusive regulatory power by imbuing the right with a different meaning.³¹ Further, the application of forum-state methodology allows content of the vested right to vary depending on where a suit is brought, which undermines the uniformity the territorial approach aims to promote.³² Implicit in the foregoing reasoning is the premise that an interpretive method is best characterized as “substance” rather than “procedure,” for under the *First Restatement* a forum could apply its own procedures when adjudicating a right that vested elsewhere.³³

Although analysis under the *Second Restatement* is multi-factored and not always determinate, a faithful application of its methodology, Pohlman explains, should lead states to use enacting-state interpretive methodology.³⁴ His essential point is that the reasoning supporting the conclusion that a sister state has a more significant relationship to the case—which, depending on the issue, could be due to that state’s greater interest in regulating the primary conduct at issue, allocating resources between the parties, or protecting parties’ expectations about the consequences of their actions—likely similarly supports applying the enacting state’s method of giving meaning to its statute.³⁵ This is especially true when the enacting state has a clearly articulated, regularly followed methodology.³⁶

While I am mostly in agreement with Hart and Pohlman in that states should generally apply other states’ interpretive methods when applying other states’ statutes, there are a few important caveats and complications.

The first complication, addressed only briefly here, is the possibility that interpretive methodology is not binding law at all. Here I refer to the view that, even in purely domestic cases, interpreters are not legally obliged to obey general approaches or particular rules. Now, it is true

29. *Id.* at 513–14.

30. *See id.* at 514.

31. *Id.* at 549–50.

32. *Id.* at 550.

33. *Id.* at 541, 544–48; *see* RESTATEMENT OF CONFLICT OF LAWS § 585 (AM. L. INST. 1934).

34. Pohlman, *supra* note 15, at 514, 553.

35. *Id.* at 550–55.

36. *Id.* at 552.

that some (or many) aspects of interpretation are fuzzy in application and inconclusive in effect, even taken sincerely on their own terms. Certain jurisdictions may leave much to individual judicial philosophy. And interpreters, as a descriptive matter, may violate the norms here as elsewhere, maybe more often here because of the fuzziness. But, as some of us have argued at length, there is at least a meaningful amount of interpretive *law*—approaches, presumptions, tiebreakers, closure rules, and rules of admissibility—that courts are required to follow when their triggering conditions are satisfied.³⁷ The amount of such law is probably growing over time as courts and legislatures become more conscious of methodology, which makes the choice-of-law questions more pressing.

The complications that will occupy most of the rest of this Essay are different in that they concern reasons for a forum state to eschew the application of enacting-state methodology even if one generally believes that at least some methodology is binding in domestic cases in the statute-enacting state.

II. THE POSSIBILITY OF TRUE CONFLICTS OVER INTERPRETIVE METHODOLOGY

To elaborate on and complicate the general duty to follow enacting-state methodology, this Essay uses language of state interests. That is not because I adopt the entirety of Brainerd Currie's approach,³⁸ but rather because thinking about the interests of the enacting and interpreting states—the differing natures of the interests on each side and the potential conflicts between them—is a useful way to illuminate corners of the problem.³⁹ An examination of the relevant interests provides some further reasons in favor of applying enacting-state methods but also suggests some legitimate exceptions to that general duty.

37. See, e.g., William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017); Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101 (2020); Pohlman, *supra* note 15, at 530–40; see also Gluck, *supra* note 8 (arguing that interpretive methodology should be treated as law but frequently has not been); cf. Christopher J. Baldacci, Note, *The Common Law of Interpretation*, 108 VA. L. REV. 1243, 1247 (2022) (providing evidence for a “soft,” incremental form of methodological precedent). But cf. Richard M. Re, *Permissive Interpretation*, 171 U. PA. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4184846 (arguing that judges may lawfully choose between three traditional rules, none of which is paramount).

38. See LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 47–48 (1991) (explaining Currie's approach); see generally BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

39. See Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2481 (1999) (“The methodology of interest analysis is useful because it foregrounds the question of what states are attempting to do.”).

Let us start with the enacting state and its potential interests in the use of its interpretive methodology, specifically the use of its methodology in other legal systems that are applying its substantive law. If we inquired into the scope of a state's interpretive methodology, the people, places, and things that fall within the methodology, as the state itself sees it, what would we find?⁴⁰ If an enacting state's methodology is not meant to apply outside of its own courts, even from the enacting state's own perspective, we might not be faced with any conflict of interpretive law at all. We would have, in the terminology of interest analysis, a false conflict (only the forum is interested in the methodology to be applied) or an unprovided-for case (neither state is interested).⁴¹

It is hard to determine the territorial scope of a state's interpretive methods simply by observing the behavior of judges and other officials in the enacting state.⁴² They are acting within the system, and not everything they do is meant to apply outside. Suppose that the state courts, in fully domestic cases, use legal-size paper, follow a textualist interpretive approach, and limit noneconomic damages. From observing those practices, we cannot know that the state officials have any interest in, or have given any thought to, whether all their practices apply externally when a different state applies at least some aspects of the enacting state's law. With regard to the paper size, it is hard to see why the enacting state would care, and, corroborating that intuition, its procedural rules probably say something like: "Filings in the trial courts of this State shall be made on legal-size paper." Note that I am not yet talking about a different state's countervailing interest in regulating the size of filings in its own courts; for now, I am only considering the enacting state's own lack of concern in other courts' choices about paper size. For the cap on damages, the enacting state probably does mean for it to apply (at least in certain configurations of parties), as the cap is at least partially tied to interests in boosting businesses or keeping prices low, goals that are undermined if the caps are meaningless across the state line. Put differently, the paper size is procedural while the damage caps are probably substantive, when judged from the enacting state's perspective. What about the scope of the interpretive method, from the enacting state's perspective?

40. Cf. RESTATEMENT (THIRD) OF CONFLICT OF LAWS ch. 5, § 5.01 (AM. L. INST., Tentative Draft No. 3, 2022) (explaining the first step in a choice-of-law analysis under most modern articulations is interpreting the laws at issue to determine their scope of application from the enacting states' perspectives).

41. See BRILMAYER, *supra* note 38, at 47 (explaining the use of these terms in interest analysis).

42. I elide here the complication of a state in which the courts and the legislature disagree on the proper method or the proper scope of the method. That is, I assume that the enacting state's legislature and its courts agree on the interpretive regime and whether it applies to foreign courts.

A rational state would have an interest in the application of at least parts of its interpretive methodology wherever its statutes are interpreted. What the statutes on the books actually achieve depends on how they are interpreted and applied, which makes methodology important. To the extent the enacting legislature contemplates any interpretive regime when considering the real-world effect of its enactments, it is the method it created or its courts regularly use, at least where the state has a discernible method.⁴³ Moreover, a reasonable lawmaker would have second-order interests in the cohesive interpretation of its statutes wherever they may find their way. In a world without a universal approach, this consistency is promoted by the enacting-state, interpretive regime following the substantive law.

We do not have to rely only on suppositions about what a sensible lawmaker would want. Although state legislatures often lack any actual intent about the territorial reach of their laws,⁴⁴ states occasionally tell us the scope of their interpretive regimes in the most conventionally powerful way: through the enacted text that creates the regime. Every state has some codified interpretive directives, which range from narrow and banal (*e.g.*, the use of the singular shall be construed to include the plural) to broad and interesting (*e.g.*, legislative history may be consulted regardless of textual ambiguity).⁴⁵ When the directives address their own scope, they generally indicate on their face that they apply to the interpretation of the state's statutes regardless of forum. That is, they say things like, "this Code" should be interpreted in the specified way or that a particular canon popular elsewhere does not apply to "the statutes of this State," or they direct how courts, without specifying which courts, should discern "the General Assembly's" intent.⁴⁶ They generally do not

43. As compared to Congress, state legislatures are more knowledgeable about and more likely to draft in light of their state interpretive methods. States typically have quite a few codified rules of interpretation, certainly more than Congress, and some state courts have well-articulated methodologies known to their legislatures. See Grace E. Hart, Note, *State Legislative Drafting Manuals and Statutory Interpretation*, 126 YALE L.J. 438, 455–62, 467 (2016) (citing state drafting manuals that refer to the state interpretive methods); see also *Carbone v. Nxegeen Holdings, Inc.*, No. HHDCV136039761S, 2013 WL 5781103, at *4 n.4 (Conn. Super. Ct. Oct. 3, 2013) ("It is presumed that each set of legislators had their own rules of statutory interpretation in mind when drafting their respective statutes, so their own rules of statutory interpretation [*i.e.*, the rules of the enacting sister state] should be applied to best implement the intended meaning of the statute.").

44. See BRILMAYER, *supra* note 38, at 48–54, 89–93.

45. See Scott, *supra* note 12, at 350, 371, 381.

46. *E.g.*, CAL. CIV. PROC. CODE § 4 (Deering 2022); 5 ILL. COMP. STAT. 70/1.01 (1945); MICH. COMP. LAWS. § 8.3 (2022); MINN. STAT. § 645.08 (2021); N.C. GEN. STAT. § 12-3 (2022); 1 PA. CONS. STAT. §§ 1502, 1901, 1922 (1972); VA. CODE ANN. § 1-201 (2022); UTAH CODE ANN. § 68-3-2(1) (LexisNexis 2022); WIS. STAT. § 990.001 (2019–20).

make statements directed only at their own courts, like telling “the courts of this State” to interpret statutes by doing *X*.⁴⁷ The directives are more often placed in the part of the state code dealing with the legislature rather than the part dealing with the courts.⁴⁸ Although each state presents a separate question, it is a fair generalization that state interpretive directives are written to govern the interpretation of state statutes in all courts. Perhaps the legislatures wrote these statutes without thought to their scope, but, to reiterate, making the directives follow the statutes into other courts generally makes sense.

When we turn to interpretive regimes generated by the state courts rather than by the legislatures, it is harder to find statements defining any intended scope, even in states that self-consciously articulate their approaches. State courts tend not to have much occasion to address the reach of their interpretive methods, since, obviously, they only decide cases within their own judicial system.⁴⁹ Perhaps state courts should certify to enacting-state courts the question whether the enacting state regards its interpretive methods (or aspects of them) as binding elsewhere. Until that happens, we at least have certifications about the meaning of particular state statutes. When answering certified questions, courts do not use different interpretive methods from what they already deploy in non-certification cases.⁵⁰ That is probably not surprising, because they are still acting within their own system. Still, at least we do not see courts saying that a certifying court should interpret the statute using its own customary methods or whatever other method it pleases.⁵¹

Further, in the absence of strong evidence to the contrary, it makes sense that state courts want their judicially announced methodology to follow the statutes. That result serves the enacting state’s legitimate interests in several ways: imbuing state statutes with their best meaning (“best” according to the enacting state, that is), promoting consistent interpretations of state law and a clear interpretive regime against which the state legislature can draft, and reducing incentives for horizontal forum shopping motivated by the hope for a different interpretation.

47. Cf. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 432–36, 433 n.16 (2010) (Stevens, J., concurring in part and concurring in the judgment) (concluding, in an *Erie* analysis, that a state statute did not serve to define rights and remedies under state law by observing, *inter alia*, that it governed the conduct of the state’s courts regardless of which substantive law the courts were applying).

48. E.g., OR. REV. STAT. § 174.010 (2021); TEX. GOV’T CODE ANN. §§ 311–312 (West 2021).

49. See Michael Steven Green, *Law’s Dark Matter*, 54 WM. & MARY L. REV. 845, 845 (2013) (observing that “whether state authorities intend their legal rules to be used in other court systems” is a matter about which “the courts of the state whose rules are at issue have no occasion to discuss”).

50. See Bruhl, *supra* note 20, at 35.

51. *Id.*

Admittedly, a state's opinion about the proper geographic scope of its interpretive methodology is an empirical question that warrants different answers across time and place. Conceivably, a state could regard interpretive methodology as a matter of "general law," meaning its higher courts bind its inferior courts on methods but foreign states' courts are equally empowered to discern proper methods.⁵² Further, the external application of a state's methodology is not necessarily an all-or-nothing binary. For example, a state's approach may provide, both internally and externally, that its statutes mean what the legislature intended (or, alternatively, what an ordinary reader would discern), and certain presumptions or rules about fixing that meaning may follow the statutes. But other aspects of the state's methodology might be interpreter-relative means of achieving the goal, means required of some interpreters but not all. In that scenario, the state's high court might be required to use legislative history (or corpus linguistics) in pursuit of the interpretive goal of intent (or ordinary meaning), but other interpreters might fare better at achieving the same goal by using imaginative reconstruction (or dictionaries).⁵³ Similarly, certain aspects of a state's interpretive method could be motivated by forum-linked "procedural" interests, such as banning legislative history to reduce burdens on the courts and bar, burdens the state may be indifferent to regarding foreign states. Yet, despite these possibilities and caveats, I feel confident saying that today, most states want foreign courts to follow at least some aspects of the enacting state's interpretive methods.

Having canvassed enacting-state interests, we now turn to a forum state's potentially conflicting interests regarding methods of statutory interpretation. Remember that the forum state has chosen to apply foreign substantive law due to the other state's stronger connection to the events in suit (or superior governmental interests or whatever factors matter under the forum's conflicts methodology). Those same substantive considerations should generally impress the forum state enough to apply the foreign methodology that will determine the statute's legal meaning and effect. Still, the use of another state's interpretive methods could come into conflict with a forum state's own interests. Here, I do not mean

52. Cf. Michael Steven Green, *Erie's Suppressed Premise*, 95 MINN. L. REV. 1111, 1126–27 (2011) (describing Georgia's approach to the common law, which appears to reflect the pre-*Erie* view that each court may independently find the common law); Varsava, *supra* note 22, at 1249–56 (positing Dworkinian states in which courts have a duty to make the best constructive interpretation of the law, departing, if necessary, from the law-supplying state's own interpretive approaches).

53. See Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 470–84 (2012) (describing interpretation-relevant institutional differences across courts within a judicial system); Varsava, *supra* note 22, at 1258–59 (describing epistemic difficulties in following another jurisdiction's law about precedent).

the forum's interests in regulating primary conduct, since those interests were already overcome or nonexistent. Rather, the forum state's interests that matter here are those inward-looking interests concerning the operation of its own judicial system—"procedural" interests, to use the familiar (if troublesome) term.

Whether we are talking about substantive law or interpretive methodology, applying the law of another state is more difficult than applying familiar forum law. To be sure, many cases will not require significant interpretive effort, because there is on-point substantive precedent. Even cases of first impression are usually simple enough. Litigating parties are expected to provide adequate briefing, and legal reasoning is similar across states. More specifically, many canons and principles of interpretation are universal or nearly so. And where there are differences in interpretive approach, state courts can probably handle a different version of a substantive canon just as they can figure out a sister state's view on premises liability or the mailbox rule. All of this is to say: at least in the typical case of interstate interpretation, the forum can easily use enacting-state methodology for enacting-state law.

Still, there can be certain situations in which the burden of applying a different state's interpretive methodology is acute. Consider these examples of potentially burdensome interpretive methodologies:

In the State of Breyer, the method for interpretation requires courts to consult legislative history in every case, as the courts are to interpret the statute to accomplish the legislative plan, but the legislative history is not particularly accessible to outsiders (say, it exists on tape recordings in the state capitol basement or is in French).

In the State of Lee, the legislature or supreme court has recently adopted corpus linguistics as the proper way to determine the ordinary meaning of its statutes, forbidding use of dictionaries.⁵⁴ The state appellate judges attend training programs on the method and sometimes hire clerks with Ph.Ds in corpus linguistics. A local university establishes itself as the leading academic center for study of the topic.

In the State of Popularity, the judiciary is elected, and the interpretive approach is that unclear statutes should be interpreted

54. See generally Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 *YALE L.J.* 788 (2018) (describing corpus linguistics and its use in statutory interpretation).

in the way that best fits with the present preferences of the state's people.⁵⁵

Suppose further, consistent with the foregoing discussion, that these states intend for their interpretive methods to follow their state statutes into other courts. (I revisit this assumption later, considering the possibility that these states would not want other states to try to use their methods.)

Even where the forum state's choice-of-law rules select the substantive law of one of the three fictitious states above, in recognition of the sister state's substantive connections or interests, the forum state would have a legitimate procedural reason to want to avoid using the sister state's methods. The use of legislative history, as its most sophisticated advocates explain, requires sensitivity to how a legislature operates and immersion in the particular events that led to a statute's enactment.⁵⁶ And although it is more accessible today, some states' legislative history really is on tapes in some basement.⁵⁷ As far as corpus linguistics goes, it is not for amateurs. Former Justice Thomas R. Lee of the Utah Supreme Court hired law clerks with advanced degrees in corpus linguistics and today provides consulting on the topic to help lawyers understand the method.⁵⁸ And taking the pulse of Popularity's people could be hard for an appointed judiciary in a state at the opposite

55. See generally Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215 (2012) (exploring whether approaches to interpretation should differ according to methods of judicial selection).

56. E.g., Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1644–57 (2014) (arguing that both textualists and purposivists need a more sophisticated understanding of legislative context in order to recreate the functional equivalent of legislative intent); see also Jesse M. Cross, *Legislative History in the Modern Congress*, 57 HARV. J. ON LEGIS. 91, 151–53 (2020) (proposing a new hierarchy of federal legislative history based on the capacities and motivation of the kinds of staffers who produce them).

57. In Wisconsin, drafting records from before 1999 are available only on microfiche. A research guide warns, “Drafting records often require explanation or interpretation. This is why it is recommended that inexperienced researchers do their work at the [Legislative Reference Bureau], where a number of people on staff can give expert advice on the use of drafting records.” WIS. LEGIS. REFERENCE BUREAU, LRB-13-WB-8, RESEARCHING LEGISLATIVE HISTORY IN WISCONSIN, at 11, 13–15 (2014). In Virginia, there are no printed records of legislative debate. The Library of Virginia in Richmond has videotapes of debates for the years 1981 to 2015. For more recent years, the recordings can be viewed online. See Fred Dingley, *Legal Research in Virginia*, WM. & MARY L. SCH., <https://law.wm.edu/library/research/researchguides/virginia> [<https://perma.cc/R79A-RY46>] (last visited Oct. 22, 2022).

58. Jessie Yount, *Utah Supreme Court Justice to Launch Corpus Linguistics Consultancy and Boutique upon Retirement*, LAW.COM (June 13, 2022, 12:00 PM), <https://www.law.com/therecorder/2022/06/13/utah-supreme-court-justice-to-launch-corpus-linguistics-consultancy-and-boutique-upon-retirement> [<https://perma.cc/LG5J-RRTX>].

end of the country and the political spectrum.⁵⁹ Should one entertain expert testimony on public opinion?

Note that a forum state could have a legitimately nondiscriminatory interest in avoiding certain methods even if the forum state uses those methods for interpreting its own statutes.⁶⁰ After all, understanding one's own state's legislative history, recognizing its leading characters, and accessing it in the basement of the capitol building across the street may be less burdensome than using another state's legislative history (or assessing the pulse of its people).

Forum interests in the operation of the judicial system are not limited to dollars and cents but can also involve more theoretical commitments. Imagine a state that embraces the conception of law as integrity, such that the judge's duty is to make the best constructive interpretation of a statute—to find the “true” law of the other state—even if the other state's interpretive methods may yield different results.⁶¹ This view is comprehensible, but I do not believe it reflects the way today's courts usually think about the statutory law of foreign states.⁶² But consider another philosophy, one more congenial to the textualist zeitgeist. Suppose the constitution of the State of Textia provides, “No court of this State may consult legislative history when interpreting a statute of this State or any other state.” One gets to the same place if the Textia Supreme Court interprets its state constitution's “judicial power” to bar its courts from using legislative history. Textia might embrace this position due to concerns about the burden on its courts and bar, or maybe it believes that the use of legislative history imperils its deeply held value of judicial restraint. Either way, the important point is that Textia's grounds for objecting to legislative history are “procedural” in that they are directed at its own courts but are independent of the source of the substantive law being interpreted.⁶³ In that regard, Textia differs from Breyer State both in the direction of its attitude toward legislative history

59. Bruhl & Leib, *supra* note 55, at 1271.

60. On certain kinds of discrimination against sister-state law as a violation of full faith and credit, see *Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. 171, 176–79 (2016); *Hughes v. Fetter*, 341 U.S. 609, 611–14 (1951); Roosevelt, *supra* note 39, at 2511–16.

61. See Varsava, *supra* note 22, at 1249–56.

62. Note the two qualifications. The Dworkinian view may be more descriptively accurate for case law (Varsava's focus) and domestic law, versus statutes from other states. See *id.*

63. Textualists' objections include these court-focused strands but also draw on features of the relevant constitution's lawmaking procedure. See generally John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) (rooting objections to legislative history in Article I considerations). That latter kind of objection should not justify a court's refusal to consider legislative history for statutes from sister states that do not, under their own constitutional structure, see any problem with using legislative history. See Pohlman, *supra* note 15, at 555 n.247.

(opposed versus solicitous) *and* in the scope of its regulation of the use of legislative history, as Breyer's method is statute-following but forum-independent. Notice that Textia's ban does not facially discriminate against the law of other states, for it bars legislative history across the board.

In the scenarios I have sketched out, a forum state has practical or theoretical reasons, rooted in the administration of its own judicial system, for not using the methods of Breyer, Lee, and Popularity. So, what then? We have a situation in which the forum state, by the lights of its own conflicts methodology, believes it should apply sister-state law. Yet the forum state has reasonable judicial-administrative interests in avoiding the sister-state method. Not every encounter with another state's interpretive methodology will trigger such concerns—most will not—but some will. What should the court do to resolve that clash?

III. RESOLVING THE CONFLICT

As a first step to resolving the conflict, it is important to distinguish between cases in which the forum may apply its own substantive law as a constitutional matter and those in which it may not.

A. When the Forum State Has Legislative Jurisdiction

Consider first the situation in which the forum state applies the substantive law of a sister state as its conflicts methodology so directs but in which it is nonetheless constitutionally permissible for the forum to apply its own substantive law. (Under today's permissive Supreme Court doctrine governing state choice of law, a state may apply its own law as long as the state has some significant regulatory interest in the case, even if another state has an objectively stronger regulatory interest.)⁶⁴ Suppose further that this is one of those circumstances described in Part II, in which the forum court has grounds not to apply the foreign interpretive methods. If the forum state is going to adjudicate the issue, I would allow it to respond to the burden by applying its own substantive law after all, despite what its conflicts methodology would otherwise direct.

There are a few reasons for allowing the forum to return to its own substantive law despite the initial answer yielded by its conflicts principles. First, judicial convenience is an explicit factor in some existing conflicts tests, and it is a legitimate ground for preferring forum law to hard-to-discern foreign law no matter how substantive the issue.⁶⁵

64. See *Phillips Petro. Co. v. Shutts*, 472 U.S. 797, 821–23 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981).

65. See *Heath v. Zellmer*, 151 N.W.2d 664, 672 (Wis. 1967) (“Whatever other factors might favor the adoption of a foreign rule, a court will not lightly consider a rule

Second, although magnanimity is to be applauded in choice of law (and magnanimity is almost all we have, under current Supreme Court doctrine), it is better for the forum to take the more “selfish” course of applying forum substantive law to the dispute when the alternative is to apply sister-state law through a method that is by the sister state’s lights. Disregarding interpretive methods that the enacting state means to travel with its statutes is a poor way to respect sister-state lawmaking and law-interpretive power. In fact, ignoring sister-state methodology while applying its substantive law may even raise constitutional concerns.⁶⁶

As an alternative, the forum state might certify a question to the enacting state or abstain under the state doctrine of *forum non conveniens*, unfamiliarity with applicable law being a typical factor in a *forum non conveniens* analysis. I take up these strategies of avoidance in greater detail below.⁶⁷

Finally, a forum state’s freedom to reject the use of sister-state law because of interpretive difficulties may act as a slight disincentive to the adoption of externally burdensome, interpretive methods. Within constitutional limits, each state may choose its own distinctive methods, but those choices do have consequences for other states, which would be well for states to remember when making the choice.

B. When the Forum State Lacks Legislative Jurisdiction

Now comes the harder situation. Suppose the forum state lacks a sufficient connection to or regulatory interest in the events in suit to support applying its own substantive law as a matter of federal constitutional law. It therefore appears that the forum state must apply the sister-state statute. Yet, the forum has reasons that are rooted in the

that will complicate its task or make the process of case deciding more onerous for itself or for the bar of its state.”); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (AM. L. INST. 1971) (“[T]he factors relevant to the choice of the applicable rule of law include . . . ease in the determination and application of the law to be applied.”); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1586–88 (1966); Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1289 (2011).

66. As explained more fully below, there is a constitutional duty of minimal fidelity when using sister-state law, which intentional disregard of the proper interpretive method could implicate. See *infra* Section III.B.1. I am not certain of the argument even in the context set forth below, namely the situation in which the forum state lacks legislative jurisdiction. It is weaker here, where there is legislative jurisdiction, as any misconstruction of foreign law—no matter how intentional or egregious—could arguably be recast as domestic law. See Note, *Misconstruction of Sister State Law in Conflict of Laws*, 12 STAN. L. REV. 653, 653, 657 n.24 (1960). But see Green, *supra* note 65, at 1280–81, 1286–89 (rejecting the foreign-law-as-domestic-law rejoinder).

67. See *infra* Section III.B.2.

operation of its judicial system to resist using the sister-state method. What then?

1. THREE BAD OPTIONS

There are apparently three options for how to decide the matter despite the clash of enacting-state and forum interests:

Option 1

The forum is constitutionally permitted to apply its own substantive law after all, notwithstanding its lack of otherwise constitutionally sufficient connection to the case, because of the forum's *procedural* interest in judicial administration, which is triggered by the foreign interpretive method.

Option 2

The forum remains constitutionally obligated to apply sister-state substantive law, and it must also apply sister-state interpretive methods.

Option 3

The forum remains constitutionally obligated to apply sister-state substantive law, but the forum may apply its own interpretive method to it.

None of these options is ideal. Consider the downsides of each:

Option 1's viability turns on whether the forum's procedural interest in avoiding the foreign interpretive method can itself provide the justification for using forum substantive law. This does not seem permissible even under the current lenient constitutional doctrine, as the Supreme Court has rejected judicial convenience as a ground for a substantively uninterested state to apply its own substantive law.⁶⁸ That is the lesson of *Phillips Petroleum v. Shutts*,⁶⁹ in which the Kansas Supreme Court wanted to apply Kansas law to all the plaintiffs' claims in a multi-state class action, Kansas-linked or not, in order to facilitate and ease the administration of the class action.⁷⁰ That basis for using forum law was impermissible, in the Supreme Court's view.⁷¹

Moreover, letting the forum's procedural interest expand the range of cases to which forum substantive law can be applied would create bad

68. See *Phillips*, 472 U.S. at 821–23.

69. 472 U.S. 797 (1985).

70. *Id.* at 820–23.

71. *Id.*; see also *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1780–81, 1783–84 (2017) (holding that the interest in the convenient adjudication of a case with plaintiffs from many states was insufficient to remedy a lack of contact between the forum and the out-of-state plaintiffs' claims, for purposes of Due Process limits on personal jurisdiction).

incentives toward exorbitant applications of forum law. The existence and severity of a claimed procedural burden associated with a foreign interpretive method would be hard to assess and harder still for the Supreme Court to police. Therefore, the risk of abusive applications of forum law is uncomfortably high.

Option 2 requires the forum to do its best to interpret enacting-state law as the enacting state would, including application of the enacting state's interpretive methods. This view is theoretically attractive, for the interpretive methods implicate the state's regulatory interests in the same way as the words in the statute book. And, to reiterate, this is what a court should do in most instances, just as a matter of its ordinary choice of law; that was Part I. But in our hypothetical, the enacting-state methods burden the forum's interest in judicial administration. Moreover, if the foreign method is hard for outsiders to use, bearing the methodological burdens may not even yield a great result in terms of the accurate determination of the foreign law.⁷² Indeed, the prospect of pain with little gain provides a reason for the forum to double-check whether the best understanding of enacting-state law really does call for outsiders to use the burdensome aspects of the methodology, or if instead those aspects are only interpreter-relative means of finding the law, helpful for enacting-state courts but not suitable for outsiders.⁷³

Supposing the second look confirms the true conflict, Option 2 requires the forum court to bow to its sister-state's interests. Now, there are instances in which current constitutional doctrine takes a hardline approach, requiring sacrifice of forum interests. Notably, a state is required to enforce sister-state judgments based on underlying claims that would be obnoxious to the enforcing state's public policy.⁷⁴ That is the painful compromise current constitutional doctrine does *not* impose when it comes to choice of law.⁷⁵ Maybe it should impose it! That is, maybe the Supreme Court should reject the principle that a state's courts need not sacrifice the state's own legitimate interests for the benefit of a sister state with stronger interests.⁷⁶ Whatever the merits of extending the demanding approach, the Court does not appear willing to impose it, as it has flown from a constitutional regime in which the states must balance

72. See Varsava, *supra* note 22, at 1258–59 (making a similar point regarding difficulties in applying another state's doctrines about precedent).

73. See *supra* text accompanying note 49.

74. *Fauntleroy v. Lum*, 210 U.S. 230, 234–38 (1908).

75. See *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232–33 (1998) (contrasting the exacting standard of full faith and credit owed judgments with the lesser standard for laws).

76. For arguments in favor of stronger duties of fidelity, see, for example, Green, *supra* note 65, at 1240, and William B. Sohn, Note, *Supreme Court Review of Misconstructions of Sister State Law*, 98 VA. L. REV. 1861, 1891–95 (2012).

interests and, importantly, in which the Court must regularly police the permissible bounds of forum preference.

Option 3 is a hybrid solution in which the forum may use its own interpretive methods even though it is constitutionally required to apply the sister state's statute. If that is a permissible combination, it is likely because, as Pohlman argues, interpretive methodology is sufficiently "procedural" for constitutional purposes even though it is substantive for purposes of normal choice of law.⁷⁷ We know that a forum state can generally apply its own procedure despite lack of substantive regulatory interests.⁷⁸

A characterization of interpretive method as procedure does have some historical heft to it. Start with the old-fashioned notion, inherited from English practice, that foreign law is a matter of fact to be proven according to the forum's rules of evidence, such as rules about expert testimony and document authentication.⁷⁹ Inspired by that tradition, state courts in this country used to treat the law of their sister states as "foreign" in the relevant sense and, therefore, as a question of fact subject to proof.⁸⁰ If foreign law, whether of Italy or Illinois, is regarded as a question of fact subject to the presentation of evidence, then it makes sense to say, as the *Second Restatement* did, that "[t]he local law of the forum determines how the content of foreign law is to be shown"⁸¹ The factual conception's assumption that the court knew nothing about foreign law except what was proven by evidence renders sensible the view, also found in some old cases, that if no "peculiar construction" of a foreign statute is proven, the forum court may interpret the statute as if it were a domestic statute, no other basis for interpreting it being knowable to the court.⁸² Furthermore, early understandings of the "law"

77. Pohlman, *supra* note 15, at 542–46. Remember that Pohlman believes states should apply sister-state interpretive methods as a matter of their ordinary conflicts doctrines. But they are not constitutionally required to do so, because interpretive method is (on his account) procedural for constitutional purposes. *Id.*

78. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722–31 (1988) (permitting forum to apply its own statute of limitations, which was treated as at least partly procedural despite disability to apply its substantive law).

79. See 1 ALBERT VENN DICEY, J. H. C. MORRIS & LAWRENCE COLLINS, 1 DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 318 (Lord Collins of Mapesbury et al. eds., 15th ed. 2012); Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 617–19 (1967).

80. See *Prudential Ins. Co. Am. v. O'Grady*, 396 P.2d 246, 248–49 (Ariz. 1964) (acknowledging, but ultimately departing from, this prior approach to sister-state law).

81. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136(2) (AM. L. INST. 1971).

82. E.g., *McKinney v. Minkler*, 102 S.W.2d 273, 279 (Tex. Civ. App. 1937); *Smith v. Bartram*, 11 Ohio St. 690, 691 (1860).

of interpretation may have regarded it as a matter of universal or general law (subject to occasional proof of local peculiarity),⁸³ and so asking *which sovereign's* law of interpretation applied would typically not be worth pondering. Between universal similarity of principles and the under-theorization of interpretive methodology—features that are only recently changing—there was probably little perception of *choice* at all.

The historical treatment of foreign law is relevant because the Supreme Court's doctrine of constitutional limitations on state choice of law draws on historical distinctions between substance and procedure. In *Sun Oil Co. v. Wortman*,⁸⁴ the Court upheld a state court's choice to apply its own statute of limitations to claims to which it could not apply its own substantive law, reasoning that "the society which adopted the Constitution" regarded limitations periods as "procedural" regulations and thus within the forum's authority, regardless of the governing substantive law or the forum's lack of connection to the events.⁸⁵ Justice Scalia's opinion for the Court refused to "update" the characterization of statutes of limitations despite what he described as more modern scholarly understandings that a limitations period has substantive as well as procedural aspects.⁸⁶

Sun Oil itself is not dispositive here and some of its discussion was arguably unnecessary, because, there, the law-supplying states apparently regarded their own statutes of limitations as procedural.⁸⁷ Given that, it is hard to see why another state would have to apply the statute. With interpretive methodologies, though, there is much reason to think that the law-supplying states (or at least some states for certain aspects of methodology) regard their methods as substantive law that should accompany the statutes.⁸⁸ Nonetheless, *Sun Oil's* mode of analysis is noteworthy as it gives broad latitude to the forum to apply its own law to matters that have at least some historical claim to procedural or mixed status.

Accepting, for the moment, the *Sun Oil* majority's historical approach, I am not convinced that the Constitution blesses the use of forum interpretive methodology as a categorical matter. Even under the outmoded practice of treating sister-state law as a fact to be proven, which triggers the forum procedural interests, a court should not stop at taking the statutory text into evidence; it should also welcome evidence

83. Bruhl, *supra* note 20.

84. 486 U.S. 717 (1988).

85. *Id.* at 722–26; *see also Townsend v. Jemison*, 50 U.S. 407, 413–14 (1850) (reaching the same result, on the ground that the place of the contract created the right, but the forum determined whether a judicial remedy was available for a breach).

86. *Sun Oil*, 486 U.S. at 726–29.

87. *See id.* at 729 n.3.

88. *See supra* Part II.

of the foreign interpretations of the text—and, when needed to determine the meaning of the text, the foreign interpretive methods too.⁸⁹ That is, the interpretive methods are part of the relevant content of the foreign law that should be put into evidence for the court to find. For example, if a statute were put into evidence along with a peculiar local rule of construction in the enacting state, that local rule of construction should be used in interpreting the statute.⁹⁰ Similarly, even in the old days of the factual conception of foreign law, the courts said that the rules for interpreting contracts were governed by the *lex loci*.⁹¹ In other words, interpretation was linked with the document being interpreted; it is just that both were treated as factual rather than legal when they were foreign.

Now set aside *Sun Oil's* use of historical understandings and return to state interests here and now. The forum state's procedural interests involving the use of sister-state law look very different today than in the past. Under current conditions, the forum's interests in regulating forms of pleading and modes of proof at trial are irrelevant, as sister-state law is no longer viewed as a matter of fact to be pleaded and proved through witnesses and other evidence.⁹² Today, a Wisconsin state court ascertains Wisconsin law, California law, and federal law in basically the same way—reading the parties' briefs, looking up the relevant statutes and cases on Westlaw, and maybe going to the library for a treatise. The Wisconsin court will not take testimony from a retired attorney.⁹³

Nonetheless, despite the disappearance of forum interests in regulating evidence and pleading, our hypothetical involving the States

89. See J.G. COLLIER, CONFLICT OF LAWS 35 (3d ed. 2001); DICEY, *supra* note 79, at 328–29; see also SOFIE GEEROMS, FOREIGN LAW IN CIVIL LITIGATION: A COMPARATIVE AND FUNCTIONAL ANALYSIS 183 (2004) (explaining that an English court may apply “English rules of construction” if “no evidence at all is offered that different rules govern the foreign court’s interpretation” of its statutes).

90. See HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 175–76 (1896) (noting states that differ from the usual rule about the interpretive value of statutory titles).

91. See *Le Roy v. Crowninshield*, 15 F. Cas. 362, 364 (C.C.D. Mass. 1820) (“It is . . . a principle of public law perfectly beyond the reach of judicial controversy, that personal contracts are to have the same validity, interpretation and obligatory force in every other country, which they have in the country where they are made, or are to be executed.”); *Lodge v. Phelps*, 1 Johns. 139, 140 (N.Y. Sup. Ct. 1799) (distinguishing “the nature and construction of the contract and its legal effect,” which is governed by *lex loci*, from “the mode of enforcing it,” which is governed by *lex fori*); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 219, 225–32 (1834). Indeed, *Sun Oil* itself referred to the traditional understanding that “rules governing the validity and effect of contracts” were substantive, distinguishing them from “procedural restrictions fashioned by each jurisdiction for its own courts,” the category into which it put limitations periods. *Sun Oil*, 486 U.S. at 726.

92. E.g., *Prudential Ins. Co. Am. v. O’Grady*, 396 P.2d 246, 249 (Ariz. 1964); *Hennessy v. Wells Fargo Bank, N.A.*, 968 N.W.2d 684, 692, 695 (Wis. 2022).

93. See *Hennessy*, 968 N.W.2d at 692.

of Breyer, Lee, and Popularity demands consideration of the potential problems of judicial administration that certain methodologies may impose on other states. In a case of first impression under sister-state law and in which the sister-state's interpretive methodology involves tapes in the capitol basement, the forum would be burdened. The burden gives concrete sense to what *Sun Oil* said about the forum's legitimate interests in "regulating the workload of its courts."⁹⁴ And that may be enough to allow the forum, under the current constitutional regime of "no sacrifices required," to apply its own method despite the interference with the enacting state's regulatory interest in giving its law its proper meaning.

Finally, recall that even if the Constitution requires application of sister-state interpretive principles, it would still be hard to show a violation of that duty under the prevailing standards. The Court has held that a forum state violates the Constitution only when its misconstruction of sister-state law "contradict[s] law of the other State that is clearly established and that has been brought to the court's attention."⁹⁵ And there apparently needs to be a material difference in law between the forum and sister-state for there to be a remediable constitutional violation.⁹⁶ Interpretive methodology is clearly established in some states in some respects, but not in all states in all respects. Some aspects of methodology are both clearly established and differ across states, but others lack one or both of those features. All of which is to say that a duty to apply sister-state methodology probably will not be especially rigorously enforced.

The last several paragraphs were admittedly more thrust and parry than resolution. To recap, Option 3 allows for a court applying sister-state law to apply forum methods to the sister-state statute on account of procedural burdens. Despite laying out the competing considerations, I am not sure whether that is constitutionally permissible, and the answer may depend on the particular methodological issues and states involved. I am more confident that Option 3 is not a good solution. The ideal is for the law of a state to sound the same in the mouth of another state as it does at home. However, under Option 3, courts are not trying to do that. The departure might be justifiable, but it is not ideal.

94. *Sun Oil*, 486 U.S. at 730.

95. *Id.* at 731.

96. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985). I say "remediable violation" because the Court's language is perhaps ambiguous as between whether there is no violation or whether any violation is harmless. Justice Stevens appears to take the view that there is no violation absent a difference in law, especially regarding due process. *Id.* at 824, 837-39 (Stevens, J., concurring in part and dissenting in part).

2. AVOIDING INTERSTATE INTERPRETATION

All three of the options above are problematic in different ways. Fortunately, there may be another better option: avoid interpretation. More precisely, the forum court could deal with the problem of seriously conflicting interests by abstaining from deciding based on *forum non conveniens* or related doctrines.⁹⁷ *Forum non conveniens* is often appropriate in the category of cases addressed here, namely those in which the forum state, though possessed of jurisdiction to adjudicate, lacks the power to apply its own substantive law. Some other state would have adjudicative jurisdiction and otherwise be a suitable forum, most especially the law-supplying state itself. Add the fact that applying the other state's method of interpretation would prove problematic for the forum court—unfamiliarity with the governing law being another factor in the *forum non conveniens* analysis—and the case for abstaining from the suit is strong indeed.⁹⁸

If we consider the interests of the states as a group, abstention would be desirable given the alternatives. As between a system in which states must either entertain foreign claims and mangle the foreign law or sacrifice their own legitimate procedural interests, states forging a hypothetical bargain would probably prefer that the forum yield jurisdiction to the law-supplying state.⁹⁹ This is not a scenario, more troubling, in which a state closes the door to a foreign claim due to disagreement with the substance of the governing law, its mere foreignness, or even a desire to preserve resources for claims under domestic law as a general matter.¹⁰⁰

97. The doctrine of *forum non conveniens* varies across the states, but almost every state has it in some form. See William S. Dodge, Maggie Gardner & Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*, 72 DUKE L.J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4060356.

98. Cf. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947) (noting the value of having “a forum that is at home with the state law that must govern the case”); *Slater v. Mexican Nat'l R.R. Co.*, 194 U.S. 120, 128–29 (1904) (affirming dismissal of case governed by Mexican statute that provided for an ongoing remedy the federal court could not administer, rather than substituting the lump-sum remedy provided by forum law). Larry Kramer proposed a similar presumptive solution to conflicts between a foreign substantive policy and a forum procedure: “In a conflict between a substantive policy and a procedural policy, the law reflecting the substantive policy should prevail unless the forum's procedural interest is so strong that the forum should dismiss on grounds of *forum non conveniens*.” Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 324 (1990).

99. Cf. Ann Woolhandler & Michael G. Collins, *Jurisdictional Discrimination and Full Faith and Credit*, 63 EMORY L.J. 1023, 1063, 1065 (2014) (describing the hypothetical desirability of abstention in certain conflicts scenarios).

100. See *Hughes v. Fetter*, 341 U.S. 609, 612–13 (1951) (striking down a door-closing statute but suggesting that a *forum non conveniens* dismissal of a sister-state claim does not deny full faith and credit).

Certification would also work, and it is generally less of a burden on the litigants than abstention. Compared to certification from federal courts to state courts, certification between states remains rare even in states where it is authorized.¹⁰¹ This is a missed opportunity. Certification of difficult questions of first impression under sister-state law has a number of virtues, all the more so when one adds in complications stemming from different approaches to interpretation.¹⁰²

Putting the forum state to the choice between fidelity to sister-state law and abstention or certification creates good incentives for the forum state. In particular, putting the forum state to the choice will reveal whether objections to the burden of the foreign method are serious. If they are so serious, then the forum state may abstain from the case or certify the question. There is no need to sacrifice its interests in judicial administration, as under Option 2 above. If the burdens are not so serious after all, then it should apply the foreign interpretive method to the foreign statute that its choice-of-law rules already say should govern the case. But what is not allowed is for the forum to assert the burden, which is hard for outsiders to second guess, and then either claim the prize of applying its own substantive law when it otherwise would not (Option 1) or mangle the other state's law through using its own method (Option 3).

Speaking of incentives, there may be good incentives for states on the law-supplying side too. If a state finds that the burden of receiving certifications or abstention-generated, new filings outweighs the benefits of correct articulation of its law, perhaps the state might reconsider its embrace of an externally burdensome interpretive method. Such a method is a sort of externality, after all. Alternatively, the law-supplying state could retain its idiosyncratic method for use in its own courts, where it presumably finds that its benefits outweigh the costs, but stop expecting other courts to follow the method. It could so announce the next time it gets a certified question. The downside of freeing other states of the obligation to follow the enacting-state's methods is a reduction in the accuracy and coherence of the state's law in cases of first impression that arise outside of the state. Of course, the state would be able to correct misapprehensions through later domestic cases.

101. See Ira P. Robbins, *Interstate Certification of Questions of Law: A Valuable Process in Need of Reform*, 76 JUDICATURE 125, 127–28 (1992).

102. See Bruhl & Leib, *supra* note 53, at 1271.

C. Summary of Prescriptions

To sum up the prescriptions from the discussion above:

I: A court applying the statute of another state should generally apply the law-supplying state's interpretive methodology, subject to confirmation that the law-supplying state means for its methodology to follow the statute. Here, I agree largely with Hart and Pohlman.

But—

II: If the law-supplying state's interpretive methodology presents a judicial-administrative burden (practical or philosophical) that makes the forum want to depart from the law-supplying state's methodology, then—

A: If the forum has the constitutional authority to apply its own substantive law, it should either (i) apply its own substantive law after all or (ii) abstain or certify the question.¹⁰³

B: If the forum court lacks the constitutional authority to apply its own law, it should abstain or certify the question.

As one can see, in none of the above prescriptions would the forum court apply its own methodology to a sister-state statute.

It may be helpful to illustrate the propositions above by returning to a concrete scenario. Consider again S.B. 8, the Texas abortion law.¹⁰⁴ Suppose a defensive suit for a declaratory judgment is brought in New York by a New Yorker who aided a Texas abortion in apparent violation of S.B. 8. Texas and New York have different views about abortion *and* about statutory interpretation.¹⁰⁵ If the New York court determines that S.B. 8 applies, then it should also apply the Texas interpretive method to it, which would mean applying a more textualist approach than the New York courts would apply to their own statutes. In the unlikely event the New York court has an objection to using the Texas interpretive approach that is rooted in judicial administration, it can certify or abstain.

103. Section III.B.2 addressed abstention when the forum court lacks legislative jurisdiction, but abstention should also be permissible when the forum has legislative jurisdiction, as in Section III.A. Because we are addressing cases in which the forum's conflicts methodology selects a different state's substantive law, the enacting state would likely have the requisite contacts to provide the available alternative forum that *forum non conveniens* requires. If so, interstate federalism can tolerate that abstention. See Woolhandler & Collins, *supra* note 99, at 1062–67; see also Samuel P. Jordan, *Reverse Abstention*, 92 B.U. L. REV. 1771, 1806 (2012).

104. See TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2021).

105. Compare Gluck, *supra* note 8, at 1787–91 (describing the textualist approach of the Texas courts), with Ethan J. Leib, *Interpretive Divergence Between Statutory and Contract Interpretation: A Case Study in the New York Court of Appeals* (unpublished manuscript) (documenting the non-textualist, intent-oriented approach in New York) (on file with author).

Of course, the obvious objection to the realism of what I have just described would be New York's unhappiness with applying a Texas statute enacted to penalize real-world conduct New York would otherwise permit. But that is why New York might not apply S.B. 8 at all, instead using New York law on abortion for the benefit of its domiciliaries. That choice is driven by substance. And if it is not clear enough that New York law would apply, or if additional protective measures against S.B. 8 were desired, New York could pass its own statute shielding against liability and even imposing reciprocal liability on S.B. 8 bounty-seekers.¹⁰⁶

In the much more common case in which a New York court is applying something like Texas insurance statutes to an anodyne coverage dispute, the New York court, if it considered the matter, would likely apply Texas interpretive methods too.¹⁰⁷

IV. THE POTENTIAL FEDERAL ROLE

Thus far, the main audience for my suggestions has been states. Let me close by considering the potential role of the federal government.

Congress has the authority to do something about state choice of interpretive law, and indeed, if one did not know better, one might think it already has. Using its power under the second sentence of the Full Faith and Credit Clause, which allows it to “prescribe . . . the Effect” of state laws in other states,¹⁰⁸ Congress has provided that state statutes “shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”¹⁰⁹ A naïve reader might take this language to mean that state statutes must be given the same meaning elsewhere, which in turn would seemingly require the use of the enacting-state's interpretive methods. That reading is bolstered by the fact that the usual rule for judgments is indeed that they enjoy the same effect everywhere that they have in the rendering state.¹¹⁰ That means applying the preclusion law of the rendering state in order to determine the meaning, scope, and preclusive

106. See Maya Yang, *Pro-Choice States Rush to Pledge Legal Shield for Out-of-State Abortions*, GUARDIAN (May 11, 2022, 4:00 AM), <https://www.theguardian.com/world/2022/may/11/abortion-pro-choice-states-safe-havens-funding-legal-protection> [<https://perma.cc/NH9T-KADY>].

107. See, e.g., *Nat'l Credit Union Admin. Bd. v. UBS Sec. LLC*, No. 13cv6731 (DLC), 2016 WL 1179203 (S.D.N.Y. Mar. 24, 2016) (applying Texas rules of statutory interpretation).

108. U.S. CONST. art. IV, § 1.

109. 28 U.S.C. § 1738.

110. See, e.g., *V.L. v. E.L.*, 136 S. Ct. 1017, 1020 (2016); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1813).

power of the judgment, subject to forum regulation of the manner of enforcement of judgments.¹¹¹

Current doctrine does not support the naïve reading of the command to give state statutes “the same full faith and credit” they enjoy in the enacting state. To the contrary, the federally imposed duty to apply and faithfully interpret sister-state statutes is but slight. Current doctrine finds a violation in the misconstruction of sister-state law only when the forum’s interpretation “contradict[s] law of the other State that is clearly established and that has been brought to the court’s attention.”¹¹² The Supreme Court has all but ignored the implementing statute in these decisions, resting instead on the Constitution.¹¹³

However little the implementing statute currently matters for the faithful application of sister-state statutes, Congress could make it mean more.¹¹⁴ To date, Congress has not done much in this regard, but it is within Congress’s power to heighten the duty of faithfulness, including to interpretive methods, or to deny preclusive effect to judgments that fail to do so, topics I hope to consider in more detail in future work on congressional power over state interpretive methods.

Finally, we should not forget the federal district courts. The Supreme Court shows no interest in expanding its role in policing state choice of law by tightening up the currently lax doctrine,¹¹⁵ but the district courts could still play a constructive role in improving interstate interpretation. In prior work, I argued that federal courts interpreting state statutes should generally use enacting-state methods, which is happily what they usually do.¹¹⁶ That view complements the position here that state courts should generally use sister-state methods when applying sister-state statutes. In the resulting world as I would decree it, the *Erie* doctrine, state choice of law, and *Klaxon Co. v. Stentor Electric Mfg. Co.*¹¹⁷ would all work together and reinforce each other. But if the state courts did not apply sister-state methods, the federal courts would need to let something slip in “diagonal” cases in which a federal court in state

111. See *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380–81 (1985); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 93–95, 99 (AM. L. INST. 1971).

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

113. See David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1656–57 (2009); see, e.g., *Hughes v. Fetter*, 341 U.S. 609, 613 n.16 (1951).

114. See Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1279 (2009).

115. See, e.g., *Franchise Tax Bd. v. Hyatt*, 578 U.S. 171, 179 (2016) (disclaiming any “inten[t] to return to a complex ‘balancing-of-interests approach to conflicts of law’”) (quoting *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 496 (2003)).

116. Bruhl, *supra* note 20, at 33.

117. 313 U.S. 487, 496 (1941) (requiring federal courts to use the conflicts rules of the state in which they sit).

X applies the law of state Y: either drop *Klaxon's* vertical mirroring in order to honor state Y methods or dishonor state Y's regulatory goals in order to decide the case as state X would.

Lower federal courts could play a constructive role in nudging the state courts to the desired end state. Multistate cases often find their way to federal court. When they do, we could expect the federal courts to be more evenhanded in assessing the interests of various states.¹¹⁸ We might therefore have more confidence in a federal court's assessment that a particular state's interpretive method is the rare one that need not be followed for legitimate, judicial-administrative reasons. Conversely, when federal courts manage to apply a particular state's interpretive methods, but a state court does not do so, that signals to the Supreme Court that the state court is being parochial. Finally, even in cases with no horizontal components, the federal courts can exert a positive influence by treating interpretive methodology as substantive for *Erie* purposes, which they largely do.¹¹⁹

CONCLUSION

Any encounter with another state's statutes presents a choice of interpretive law. May the interpreting state use its own interpretive methods, or must it instead use the enacting state's methods?

Commentators and attentive courts seem to be converging on the view that the forum court should use enacting-state methods. I generally agree with that view, but I attempted here to add some caveats and nuance. First, it is necessary to consider an enacting state's interests in the scope of its methods. Enacting states generally mean for their methods to follow the statutes, but whether a particular state for particular aspects of its methodology so means is an empirical question. Second, I have addressed conflicts between enacting-state interests and the judicial-administrative interests of law-applying states. In circumstances of true conflict, the best way to honor the sister state may be not to apply its substantive law in a compromised form but instead to avoid adjudicating claims under its law altogether. Third, I have explained that federal courts can play a useful role in modeling and encouraging evenhanded compliance. Even besides that, merely raising awareness of the existence of choice of interpretive law should have the salutary effect of making attorneys and other courts think about the issue and hopefully reach the right answers.

118. See generally Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 658-68 (1981) (explaining concurrent federal and state jurisdiction as an adaptive response to self-interest and ideological differences across states).

119. See Bruhl, *supra* note 20, at 59-60.

* * *