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GENERAL LAW IN FEDERAL COURT

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INTRODUCTION

Conventional wisdom maintains that the Supreme Court banished general law from federal court in 1938. In *Erie Railroad Co. v. Tompkins*, the Court famously declared that "[t]here is no federal general common law."[1] In so doing, the Court overruled its 1842 decision in *Swift v. Tyson*.[2] Modern accounts start from the premise that *Swift* and *Erie* represent irreconcilable conceptions of federal judicial power, but this premise is mistaken. According to these accounts, *Swift* viewed the common law as a "brooding omnipresence," rather than a sovereign act, and authorized federal courts to disregard state common law in favor of general common law of their own choosing.[3] *Erie*, by contrast, constrained such judicial lawmaking by interpreting the Constitution to banish general law from federal courts in the face of contrary state law.[4] Because the *Erie* Court concluded that "the unconstitutionality of the course pursued" was "clear," it felt compelled to overrule *Swift* and abandon a doctrine that had been "widely applied throughout nearly a century."[5] The effect of this decision, it is said, was to prohibit federal courts from applying general law unless it qualifies as state law or, more controversially, as "federal common law."[6]

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1. 304 U.S. 64, 78 (1938).

2. 41 U.S. (16 Pet.) 1, 18 (1842).

3. *See, e.g.*, Susan Bandes, Erie *and the History of the One True Federalism*, 110 YALE L.J. 829, 854 (2001) (reviewing EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA (2000)) ("[T]he received legal wisdom about *Swift* and *Erie* has it that *Swift* was based on a misunderstanding about the nature of law. The *Swift* Court, in the thrall of natural law, mistook law for a 'brooding omnipresence.'" (internal citations omitted)); Michael Steven Green, *Horizontal* Erie *and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1238 (2011) ("We all know the story. At the time of *Swift v. Tyson*, federal courts thought of the common law as a 'brooding omnipresence' about which they could make their own judgments." (internal citations omitted)).

4. *Erie*, 304 U.S. at 78.

5. *Id.* at 77-78.

6. *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1247, 1264 (1996). Federal common law is controversial because judicial lawmaking raises separation of powers concerns and because federal common law overrides state law with no clear warrant in the Supremacy Clause for doing so. *Id.* at 1248-50. Although some enclaves of federal common law are more defensible than others, a full analysis of this topic is beyond the scope of this Article.

Although we agree that *Erie* rests on constitutional grounds, it does not follow that *Swift* was unconstitutional when it was decided or that the Constitution prohibits federal courts from applying general law under any circumstances. To the contrary, *Swift* and *Erie* represent compatible conceptions of federal judicial power when each decision is understood in its full historical context. In our view, *Erie* is best read as recognizing that federal courts must apply state law unless required to disregard such law by the Supremacy Clause. At the time *Swift* was decided, state common law largely incorporated general commercial law. General commercial law, or the law merchant, referred to shared commercial customs and practices among nations. General law was distinct from local law, which referred to law that applied only within the territorial jurisdiction of a particular sovereign. At the time *Swift* was decided, a federal court's application of general commercial law did not implicate the Supremacy Clause because federal and state courts alike did not understand general commercial law to be the law of a particular state. Accordingly, when federal courts applied general commercial law, they did not displace state law, but rather acted in accord with a state's choice to apply general commercial law.

The relevant distinction at the time was not between general law and state law, but between two kinds of state law: general law and local law. General law was "an identifiable body of rules and customs developed and refined by a variety of nations over hundreds and, in some cases, thousands of years."[7] Such law addressed matters of concern to more than one sovereign, and no single sovereign had the ability to fix its meaning. Thus, nations and states used independent judgment to ascertain the content of general law, and voluntarily applied such law in order "to foster peaceful coexistence and to facilitate mutually beneficial transactions among their citizens."[8] Local law, by contrast, governed "rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."[9] In England, the common law included

7. *Id.* at 1279; *see also* Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 889-91 (2005) (describing general law).

8. Clark, *supra* note 6, at 1280.

9. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842), *overruled by Erie*, 304 U.S. 64.

both general and local law, and the states adopted the common law following independence. *Swift* acknowledged that federal courts exercising diversity jurisdiction were bound to follow state decisions on matters of local law. Because the issue in *Swift* was one of general commercial law, however, neither state nor federal courts understood the applicable law to be local to any particular sovereign. This meant that federal courts—like state courts—were expected to use independent judgment to ascertain the applicable rule of decision.

Although *Swift* was defensible when decided, the "*Swift* doctrine" that federal courts subsequently developed was problematic for two reasons. First, states increasingly exercised their prerogative to replace general commercial law with local law through both judicial decisions and state statutes.[10] This development rendered the federal courts' continued application of general commercial law in diversity cases constitutionally problematic. Second, federal courts steadily expanded their application of general law to matters historically governed by local law, such as torts and even real estate transactions.[11] In practice, these two developments meant that federal courts often disregarded state law with no warrant in the Supremacy Clause for doing so. As a result, the law applied to similarly situated litigants increasingly varied depending on whether the case was tried in state or federal court.[12] *Erie* eliminated this disparity by holding, as a matter of constitutional law, that federal courts must apply state law—whether written or unwritten—unless such law is preempted by the Constitution, acts of Congress, or treaties.[13]

Understood in historical context and in light of the constitutional structure, *Swift* and *Erie* establish that there is no categorical constitutional prohibition against the application of general law in federal court. Rather, the application of such law is problematic only when it disregards state law with no basis in the Supremacy Clause

10. *See infra* Part II.A.

11. *See infra* Part II.B.

12. *See infra* notes 188-94 and accompanying text.

13. *See Erie*, 304 U.S. at 78. Although *Erie* mentions only "the Federal Constitution" and "Acts of Congress," *id.*, treaties also qualify as "the supreme Law of the Land," *see* U.S. CONST. art. VI, cl. 2.

for doing so.[14] At the Founding, general law was synonymous with *jus gentium*, or the law of nations.[15] Courts and other writers recognized various branches of the law of nations, including the law merchant (or general commercial law), the law maritime, and the law governing relations between sovereign states.[16] In drafting Article III, the Founders fully expected federal courts to apply these branches of the law of nations in appropriate cases.[17] Article III extended the federal judicial power not only to cases arising under the Constitution, laws, and treaties of the United States, but also to cases in which general law was likely to apply, such as diversity cases between merchants, admiralty and maritime cases, and cases affecting ambassadors. Consistent with these expectations, federal courts applied the law merchant, the law maritime, and the law of state-state relations in appropriate cases within their jurisdiction.

Initially, courts paid little attention to whether they should classify general commercial law as state law because at the time little turned on that classification.[18] In England, the common law incorporated much of general law as a set of default rules until changed by Parliament. In the United States, the states received the common law—and hence much of general law—as their own background law subject to future alterations. Early acts of Congress generally required federal courts to apply state forms of proceeding and state rules of decision in actions at law unless preempted by enacted federal law. Although these directives required federal courts to respect a state's choice whether to apply general commercial law or local law to particular disputes, federal courts did not understand these statutes to require deference to state court understandings of general law. Because no sovereign had unilateral authority to prescribe the content of general law, the courts of each sovereign exercised independent judgment to determine its content and expected the courts of other sovereigns to do likewise. Thus, it was largely immaterial whether federal courts classified general

14. *See infra* Part II.C.

15. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 6-7 (2009) (discussing the law of nations at the founding of the United States).

16. *See id.*

17. *Id.* at 33-44.

18. *See infra* Part I.B.

commercial law as part of state common law or as some other source of law. Either way, federal courts were free to exercise independent judgment regarding the content of general law.

By the late nineteenth century, however, state abandonment of general commercial law and federal court expansion of the scope of general law created a growing dichotomy between the law applied in state and federal courts.[19] Increasingly, state courts applied local state law and federal courts applied so-called "general law" to the same kinds of disputes. As a result, judges frequently applied different rules of decision to similar cases based solely on whether the case was brought in state or federal court. *Erie* responded to the states' permissible localization of general law and the federal courts' improper generalization of local law by holding that—in the absence of supreme law of the land to the contrary—the Constitution requires federal courts to follow state law, including state common law as defined by state courts.

To reach this conclusion, the Court implicitly invoked the negative implication of the Supremacy Clause.[20] Each source of federal law recognized by the Supremacy Clause—the Constitution, laws, and treaties of the United States—can only be adopted pursuant to procedures that require the participation and assent of at least two actors subject to "the political safeguards of federalism": the House of Representatives, the Senate, and the President.[21] More importantly, each source of supreme federal law can only be adopted with the participation and assent of the Senate—the federal institution designed to represent the states—or, in the case of the Constitution, with the assent of the states themselves.[22] These procedural safeguards of federalism leave states free to govern their own affairs unless and until the specified combination of political actors agree

19. *See infra* Part II.

20. U.S. CONST. art. VI, cl. 2.

21. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543-44 (1954) (arguing that the states' role in selecting the House, the Senate, and the President operate as "political safeguards of federalism"); *see also* THE FEDERALIST NO. 45, at 358, 361 (James Madison) (John C. Hamilton ed., 1864) (explaining the states' role in the selection of the national government and the advantages this role afforded states).

22. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1342-46 (2001) ("Federal lawmaking procedures, moreover, maximized state influence by singling out the Senate ... to participate in *all* forms of federal lawmaking.").

to override state law.[23] By design, the states "are represented in the Congress but not in the federal courts."[24] Thus, when federal courts disregarded state law in favor of general law of their own choosing, they circumvented the political and procedural safeguards provided by the Constitution[25] and "invaded rights ... reserved by the Constitution to the several States."[26]

Erie's holding that federal courts must follow state law unless preempted by the supreme law of the land does not mean that the Constitution categorically prohibits federal courts from applying general law.[27] The *Erie* Court's statement that "[t]here is no federal general common law"[28] has generated confusion because it conflated two distinct categories of law: general law and local common law. This statement is overbroad if taken to mean that federal courts may never apply general law in cases within their jurisdiction. To be sure, the Constitution requires federal courts to apply state law to matters within state authority in the absence of supreme federal law to the contrary. At the same time, however, the Constitution places certain matters beyond state authority and sometimes requires courts to apply general law as a means of upholding aspects of the constitutional structure. Under *Erie*, the relevant constitutional distinction is not whether general law or local law traditionally governed a particular matter. Rather, the relevant distinction under *Erie* is whether a particular matter falls within the (exclusive or concurrent) authority of the states, or falls beyond state authority. *Erie* determined that state law governs matters in the former category unless and until such law is preempted by the supreme law of the land. By contrast, however, general law may govern matters

23. *Id.* at 1329-30 (stating that the negative inference of the Supremacy Clause is that state law remains in full force in the absence of federal law).

24. Paul J. Mishkin, Comment, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682, 1685 (1974).

25. *See* Bradford R. Clark, Erie*'s Constitutional Source*, 95 CALIF. L. REV. 1289, 1309-10 (2007) (discussing how courts' application of general law post-*Swift* degenerated into "judicial lawmaking," circumventing safeguards built into the Supremacy Clause).

26. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 80 (1938).

27. In practice, as Caleb Nelson has observed, federal courts continue to apply general law in a range of contexts. *See* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505-25 (2006).

28. *Erie*, 304 U.S. at 78.

in the latter category when the application of such law is necessary to uphold an aspect of the constitutional scheme.

This Article proceeds as follows. Part I examines the distinction between local and general law that existed at the time of the Founding and continued at least through *Swift*. Careful examination of judicial decisions reveals that both federal and state courts applied local law in cases in which local law applied, and general law in cases in which general law applied. This examination tends to refute modern suggestions that the *Swift* Court misconstrued section 34 of the Judiciary Act of 1789 or usurped state authority under the Constitution.

Part II describes two subsequent developments that undermined the *Swift* doctrine. First, states gradually abandoned general commercial law in favor of local doctrines and statutes. Second, federal courts gradually expanded their conception of "general law" to encompass matters traditionally governed by local law, such as torts and titles to real property. The federal courts' expansion and continued application of the *Swift* doctrine despite these two developments contradicted the Supremacy Clause by disregarding state law with no basis in supreme federal law for doing so.

Part III explains why *Erie* does not prohibit the application of general law by federal courts in all circumstances. The constitutional principles applied in *Erie* require federal courts to distinguish between matters that fall within the exclusive or concurrent power of the states on the one hand, and those that fall beyond state authority on the other. As to the first category, *Erie* requires federal courts to follow state law in the absence of a controlling provision of the Constitution, laws, or treaties of the United States. But *Erie* does not prohibit federal judicial application of general law in cases beyond state regulatory authority. Indeed, sometimes federal courts must apply principles derived from general law in order to uphold basic features of the constitutional structure that preempt state law, such as the Constitution's allocation of specific foreign relations powers to the federal political branches.[29]

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29. *See* Bellia & Clark, *supra* note 15, at 33-44; *see also* Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 733-34 (2012).

I. THE DISTINCTION BETWEEN GENERAL AND LOCAL LAW

To understand why the Supreme Court's original decision in *Swift* was consistent with the constitutional principles applied in *Erie*, one must begin by recognizing the traditional distinction between local and general law.[30] Local law was a body of written and unwritten law that concerned matters specific to a particular state or a nation, such as real property rights.[31] General law was a body of general rules and customs that concerned matters of common interest to more than one jurisdiction.[32] States and nations applied general law in order to advance their mutual interest in peace and prosperity. At the time *Swift* was decided, states had widely adopted general commercial law as part of their common law to govern commercial transactions between citizens of different states as well as certain kinds of transactions between their own citizens. The content of such law was not understood to be the command of any particular sovereign, but the product of reason and the common practices of the civilized world. Given the nature of general law, courts applying such law considered themselves free to exercise independent judgment to ascertain its content. Although state and federal courts sometimes disagreed about the precise content of such law, they understood themselves to be jointly administering a common body of law. Accordingly, neither state nor federal courts regarded the others' failure to follow their decisions on questions of general law as improper or an invasion of sovereign authority.

A. Local Law and General Law

"Municipal" law was understood to be the law of a particular nation or district within a nation. In his *Commentaries on the Laws of England*, William Blackstone defined "municipal" law as "the rule

30. *See* TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 26-29 (1981); 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, 1516-17 (1984) (discussing the distinction between general and local law).

31. *See* Fletcher, *supra* note 30, at 1532-33 (discussing courts' general guidelines for distinguishing between general and local law).

32. *See id.*

by which particular districts, communities, or nations are governed."[33] In "common speech," the expression "municipal law ... applied to any one state or nation, which is governed by the same laws and customs."[34] (Because the United States has a federal system, the federal government and each state has its own "municipal" law.)

English writers described two forms of municipal law: unwritten and written.[35] Unwritten customs, Blackstone explained, are "the universal rule of the whole kingdom, and form the common law, in its ... usual signification."[36] The judges of the several courts of Westminster had the duty to determine the content of the common law.[37] They professed to determine this law from prior judicial records[38] or, when no prior decision resolved a question, from established custom and reason.[39] In addition to the common law, England had a written municipal law. The "*legis scriptae*, the written laws of the kingdom," according to Blackstone, were "statutes, acts, or edicts, made by the king's majesty by and with the advice and consent of the lords spiritual and temporal and commons in

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33. 1 WILLIAM BLACKSTONE, COMMENTARIES *44.

34. *Id.*

35. *See id.* at *63 ("The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds: the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law.").

36. *Id.* at *67.

37. *See id.* at *69 ("[H]ow are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice.").

38. *See, e.g.*, R v. Despard, (1798) 101 Eng. Rep. 1226 (K.B.) 1230 (opinion of Lord Kenyon C.J.) ("[T]he records of the Court furnish me with the law of the land."). *See generally* 1 BLACKSTONE, *supra* note 33, at *69 ("And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law.").

39. *See* Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 931-37 (2013). For judicial statements that the common law could exist even in the absence of judicial decisions expressly stating it, see *Despard*, 101 Eng. Rep. at 1230 (opinion of Lord Kenyon C.J.) ("To one argument used by the defendant's counsel I cannot assent, namely, that no point is to be considered as law, unless it has been made and judicially decided: if that were true, farewell to the common law of the land."); *id.* at 1231 (opinion of Ashhurst J.) ("It is rather an extraordinary position ... that nothing is to be considered as law but what has been solemnly decided; for a point may be so clear that it was never doubted, and yet if this position were well founded, it would not be law."); Paget v. Gee, (1753) 27 Eng. Rep. 133 (Ch.) 134 ("Where this court finds out the law of the land in any instances, they will follow and extend it to other cases that are analogous.").

parliament assembled."[40] Both written and unwritten municipal law provided rules of decision in English courts.

In addition, municipal law in England drew a distinction between local law and general law, a distinction important to understanding *Swift*.[41] Matters subject to local law were typically those that occurred within the territorial jurisdiction of the state and affected only that state, such as trusts and estates, property, local contracts, civil injuries, and crime. Local law could be written or unwritten. General law was an unwritten body of law based on custom and the laws of nature and reason. Matters governed by general law originally were those of interest to more than one state, such as commercial transactions between citizens of different states, maritime matters, and the relations between sovereign states.[42]

England voluntarily incorporated principles of general law into its municipal law because general law fostered peaceful relations and international commerce.[43] Such incorporation occurred through both common law and statutory adoption. Blackstone equated "general law" with the "law of nations," describing this law to encompass the law of state-state relations, the law merchant, and the law maritime.[44] In particular, he explained that

> in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law-merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.[45]

40. 1 BLACKSTONE, *supra* note 33, at *85.
41. *Id.* at *67-68.
42. *See supra* notes 7-9 and accompanying text.
43. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *66-67.
44. *Id.* at *66.
45. *Id.* at *67.

As Philip Hamburger has emphasized, however, general law provided rules of decision in English courts only to the extent that the municipal laws of England, including the common law, adopted it.[46]

Following the Declaration of Independence, the states applied their own written and unwritten municipal law within their respective territories. By receiving the common law, the newly independent states made such law part of their own municipal law. The common law they received necessarily included both aspects of local law developed in England and those parts of the general law adopted by the English common law. States did not regard the content of general law as the command of any particular sovereign, but elected to apply it—as England had—in order to foster peaceful relations and commercial transactions with other nations and states. Of course, each state reserved the right to adapt the common law to its local conditions, but each state's reception of the common law immediately gave it a developed body of municipal law by which to govern itself.[47]

With the adoption of the Constitution, the Founders granted Congress limited and enumerated powers to enact specific kinds of municipal law for the United States as a whole.[48] In addition to limiting the kinds of laws Congress could enact, the Constitution prescribed precise procedures for the enactment of federal laws. According to these procedures, a bill becomes a law of the United States only if it is passed by both houses of Congress and signed by the President, or if two-thirds of both houses override the President's veto.[49] Because the Constitution presupposed the continued existence of states,[50] the Founders recognized that the federal government and the states would possess some degree of overlapping authority to regulate certain matters. Thus, in the

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46. *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 62, 349-50 & n.43 (2008) (explaining how the law of nations applied in English courts in the eighteenth century insofar as English law incorporated it).

47. *See* Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 AM. L. REG. 553, 554 (1882) ("[T]he presumption in every case is, that the common law is the same in [America] as it was in [England].").

48. *See* U.S. CONST. art. I, § 8.

49. *Id.* art. I, § 7.

50. *See id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

United States—unlike in England—two sources of municipal law could operate at the same time in the same territory.

Given this concurrent authority to adopt municipal law, the Founders recognized the need for a mechanism to resolve the conflicts such authority would produce. After rejecting proposals to authorize military force or a congressional negative on state laws, the Founders ultimately adopted the Supremacy Clause to perform this function. The Clause recognizes three sources of federal law as "the supreme Law of the Land," and expressly directs state judges to apply such law notwithstanding contrary state law:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[51]

The Clause performs the essential function of elevating one form of municipal law (supreme federal law) above another form of municipal law (state law) in both state and federal courts. Article III reinforces the Supremacy Clause by authorizing Congress to confer both appellate jurisdiction on the Supreme Court to review state court determinations of federal law and original jurisdiction on lower federal courts to hear cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[52] In the absence of such supreme federal law, however, the negative implication of the Supremacy Clause requires federal (and state) courts to apply state law.

The adoption of the Constitution also resulted in two sets of courts—one state and one federal—capable of applying both general and local law in appropriate cases. The Founders drafted several

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51. *Id.* art. VI, cl. 2.

52. *Id.* art. III, § 2. For extended treatment of the histories of the Supremacy and Arising Under Clauses, see Anthony J. Bellia Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 292-317 (2007) (discussing the Arising Under Clause); Clark, *supra* note 6, at 1346-55 (discussing the Supremacy Clause); James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 702-73 (1998) (discussing the Supremacy and Arising Under Clauses).

provisions of Article III to grant federal courts power to hear cases likely to implicate the general law of nations.[53] For example, Article III authorizes federal courts to hear controversies "between Citizens of different States" and controversies between "Citizens of a State and foreign Citizens or Subjects."[54] At the time, such cases frequently involved merchants from different states and nations. Because mercantile transactions were governed by the general law merchant, the Founders did not expect that a change of forum in such cases would result in a change in the applicable law. Rather, they merely assumed that adjudication by independent federal courts would reassure out-of-state merchants that their cases would be handled fairly.

B. Judicial Adherence to the Distinction

At least until *Swift*, state and federal courts understood—and tried to adhere to—the traditional distinction between local and general law. This meant that, in matters governed by local law, federal courts applied state statutes and local state customs having the force of law. In matters governed by general law, state and federal courts alike exercised independent judgment to ascertain and apply general law.[55] Neither state nor federal courts considered themselves bound by the others' interpretations of general law because both sets of courts "considered themselves to be deciding questions under a general law merchant that was neither distinctively state nor federal."[56]

This Section examines judicial application of general law and local law from the time of the Founding through the Supreme Court's 1842 decision in *Swift v. Tyson*. The *Erie* Court characterized *Swift* as holding

> that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court; that they are free to exercise an independent

53. *See* Bellia & Clark, *supra* note 15, at 37-39.
54. U.S. CONST. art. III, § 2, cl. 1.
55. *See infra* Part I.B.2.
56. Fletcher, *supra* note 30, at 1554.

> judgment as to what the common law of the State is—or should be.[57]

This characterization of *Swift* has long been a standard account in federal courts cases and scholarship, but it is exaggerated and inaccurate because it conflates the distinct concepts of general law and common law. It also equates the content of general law with the decision of a state court ascertaining its content. As explained, the common law included both general and local law.[58] While federal courts deferred to state court decisions on questions of local law at the time of *Swift*, they did not defer to state court decisions ascertaining the content of general law. Thus, this account mischaracterizes *Swift* as holding that federal courts may exercise independent judgment about all forms of common law. *Swift* involved a relatively routine application of general commercial law, but expressly denied that federal courts had power to exercise independent judgment regarding the content of local state law, whether written or unwritten. The Court did not consider itself "free to exercise an independent judgment as to what the *common law* of the State ... should be."[59] Rather, the Court applied its best understanding of general law because the state itself had no local law governing the issue and looked instead to general commercial law to provide a rule of decision.

To place *Swift* in context, this Part examines how federal courts adhered to the distinction between general and local law in commercial cases in the decades preceding *Swift*—and indeed in *Swift* itself. It is important to consider early federal court decisions in light of this distinction and the acts of Congress that governed such cases. The Process Act of 1792 instructed federal courts to employ state forms and modes of proceeding in actions at law, subject to appropriate revisions by federal courts.[60] Accordingly, federal courts

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57. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 71 (1938).

58. *See supra* notes 41-42 and accompanying text.

59. *Erie*, 304 U.S. at 71 (emphasis added).

60. The Process Act of 1792, enacted after the interim Process Act of 1789, provided that

> the forms of writs, executions and other process, except their style and the forms and modes of proceeding in suits in those of common law shall be the same as are now used in the said courts respectively in pursuance of the act, entitled "An act to regulate processes in the courts of the United States."

Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276. The Process Act of 1792 also established that

often applied local state law to determine what forms of proceeding they should follow. In addition, section 34 of the Judiciary Act of 1789 directed federal courts to apply local state law as a rule of decision in trials at common law where it applied.[61] Under this provision, federal courts routinely applied state law as rules of decision in local disputes. Finally, in the absence of an applicable federal law or a local state rule of decision, federal courts were expected to apply general commercial law. This Part describes early federal judicial decisions applying local state law and general commercial law as rules of decision. Read in light of the Process Act and section 34 of the Judiciary Act, early federal court opinions not only adhered to the distinction between general and local law, but also respected state authority to settle matters governed by local law.

First, before *Swift*, federal courts generally adhered to the distinction between general and local law. The modern misperception that federal courts treated all unwritten law as "ambient law" may stem in part from the Supreme Court's presumptive application of common law in many cases without expressly identifying it as the law of a particular state. This practice must be considered, however, in light of the context in which the Court resolved these cases. All states (except Louisiana) had adopted the common law (and by extension general law), and initially there were relatively few known variations in the common law from state to state[62]—a circumstance exacerbated by the dearth of reported state court decisions in the late eighteenth and early nineteenth centuries. Accordingly, in the absence of state court precedent to the contrary, the Court generally presumed that state law followed the common law of England in cases involving local matters and that general law applied in cases involving matters traditionally subject to such law. When reported state decisions clearly departed from English common law or supplanted general law, however, the Court applied the controlling state law.

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in equity cases federal courts should apply the "principles, rules and usages" that govern courts of equity, subject to residual authority to make expedient additions and alternations to such practices. *Id.* The principles, rules, and usages of courts of equity could include reference to the law merchant where it applied.

61. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

62. *See* Clark, *supra* note 6, at 1286-87 n.192.

Second, the Supreme Court generally followed state judicial decisions with respect to questions of local law, but not with respect to questions of general law. In almost all cases, the Supreme Court accepted state court interpretations of state statutes and state court explanations of local law. The Supreme Court did not, however, accept state court determinations of general law in the rare cases—such as *Swift*—in which general law remained unsettled.[63] States did not have the power to "settle" questions of general law. In such cases, the Court naturally exercised independent judgment to ascertain the content of such law.

In short, taken in its full legal and historical context, *Swift* was consistent with state law, relevant acts of Congress, and the constitutional structure.

1. Local Law in Federal Court

Prior to its decision in *Swift*, the Supreme Court often applied state law rules of decision in cases within its jurisdiction to commercial matters governed by local law. As explained, the Process Act directed federal courts, as a default rule, to apply state forms of proceeding, and section 34 required them to apply state rules of decision in actions at law.[64] Although it was not always clear where state forms of proceeding ended and state law rules of decision began, federal courts typically did not have to draw a sharp line between them because Congress directed them to apply both. If a state rule was part of a common law form of action, then the Process Act required federal courts to apply it in actions at law unless they exercised their residual authority to alter or add to state forms of proceeding.[65] If a state law constituted a local rule of decision, then section 34 required federal courts to apply it as well.[66] In short, when settled state law—statutory or common law—was determinative of a question in a commercial case at law, federal statutes generally required federal courts exercising jurisdiction over the case to apply such law.

63. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 22 (1842), *overruled by Erie*, 304 U.S. 64.
64. *See supra* notes 60-61 and accompanying text.
65. *See supra* note 60 and accompanying text.
66. *See supra* note 61 and accompanying text.

a. State Statutes

The Supreme Court routinely applied state statutes in commercial cases from the Founding until *Swift*. For example, in 1818 in *Lenox v. Prout*, the Court applied a Maryland statute providing "that an endorser may tender to a plaintiff the amount of a judgment which he has recovered against the maker of a note, and obtain an assignment of it."[67] There was no suggestion that the Court was free to disregard such statutes in favor of unwritten law of its own choosing.[68] To the contrary, the Court regularly applied

67. 16 U.S. (3 Wheat.) 520, 526 (1818).

68. The 1795 circuit court decision in *United States v. Mundell*, 27 F. Cas. 23 (C.C.D. Va. 1795) (No. 15,834), is illustrative of this same principle. In *Mundell*, a U.S. circuit court faced the question whether the U.S. marshal may require bail in an action of debt by the United States for a penalty under an act of Congress. *Id.* at 26. Although the defendant was indicted under an act of Congress for resisting the deputy marshal, "the proceeding in question was not a proceeding in a criminal case ... but was, in truth, a civil suit." *Id.* Having found that section 34 applied to this case, James Iredell, writing as circuit justice, proceeded to identify what Virginia law was on this subject. He began by explaining that "the common and statute law of England, as they existed in England at the time of the first settlement of the country, and so far as they were applicable to its situation, were in force" in Virginia, "except in those cases where there was a special law of the Virginia legislature itself." *Id.* at 29. Justice Iredell concluded that "under the express reference" in section 34 "to the laws of the several states, as rules for our decision, ... the law, of Virginia, whatever it may be, concerning the requisition of bail in actions of debt by the public upon penal statutes, is that by which we are bound to decide on the present occasion." *Id.* at 30. After examining the statute and common law of Virginia, Justice Iredell determined that a Virginia act of assembly concerning bail was the "rule of decision in the present case." *Id.* at 31. As Michael Collins has argued, "*Mundell* is strong early constitutional and statutory authority for the application of a particular state's statutory and common law in civil litigation in the federal courts." Michael G. Collins, *Justice Iredell, Choice of Law, and the Constitution—A Neglected Encounter*, 23 CONST. COMMENT. 163, 177 (2006).

state statutes in commercial cases,[69] including statutes of frauds[70] and statutes concerning usury.[71]

In addition, prior to *Swift*, the Court followed settled state court interpretations of state statutes. At the time of the Founding, it may not have been a foregone conclusion that federal courts would follow such interpretations.[72] In time, however, the Marshall Court rooted this practice in a "universally recognized" principle that the courts of one sovereign should accept the interpretations that another sovereign's courts gave to its own enactments.[73] In 1825 in *Elmendorf v. Taylor*, in applying the Kentucky courts' settled interpretation of a Kentucky statute, Chief Justice Marshall explained for the Court:

> This Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognised, that the judicial department of every government, where such department exists, is the appropriate

69. *See, e.g.*, Smith v. Clapp, 40 U.S. (15 Pet.) 125, 127-28 (1841) (explaining that the question before the Court "depend[ed] entirely upon the statute law of Alabama," which provided "that every joint promissory note shall be deemed and construed to have the same effect, in law, as a joint and several promissory note"); Evans v. Gee, 36 U.S. (11 Pet.) 80, 84 (1837) ("As to the damages which the court ruled the endorser in this case to be liable for, we need only say the statute of Alabama gives them, and applies directly to the case."); Mandeville v. Union Bank of Georgetown, 13 U.S. (9 Cranch) 9, 11 (1815) (determining that "[i]t is entirely immaterial whether this question be governed by the laws of Virginia or of Maryland" because "[b]y neither of them can the discounts claims by the Plaintiff in error be allowed"); Stewart v. Anderson, 10 U.S. (6 Cranch) 203, 205 (1810) (applying Virginia law dealing with offsets against negotiable notes).

70. *See, e.g.*, D'Wolf v. Rabaud, 26 U.S. (1 Pet.) 476, 499 (1828) (applying New York statute of frauds); Weightman v. Caldwell, 17 U.S. (4 Wheat.) 85, 86-89 (1819) (applying statute of frauds); Violett v. Patton, 9 U.S. (5 Cranch) 142, 151-52 (1809) (applying Virginia statute of frauds, which, the Court noted, differed in terms from the English statute, although the difference was not material in this case); Grant v. Naylor, 8 U.S. (4 Cranch) 224, 229 (1808) (applying statute of frauds); Clarke v. Russel, 3 U.S. (3 Dall.) 415, 420, 424-25 (1799) (applying the statute of frauds, which counsel noted "is in force in Rhode-Island").

71. *See, e.g.*, Andrews v. Pond, 38 U.S. (13 Pet.) 65, 79 (1839) (holding that defense of usury "must be determined by the laws of New York, and not by the laws of Alabama"); Thornton v. Bank of Wash., 28 U.S. (3 Pet.) 36, 40 (1830) (rejecting defense of usury "within the meaning of the statute of Maryland against usury" on the ground that the plaintiff's conduct was "not usury"); Gaither v. Farmers & Mechs. Bank of Georgetown, 26 U.S. (1 Pet.) 37, 43 (1828) ("This case is governed by the laws of Maryland: and the Act of Maryland against usury is in the words of the Statute of Ann.").

72. *See* Nelson, *supra* note 39, at 938-41.

73. Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152, 159 (1825).

> organ for construing the legislative acts of that government. Thus, no Court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the Courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the Courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute.[74]

In other cases, the Court described its respect for state court interpretations of state statutes as rooted in long-standing practice, especially in cases involving land titles,[75] but also in cases involving state statutes of frauds, statutes of limitations, and commercial regulations.[76] In 1829 in *Beach v. Viles*, the Court followed a state court construction of a 1795 Massachusetts statute that allowed "a foreign attachment against garnishees, who possess goods, effects or credits of the principal debtor."[77] Writing for the Court, Justice Story explained that "[t]he present being a suit upon a local statute, ... the decisions which have been made upon the construction of that statute by the state courts, are entitled to great respect; and ought

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74. *Id.* at 159-60.

75. *See, e.g.*, Jackson v. Chew, 25 U.S. (12 Wheat.) 153, 168 (1827) ("[I]n construing the statutes of a State, on which land titles depend, infinite mischief would ensue, should this Court observe a different rule from that which has been long established in the State." (quoting McKeen v. Delancy's Lessee, 9 U.S. (5 Cranch) 22, 32 (1809))); McDowell v. Peyton, 23 U.S. (10 Wheat.) 454, 461 (1825) ("[T]his Court has always conformed to that construction of the legislative acts of a state, which has been given by its own Courts. This general principle is entitled to peculiar consideration, when it applies to an act which regulates titles to land."); *see also* Gardner v. Collins, 27 U.S. (2 Pet.) 58, 85 (1829) ("If this question [of the operation of a state statute] had been settled by any judicial decision in the states where the land lies, we should, upon the uniform principles adopted by this Court, recognise that decision as a part of the local law.").

76. *See, e.g.*, Bell v. Morrison, 26 U.S. (1 Pet.) 351, 359-60 (1828) (explaining the English decisions offered to prove meaning of state statute of limitations "cannot be considered as conclusive authority, upon the construction of the statute passed by a state, upon the like subject; for this justly belongs to the local state tribunals, whose rules of interpretation must be presumed to be founded upon a more just and accurate view of their own jurisprudence"); D'Wolf v. Rabaud, 26 U.S. (1 Pet.) 476, 501 (1828) ("What might be our own view of the question, unaffected by any local decision, it is unnecessary to suggest; because the decisions in New-York, upon the construction of its own statute, and the extent of the rules deduced from it, furnish, in the present, a clear guide for this Court.").

77. 27 U.S. (2 Pet.) 675, 678 (1829).

in conformity to the uniform practice of this Court to govern our own decisions."[78]

b. Unwritten Local Law

In addition, the Supreme Court generally followed settled unwritten state law in cases to which local law applied. At the time of the Founding, this practice may not have been a foregone conclusion in cases in which a federal court believed that a state court decision mistook actual local customs.[79] Nonetheless, from early on, federal courts treated state court understandings of local law as conclusive.[80] This practice both comported with "abstract notions of state sovereignty" and "had some very practical benefits for the citizenry."[81] The Court's 1830 decision in *Bank of the United States v. Tyler* provides an example.[82] In *Tyler*, the Court addressed whether the assignee of a promissory note was obliged to pursue redress against the drawer of the note before proceeding against an endorser.[83] The Court began by observing that "[a]s this note was drawn, assigned, and payable in Kentucky, the obligations and rights of the parties must depend on the laws of that state."[84] Although Kentucky statutes did not address the question before the Supreme Court, "the courts of that state ha[d] clearly defined"—as a matter of "local law"—that "[t]he assignee cannot maintain an action" against the assignor until the assignee "has made use of all due and legal diligence to recover the money from the drawer."[85] The Court believed that this local principle—"exact[ing] such an unusual degree of vigilance from the assignee"—was "peculiar to the jurisprudence of Kentucky."[86] Indeed, the Court noted that "no decisions in any state ... have extended the rule of diligence so far."[87] Nonetheless, the Court concluded that

78. *Id.*
79. *See* Nelson, *supra* note 39, at 938-41.
80. *See id.* at 938-39.
81. *Id.* at 941.
82. 29 U.S. (4 Pet.) 366 (1830).
83. *Id.* at 380.
84. *Id.* at 380.
85. *Id.*
86. *Id.* at 382.
87. *Id.*

> [t]hese rules are the law of the case; and although in our opinion they carry the doctrine of diligence to an extent unknown to the principles of the common law, or the law of other states, where bonds, notes, and bills are assignable, we must adopt them as the guide to our judgment.[88]

The Court concluded that "it is not an open question, whether these principles shall be respected by this court," and did not "feel authorised to depart from them in a case to which their application cannot be questioned."[89]

2. General Commercial Law in Federal Court

From the Founding through the *Swift* decision, state and federal courts alike understood the law merchant—or general commercial law—to govern commercial disputes in the absence of a state statute or fixed customary practice establishing a local rule of decision to the contrary. Scholars have long pondered the origins and development of the medieval law merchant as a general body of customary laws.[90] By the time of the Founding, however, judges and other public officials in England and the United States understood the law merchant as a body of customary rules incorporated by the common law.

State courts routinely applied the general law merchant in commercial cases as part of their common law, unless local law superseded it. State courts understood the law merchant to be a transnational, rather than local, body of customary law. As the Supreme Court of New York explained in *Woodworth v. Bank of America*, "[t]he Law Merchant relative to bills of exchange and

88. *Id.* Thus, the Court explained, "[t]he law of Kentucky has given this effect to assignments of notes under the statute of that state; and as the plaintiffs cannot sustain this action in their own name without the aid of the law, they must submit to the conditions which the settled judgments on the action have imposed on them." *Id.* at 385. Additionally, the Court explained, even "[i]f the law merchant were to govern," instead of Kentucky common law, still "the plaintiff would be without remedy." *Id.* at 384. Were the plaintiff to sue "as the indorser of a negotiable note," invoking the law merchant, "[t]he diligence exacted of him is quite as extreme, if not more so, as when he sues as assignee." *Id.*

89. *Id.* at 391.

90. *See, e.g.*, J.H. Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMBRIDGE L.J. 295 (1979); Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153 (2012).

endorsed notes, and commercial paper generally, is not the law of this state only, but of all the states of the Union, and of all the commercial nations of Europe."[91] This meant that state courts looked to precedents from multiple jurisdictions and exercised independent judgment to determine the precise content of general commercial law. In most cases, state courts applied general commercial law rules that they considered to be well established across jurisdictions. In cases of doubt, however, state courts exercised independent judgment on questions of general law.

State courts consulted treatises, English cases, other state court cases, and federal court cases in discerning rules of the general commercial law, but they did not consider any of these sources to be authoritative. Rather, they consulted these sources as evidence of customary multijurisdictional commercial law. In 1806, Virginia Supreme Court of Appeals Judge Spencer Roane nicely captured this sentiment. He explained that as "the greatest Judges who ever sat in England have often consulted eminent jurists and merchants on the continent, in relation to" the law merchant, so "we avail ourselves of the testimony of eminent writers on those subjects, though clothed with no authority whatsoever."[92] In addition, he described English judicial decisions "as affording evidence of the opinions of eminent Judges as to the doctrines in question, who have at least as great opportunities to form correct opinions as we have."[93] Although English cases were evidence of general law, the Virginia courts did not consider themselves bound by them.[94] Likewise, although state courts consulted decisions of other state courts on general commercial law, state courts did not consider themselves bound by such decisions.[95]

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91. 19 Johns. 391, 416 (N.Y. Sup. Ct. 1821).

92. Baring v. Reeder, 1 Va. (1 Hen. & M.) 154, 162 (1806) (emphasis omitted).

93. *Id.*; *see also* N.Y. Fireman Ins. Co. v. Lawrence, 14 Johns. 46, 62 (N.Y. Sup. Ct. 1816) (consulting English and state cases as evidence of "the true exposition of the law" on a point of general commercial law); Walden v. LeRoy, 2 Cai. 263, 265-66 (N.Y. Sup. Ct. 1805) (consulting English cases and foreign writers as evidence of the content of general commercial law).

94. *See, e.g.*, Bourke v. Granberry, 21 Va. (Gilmer) 16, 25 (1820) ("It is not new for this court to differ from the courts of England, on questions of general law.").

95. *See, e.g.*, Southard v. Steele, 19 Ky. (3 T.B. Mon.) 435, 438 (1826) (describing a Pennsylvania decision on the law merchant as "not obligatory upon us, yet ... entitled to respect"); Hixon v. Reed, 12 Ky. (2 Litt.) 174, 177 (1822) (describing New York decisions on "commercial subjects" as "not obligatory on this court" but "entitled to high respect"); Houston

Like state courts, federal courts applied general commercial law in the absence of local rules of decision, and exercised independent judgment to determine its content. English courts applied general commercial law because the common law incorporated such law as part of the municipal law of England. Federal courts did not have any need to address explicitly whether they were applying general law as state municipal law (incorporated as part of state common law) or as some other form of law. There are certain indications, however, that early federal courts assumed that general commercial law applied in federal court by virtue of state incorporation of such law. One indication is that federal courts understood states to possess authority to displace general commercial law with local law. For example, prior to *Swift*, Justice Story considered himself bound to apply a local state law deviation from the general commercial law.[96] If a state court's decision to replace general commercial law with local law was binding on federal courts, federal courts may also have considered themselves bound to apply general law because the state had adopted general law as the governing rule of decision. In *Swift* itself, the Supreme Court applied general commercial law only after noting that New York courts applied general rather than local law to decide the issue before the Court.[97] Moreover, neither federal nor state courts considered federal decisions on matters of general law to be binding in state court even after *Swift*, when federal courts expanded general law and disregarded local law with increasing frequency. Indeed, it was this growing disparity between the law applied in federal and state courts that gave rise to the "injustice and confusion" described in *Erie*.[98]

Regardless of whether federal courts applied general commercial law as state law or as another form of law, the important point for

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v. New England Ins. Co., 22 Mass. (22 Pick.) 89, 92 (1827) (refusing to "adopt the decision in Virginia as the law merchant" because the law was "otherwise settled in England and New York, both of which communities are of the highest commercial character").

96. *See* Halsey v. Fairbanks, 11 F. Cas. 295, 297 (C.C.D. Mass. 1826) (No. 5964); *see infra* notes 123-27 and accompanying text.

97. *See infra* notes 143-44 and accompanying text. It is true that *Swift* interpreted the phrase "laws of the several states" in section 34 of the Judiciary Act to refer only to local state law, such as state statutes and fixed local usages. That interpretation, however, does not foreclose the possibility that the Court applied general law as a consequence of state incorporation of the common law (including general commercial law) as state municipal law.

98. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77 (1938).

present purposes is that, well before *Swift*, federal courts routinely applied general commercial law as a rule of decision unless state law displaced or opted out of it.[99] Indeed, Justice Story—the author of *Swift*—unremarkably applied general commercial law on behalf of the Court in the years preceding *Swift*. In 1825 in *Bank of the United States v. Bank of Georgia*, the Bank of the United States presented notes to the Bank of Georgia that had been issued by the latter but were "fraudulently altered" while in circulation.[100] The Bank of Georgia accepted the notes before discovering the forgery several days later.[101] The question before the Court was whether the Bank of Georgia should bear the loss when both parties were equally innocent of the forgery.[102] Justice Story first considered

99. The Supreme Court's 1807 decision in *French's Executrix v. Bank of Columbia* provides a typical example. The Court considered whether an accommodation endorser—one who endorses to back the credit of another—was relieved from liability on the endorsement by the failure of the holder of a promissory note to give the endorser notice of nonpayment by the maker. 8 U.S. (4 Cranch) 141, 153 (1807). Chief Justice Marshall began his opinion for the Court by reciting "the general rule of law" that "the omission ... to give notice to the indorser that payment has been refused, discharges the indorser." *Id.* He then considered whether this rule applied in "the case of an indorser of a promissory note for the accommodation of the maker." *Id.* at 154. After examining the reason of the rule and a number of English cases addressing it, Chief Justice Marshall concluded that "[i]n point of reason, justice, and the nature of the undertaking, there is no case in which the indorser is better entitled to demand strict notice than in the case of an indorsement for accommodation." *Id.* at 164.

The Court similarly relied on general commercial law in considering many cases involving the notice due to makers and endorsers of promissory notes and bills of exchange. *See, e.g.*, Dickens v. Beal, 35 U.S. (10 Pet.) 572, 581 (1836) ("Where the parties do not reside in the same place, diligence consists in sending notice by the first mail, of the day of protest."); Bank of the U.S. v. Carneal, 27 U.S. (2 Pet.) 543, 551 (1829) (considering "what is due diligence in respect to notice to indorsers"); Bank of the U.S. v. Corcoran, 27 U.S. (2 Pet.) 121, 131 (1829) (addressing "whether such notice was given of the non-payment of the note on which this suit was brought, as the law requires to charge an indorser"); Williams v. Bank of the U.S., 27 U.S. (2 Pet.) 96, 101 (1829) (applying the "general rule of law ... that, to enable the holder of a bill of exchange, or promissory note to charge the indorser," the holder must give the endorser either timely notice that the maker has dishonored the bill or otherwise not paid it, or demonstrate a sufficient excuse for failing to give such notice); Bank of Columbia v. Lawrence, 26 U.S. (1 Pet.) 578, 582 (1828) ("The general rule is, that the party whose duty it is to give notice in such cases, is bound to use due diligence in communicating such notice."); Bussard v. Levering, 19 U.S. (6 Wheat.) 102, 103 (1821) ("[B]y the general law merchant, notice of non-payment given to the drawer on the last day of grace, after a demand upon the acceptor on the same day, ... was sufficient to charge the drawer."); Lindenberger v. Beall, 19 U.S. (6 Wheat.) 104, 106 (1821) ("[A]fter demand of the maker on the third day of grace, notice to the endorser on the same day was sufficient, by the general law merchant.").

100. 23 U.S. (10 Wheat.) 333, 340-41 (1825).

101. *Id.* at 341.

102. *Id.*

"general considerations" of "public convenience and policy," concluding that "the receipt by a bank of forged notes, purporting to be its own, must be deemed an adoption of them," because a bank, unlike the party presenting them, was "bound to know" its own instruments.[103] "Passing from these general considerations," Justice Story "inquire[d] how, in analogous cases, the law has dealt with this matter."[104] Justice Story identified English and American state cases reasoning that a bank has a duty to know its own notes.[105] "Against the pressure of these authorities," Justice Story concluded, "there is not a single opposing case; and we must, therefore, conclude, that both in England and America, the question has been supposed to be at rest."[106] Thus, "the defendants were bound to know their own notes, and having received them without objection, they cannot now recal[l] their assent."[107] The Court routinely applied general law in cases involving bills of exchange, promissory notes, and other mercantile instruments.[108]

Like state courts, federal courts applying general law did not consider themselves bound by judicial decisions from other jurisdictions expounding the content of such law. Even if general law was incorporated as a form of state municipal law, there was nothing anomalous about federal courts exercising independent judgment to ascertain its content. Unlike local law, general law was understood to reflect reason and practices common to many nations. Accordingly, whether applied by federal or state courts, general

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103. *Id.* at 343-45.

104. *Id.* at 345.

105. *Id.* at 347-51.

106. *Id.* at 351-52.

107. *Id.* at 355-56.

108. *See, e.g.*, Lee v. Dick, 35 U.S. (10 Pet.) 482, 495-96 (1836) (holding that, under the law merchant, the plaintiffs had to give the defendant notice that they accepted his letter of guarantee); Thornton v. Wynn, 25 U.S. (12 Wheat.) 183, 187-88 (1827) (explaining that a "well settled principle of the law merchant" regarding the acts of drawers or endorsers "applies with equal force to promissory notes, which, after endorsement, partake of the character of bills of exchange"); Dugan v. United States, 16 U.S. (3 Wheat.) 172, 183 (1818) ("[I]f any person who endorses a bill of exchange to another, whether for value, or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the *bona fide* holder and proprietor of such bill."); Coolidge v. Payson, 15 U.S. (2 Wheat.) 66, 75 (1817) ("[A] letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on credit of the letter, a virtual acceptance binding the person who makes the promise.").

law—by its very nature—did not require deference to the judicial decisions of any particular sovereign. Rather, the courts of every nation or state had the right and the responsibility to use their independent judgment to ascertain the content of such law.[109]

Well before *Swift*, the Supreme Court did not consider itself bound by state court decisions applying general commercial law. For example, in 1833 in *Nichols v. Fearson*, the Court resolved a question of "general mercantile interest" not according to the decisions of any particular state but "upon what appear[ed] to us to be the weight of authority."[110] Fearson endorsed a promissory note for $101 over to Nichols in exchange for $97 cash.[111] The issue was whether this transaction was usurious and the promissory note thus unenforceable.[112] After reviewing state court decisions from New York, Massachusetts, and Connecticut, the Court stated that "[u]pon a subject of such general mercantile interest, we must dispose of the question according to our own best judgment of the law."[113] The Court "recollect[ed] no other case in which [it had] been called upon to consider the effect of usury upon the contracts of parties to negotiable paper," and thus was "uncommitted upon the question ... and free to decide it, as well upon reason and principle, as upon what appears to us to be the weight of authority."[114] Although the Court had "not ... leisure fully to explore the decisions of the states on the question, ... as far as we have gone, the great weight of authority is certainly in favour of the validity of the contract under

109. By analogy, when federal courts apply a state's choice of law rules, they are not bound to follow state courts' understanding of foreign law that applies under such rules. In diversity cases, federal courts apply state choice of law rules to determine which state or nation's law applies to a given dispute. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). But federal courts have never suggested that they must defer to a state court's understanding of applicable law from another jurisdiction. For example, if a federal court sitting in New York applies New York choice of law principles to determine that the laws of France govern a particular dispute, the federal court has no obligation to defer to New York courts' understanding of French law. Similarly, although federal courts applied the law merchant because a state's courts would apply it, federal courts did not defer to that state's courts' understanding of the law merchant.

110. 32 U.S. (7 Pet.) 103, 108-09 (1833).

111. *Id.* at 103.

112. *Id.* at 105.

113. *Id.* at 108.

114. *Id.* at 109.

review."[115] The Court concluded, then, "upon both reason and authority," that the promissory note was enforceable.[116]

Notably, Justice Story endorsed this view as Circuit Justice in two 1838 decisions, foreshadowing his opinion in *Swift* four years later. First, in *Williams v. Suffolk Insurance Co.*, Justice Story explained that a rule of decision

> being founded, not upon local law, but upon the general principles of commercial law, would be obligatory upon this court, even if the decisions of the state court of Massachusetts were to the contrary; for upon commercial questions of a general nature, the courts of the United States possess the same general authority, which belongs to the state tribunals, and are not bound by the local decisions. They are at liberty to consult their own opinions, guided, indeed, by the greatest deference for the acknowledged learning and ability of the state tribunals, but still exercising their own judgment, as to the reasons, on which those decisions are founded.[117]

Similarly, in *Robinson v. Commonwealth Insurance Co.*, Justice Story, after addressing a question of general commercial law, observed:

> I am aware, that a rule somewhat different has been laid down by the supreme court of Massachusetts, for whose judgments I entertain the most unfeigned respect. But questions of a commercial and general nature, like this, are not deemed by the courts of the United States to be matters of local law, in which the courts of the United States are positively bound by the decisions of the state courts. They are deemed questions of general commercial jurisprudence, in which every court is at liberty to follow its own opinion, according to its own judgment of the weight of authority and principle.[118]

As these opinions suggest, however, when local state enactments or local state customs clearly established a rule at variance from the

115. *Id.* at 111.
116. *Id.* at 112.
117. 29 F. Cas. 1402, 1405 (C.C.D. Mass. 1838) (No. 17,738).
118. 20 F. Cas. 1002, 1004 (C.C.D. Mass. 1838) (No. 11,049) (internal citations omitted).

general commercial law, federal courts considered themselves bound by the local departure. Such instances were rare, but not unprecedented, in the years before *Swift* because state laws largely conformed to general commercial law. The general commercial law, a branch of the law of nations, was subject to local deviations. Thus, English courts recognized and applied local customs and usages that supplemented or supplanted the general law merchant.[119] American courts likewise recognized that fixed local usages governed as rules of decision even if they departed from the general law merchant, and that the law merchant itself was not perfectly consistent from nation to nation.[120] Local laws regulating forms of proceeding commonly provided rules of decision in cases in which the law merchant otherwise might apply.[121] Like other courts, federal courts

119. *See generally* TIMOTHY CUNNINGHAM, THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES, BANK-NOTES, AND INSURANCES 77-100 (1760) (listing examples of special or local customs that operated in conjunction with, or contrary to, principles of the law merchant). For example, local customs governed usances. *See, e.g.*, Buckley v. Cambell, (1706) 88 Eng. Rep. 917 (Q.B.) 917 (Sir Holt C.J.) (explaining, regarding time of usances, that "he would take notice of the custom of merchants here, but not of that at Amsterdam or Venice," for "[i]n such case, you must set forth the custom in your declaration"); Meggadow v. Holt, (1692) 88 Eng. Rep. 1134 (K.B.) 1135 ("It is not necessary to shew the custom of merchants, but it is necessary to shew how the usance shall be intended, because it varies as places do."). Local custom also governed, in certain instances, whether infants could bind themselves by accepting bills of exchange. *See, e.g.*, Williams v. Harrison, (1697) 91 Eng. Rep. 774 (K.B.) 774 (recognizing local custom in London that an infant may bind himself as an apprentice by accepting a bill of exchange, notwithstanding that the "custom of merchants [which holds otherwise] is part of the law of the land").

120. *See, e.g.*, Bank of Wash. v. Triplett, 26 U.S. (1 Pet.) 25, 34 (1828) ("This bill being drawn on a person residing in Washington, and being protested for non-payment in the same place, is, according to the law merchant, to be governed by the usage of Washington."); Fenwick v. Sears's Adm'rs, 5 U.S. (1 Cranch) 259, 270 (1803) ("[T]he custom of merchants in the United States differs in some respects from the custom of merchants in England."); Brown v. Barry, 3 U.S. (3 Dall.) 365, 368 (1797) (Elsworth, C.J.) ("I say the custom of merchants in this country; for the custom of merchants somewhat varies in different countries, in order to accommodate itself to particular courses of business, or other local circumstances."); Thurston v. Koch, 23 F. Cas. 1183, 1184 (C.C.D. Pa. 1800) (No. 14,016) (Paterson, J.) ("It is, however, evident, that the law merchant varies in different nations, and even in the same nation at different times. The course of trade, local circumstances, commercial interests, and national policy, induce to some variation of the rule."); Snyder v. Findley, 1 N.J.L. 78, 79 (1791) ("[A]s to negligence, the custom of merchants settles it in Great Britain; there is, however, no such custom here."); Fleming v. McClure, 3 S.C.L. (1 Brev.) 428, 432-33 (S.C. Const. Ct. 1804) ("The law merchant, as it obtains in England, is generally speaking, the law of this country. Some exceptions have been made, and some more may be made, which convenience and necessity have directed, and may hereafter suggest.").

121. *See, e.g.*, Yeaton v. Bank of Alexandria, 9 U.S. (5 Cranch) 49, 52-53 (1809) (applying

presumed that local statutory and common law rules governed even when they conflicted with or supplanted the general commercial law.[122]

Justice Story himself recognized that federal courts were bound to follow state court decisions when they opted out of general law and established local law in its place. For instance, in 1826 in *Halsey v. Fairbanks*, Justice Story, sitting as circuit justice, addressed whether a debtor's assignment of property to a trustee was fraudulent as to his creditors.[123] Justice Story began his opinion by explaining:

> In one sense, the present discussion may be said to depend upon local law; in another, to depend upon general principles and presumptions belonging to the common law, in its widest application. So far as there may be any peculiarity in the jurisprudence and laws of Massachusetts, which limits the effect, or destroys the validity of general assignments, the question is local. So far as it involves principles and presump-

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Virginia act incorporating bank to determine whether the bank could sue an endorser of a negotiable note without first suing the maker); Hinkley v. Marean, 12 F. Cas. 205, 206 (C.C.D. Mass. 1822) (No. 6523) ("When the right exists, the remedy is to be pursued according to the lex fori, where the suit is brought."); Le Roy v. Crowninshield, 15 F. Cas. 362, 364-65 (C.C.D. Mass. 1820) (No. 8269) (explaining that "remedies on contracts are to be regulated and pursued according to the law of the place, where the action is instituted, and not by the law of the place, where the contract is made," and a nation "is not obliged to depart from its own notions of judicial order, from mere comity to any foreign nation").

122. For example, in *Slacum v. Pomery*, the Court interpreted a Virginia act of assembly that created a liability in drawers or endorsers of bills of exchange for special damages and interest and gave an action of debt against them. 10 U.S. (6 Cranch) 221, 221 (1810). The question before the Court was whether this act dispensed with the notice of protest that was "essential in an action founded on the custom of merchants." *Id.* at 225. Chief Justice Marshall wrote for the Court that the Virginia act did not dispense with the notice requirement because the Virginia legislature had not altered the commercial nature of the paper at issue, which thus remained "a pure commercial transaction governed by commercial law." *Id.* This analysis presupposed that if the Virginia legislature had altered the character of the paper, the Court would have applied the Virginia rule.

Other federal court cases proceeded on the same assumption. In *The Betsy and Rhoda*, the district court recognized that "by the local law" of Massachusetts, "the acceptance of a negotiable security for a pre-existing debt, by simple contract is generally held to be payment, and an extinguishment of the original cause of action." 3 F. Cas. 305, 306 (D. Me. 1840) (No. 1366). The court explained that "[t]his is not only an innovation on the common law; it is also a departure from the general law merchant." *Id.* Although the court did not apply this law because it was sitting as a court of admiralty, it observed "that if this had been a transaction between merchant and merchant, ... the local law ought ... to prevail." *Id.*

123. 11 F. Cas. 295, 297 (C.C.D. Mass. 1826) (No. 5964).

> tions of constructive fraud upon creditors, the question must turn upon the same considerations substantially, as would govern it in New York, Pennsylvania, or England.[124]

After considering the general law, Justice Story identified a Massachusetts case, *Widgery v. Haskell*,[125] that had "been pressed upon the attention of the court, as containing a doctrine not entirely consonant with the English doctrine, and establishing, in some sort, a rule of local law."[126] It is worth quoting Justice Story's analysis of *Widgery* at length:

> It is not ... my intention to go into a commentary upon the case of Widgery v. Haskell, or to question, that it was rightly decided upon its own circumstances. I must indeed confess, that some of the reasoning, used by the learned chief justice on that occasion, did not then convince my mind, and upon frequent revisions since, I remain still unconvinced of its accuracy.... So far, however, as it may be presumed to stand upon local law, my duty is to follow it, and it will be performed without hesitation. I understand, then, the case of Widgery v. Haskell to have decided, that in Massachusetts an assignment to a trustee, executed by a debtor bonâ fide for the benefit of creditors, is not valid, unless the creditors are parties to, or assent to the deed.[127]

In sum, contrary to modern assertions that federal courts exercised independent judgment over all forms of state common law, federal courts drew an important distinction between general law and local law. Traditionally, federal courts exercised independent judgment only on questions of general law, and deferred to settled state court decisions on questions of local law.

Not surprisingly, just as federal courts did not consider themselves bound by state court pronouncements on general law, state courts did not consider themselves bound by Supreme Court pronouncements on such law. For example, in 1830 in *Thompson v. Cumming*, the Supreme Court of Appeals of Virginia explained that the "custom of merchants" as stated by the Supreme Court of the

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124. *Id.*
125. 5 Mass. (5 Tyng) 144 (1809).
126. *Halsey*, 11 F. Cas. at 299.
127. *Id.* at 299-300.

United States "does not bind us."[128] Rather, the Virginia court was "free to follow, and ought to follow, the rule of the law merchant, as long settled in England, and in most of the states of the Union."[129] State courts continued to exercise independent judgment on general commercial law matters even after *Swift* was decided, as Part II.B explains. Shortly after *Swift*, for instance, counsel urged New York's highest court to conform its decision "to the opinion of Mr. Justice Story in the recent case of *Swift v. Tyson*."[130] Although recognizing that on "question[s] of commercial law, ... it is desirable that there should be, as far as practicable, uniformity of decision," the New York court nonetheless declined to follow the rule applied in *Swift* and characterized the Supreme Court as a "tribunal, whose decisions are not of paramount authority" on such questions.[131]

C. Swift v. Tyson *in Historical Context*

This background provides essential context for understanding the Supreme Court's decision in *Swift v. Tyson*.[132] Scholars and judges have long criticized *Swift* on two grounds. First, commentators claim that *Swift* misinterpreted section 34 of the Judiciary Act by holding that the provision only applied to state statutes and not to unwritten state law.[133] Second, commentators suggest that the *Swift* Court usurped state regulatory authority by disregarding state court precedent and applying its own conception of general commercial law.[134] Neither critique holds up when *Swift* is understood in historical context. At the time it was decided, *Swift* was an unexceptional opinion, using independent judgment to ascertain and apply

128. 29 Va. (2 Leigh) 321, 325 (1830).

129. *Id.*

130. Stalker v. McDonald, 6 Hill 93, 95 (N.Y. Sup. Ct. 1843).

131. *Id.* at 95, 112.

132. 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

133. *See* Clark, *supra* note 6, at 1278 (citing JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 4.1, at 192 (2d ed. 1993)); Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 132-33 (2011) (stating that the *Swift* "Court interpreted the Act as requiring the application of only state statutory law, and not state common law").

134. *See* Clark, *supra* note 6, at 1278; *see also* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 431 (1995) (explaining that the *Swift* doctrine raised federalism problems because it seemed "as if federal courts were exercising the power of *state* legislatures").

general commercial law just as federal and state courts had done in numerous cases before it. *Swift* was different only insofar as the Supreme Court disagreed with the apparent understanding of general commercial law by the courts of New York—the state with local authority over the transaction. Although such disagreements were rare, they were always possible when a federal court exercised independent judgment to ascertain applicable principles of general law. This was the nature of general law.

In *Swift*, Tyson bought land from speculators, Norton and Keith, using a bill of exchange.[135] The speculators in turn gave Swift the negotiable instrument to satisfy a debt they owed Swift.[136] When Swift sought payment on the instrument from Tyson, Tyson refused to pay on the ground that the speculators had fraudulently induced him to buy land that the speculators did not own.[137] If the Court found that Swift gave valuable consideration and was a bona fide holder of the instrument, then Tyson had no defense against him. Whether Swift was entitled to payment turned on whether release of a preexisting debt was valid consideration for the note. As Justice Story explained for the Court, "the only real question in the cause is, whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments."[138]

Before resolving this question, the Court had to ascertain the source of the applicable law. Tyson argued that the Court should treat the transaction "as a New York contract, and therefore to be governed by the laws of New York, as expounded by its Courts, as well upon general principles," in accordance with section 34 of the Judiciary Act.[139] Tyson "further contended, that by the law of New York, as thus expounded by its Courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments."[140] Justice Story assumed that New York courts held this view of the general law, but he concluded that the Supreme Court was not bound to follow the New York

135. *Swift*, 41 U.S. at 14-15.
136. *Id.*
137. *Id.* at 15.
138. *Id.* at 16.
139. *Id.*
140. *Id.*

courts' understanding "if it differs from the principles established in the general commercial law."[141] The *Swift* Court made three important points in the course of deciding the case.

First, the Court stressed that the question to be decided was one of general law rather than local law, and that local law could be written or unwritten. According to the Court, local state law extended only "to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."[142] "[Q]uestions of a more general nature," by contrast, are "not at all dependent upon local statutes or local usages of a fixed and permanent operation," but include "questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, ... what is the just rule furnished by the principles of commercial law to govern the case."[143] Indeed, the Court went out of its way to emphasize that New York state courts themselves understood the question before the Court as one of general law rather than local law. As the Court put it, "[i]t is observable that the 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."[144]

Second, the Court rejected the contention that section 34 of the Judiciary Act requires federal courts to follow state court decisions on questions of general law. Section 34 provided "[t]hat the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."[145] The Court denied that the statute's reference to "the laws of the several states" included the decisions of state courts. Echoing Blackstone, the Court first remarked that such decisions "are, at most, only evidence of

141. *Id.* at 18-19.
142. *Id.* at 18.
143. *Id.* at 18-19.
144. *Id.* at 18.
145. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

what the laws are; and are not of themselves laws."[146] According to the Court, "[t]he laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, *or long established local customs having the force of laws*."[147] Although federal courts had long deferred to state court decisions interpreting state enactments or applying local state customary law, federal courts had never deferred to state court understandings of general commercial law. Because state courts did not understand themselves to be fixing the content of general law unilaterally, their decisions were mere evidence of the content of such law.

The Court's discussion of this point clearly contradicts conventional accounts that *Swift* (mis)interpreted section 34 to apply to state statutes, but not to unwritten state law. In fact, the crucial distinction drawn by the Court was not between written and unwritten law at all, but between general and local law, whether written or unwritten. Thus, the Court explained that

> the true interpretation of the thirty-fourth section limited its application to state laws strictly *local*, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character.[148]

In other words, the Court read section 34 to apply not only to local statutes but also to "local customs having the force of laws" or "local usages of a fixed and permanent nature,"[149] the meaning and

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146. *Swift*, 41 U.S. at 18. In support of this conclusion, the Court noted that the decisions of courts "are often reexamined, reversed, and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect." *Id.*

147. *Id.* (emphasis added).

148. *Id.* at 19 (emphasis added).

149. *Id.* at 18-19. Counsel for Tyson, Richard Dana, in arguing that the Supreme Court must follow New York court decisions on the issue before the Court, cited five cases for the proposition "[t]hat the provisions of the thirty-fourth section are not confined to 'statutes.'" *Id.* at 14. Each of these cases, however, involved a question of local law, not general law. *See* Green v. Neal's Lessee, 31 U.S. (6 Pet.) 291, 295-99 (1832) (following state court construction of a state statute); Henderson v. Griffin, 30 U.S. (5 Pet.) 151, 157 (1831) (determining, in a case involving real property, that "[t]hese are the views which inevitably result from the local

content of which state court decisions conclusively fixed as far as federal courts were concerned.

Conversely, the Court denied that section 34

> did apply, or was designed to apply, to questions of a more *general* nature; not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law.[150]

Given the nature of general law, this conclusion was hardly novel or surprising. At the time, judges did not regard any one sovereign as having the authority to fix the content of general law for other sovereigns. Although "the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court[,] they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."[151] Rather, "[t]he law respecting negotiable instruments may be truly declared ... to be in a great measure, not the law of a single country only, but of the commercial world."[152]

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laws, expounded by the highest court in the state"); Jackson v. Chew, 25 U.S. (12 Wheat.) 153, 162 (1827) ("applying the rule which has uniformly governed this Court, that where any principle of law, establishing a rule of real property, has been settled in the State Courts, the same rule will be applied by this Court that would be applied by the State tribunals"); United States v. Wonson, 28 F. Cas. 745, 749 (C.C.D. Mass. 1812) (No. 16,750) (Story, Circuit J.) (stating that section 34's "true exposition is, that the rights of persons and rules of property, as settled in the states, shall be guides to the courts of the United States in controversies depending before such courts[,] [a]s, for instance, the mode of conveying real estate by deed or by will, the right in cases of intestacy of the heirs, in the descent and distribution of estates" (internal citation omitted)); Van Reimsdyk v. Kane, 28 F. Cas. 1062, 1063-64 (C.C.D. R.I. 1812) (No. 16,871) (determining applicability of a state insolvency statute).

150. *Swift*, 41 U.S. at 19 (emphasis added).

151. *Id.* Thomas Fessenden, counsel for Swift, argued to the Court:

> In cases in which the Courts of the United States have jurisdiction, by the Constitution and laws of the United States, the common mercantile law of the respective states applying to and governing those cases, is as much submitted to the actual consciences and judgments of the minds of the judges who constitute those courts, to be considered and declared, without respect to the decision of any state Court, as binding authority, as the same law, in cases where the United States Courts have not jurisdiction, is to the best judgment of the state Courts, without respect to the decision of any Court of the United States, as binding authority.

Id. at 9.

152. *Id.* at 19. On this point, Fessenden argued to the Court that

Third, because the question in *Swift* was one of general law to which section 34 did not apply, the Court concluded that federal courts—no less than state courts—were free to use their independent judgment to ascertain the content of the applicable law. With respect to "questions of general commercial law," Justice Story explained that

> the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.[153]

In performing this function, the Court examined both reason and authority.[154] "[W]hy upon principle," the Court asked, "should not a pre-existing debt be deemed such a valuable consideration?"[155] As a matter of reason,

> [i]t is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts.[156]

The more restrictive doctrine allegedly embraced by New York courts "would strike a fatal blow at all discounts of negotiable securities for pre-existing debts."[157] As a matter of judicial authority, the Court explained, the overwhelming weight of decisions was that a preexisting debt constituted a valuable consideration. Because this was a question of general law, the Court canvassed a wide range of sources, including its prior opinions, English decisions,

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> [i]f there is any question of law, not local, but widely general in its nature and effects, it is the present question. It is one in which foreigners, the citizens of different states, in their contests with each other, nay, every nation of the civilized commercial world, are deeply interested.

Id. at 8.

153. *Id.* at 19.

154. *See supra* notes 110-18 and accompanying text (describing this general practice).

155. *Swift*, 41 U.S. at 20.

156. *Id.*

157. *Id.*

treatises, and the decisions of American state courts.[158] On the basis of this review, the Court had "no hesitation" in concluding "that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments."[159]

In context, *Swift v. Tyson* was not a path-breaking case. Rather, it followed a long line of cases applying general law in federal court. Tellingly, in the years that immediately followed, courts did not cite *Swift* for the proposition that federal courts sitting in diversity could apply general law because that proposition was unremarkable. Rather, they cited it as authority merely for the specific principle of general law that it endorsed.[160] Courts certainly did not cite *Swift* in those years for the extravagant claim that federal courts could exercise independent judgment over all forms of state common law, be it general law or local law. *Swift* merely signaled that federal courts would apply general law when state courts would apply general law, and that federal courts would exercise independent judgment as to the content of such law, just as state courts would. Because New York courts applied general law rather than any local New York statute or custom to decide the question in *Swift*, neither the Constitution nor early acts of Congress imposed any impediment to the application of general law in federal court.

II. THE BREAKDOWN OF GENERAL AND LOCAL LAW

In the decades following *Swift*, the evolving *Swift* doctrine became increasingly inconsistent with the constitutional structure and acts of Congress. As discussed below, states increasingly exercised their regulatory power to localize matters they were previously content to have governed by general commercial law. At the same time, federal courts improperly expanded their conception of general law beyond commercial law to include matters traditionally subject to local law. These two developments ultimately led the Supreme Court to declare the *Swift* doctrine unconstitutional in *Erie Railroad Co. v. Tompkins*.

158. *Id.* at 20-22.

159. *Id.* at 19.

160. *See* Fletcher, *supra* note 30, at 1514 ("*Swift* appears to have been regarded when it was decided as little more than a decision on the law of negotiable instruments.").

A. State Efforts to Localize General Law

After *Swift*, states increasingly localized matters previously subject to general law, abandoning "reliance on the general law merchant in favor of localized commercial doctrines."[161] Both state legislatures and state courts participated in this shift.[162] State legislatures enacted commercial statutes to replace general commercial law, and state courts increasingly regarded commercial law as local law rather than general law.

First, state legislatures steadily subjected commercial transactions to state legislation, eventually including uniform commercial laws. By the late nineteenth century, commercial transactions in the United States were subjected to various and often contradictory state statutory requirements.[163] At this time, "statutes grew and increased like weeds in all the forty-eight states and territories."[164] Indeed, "every state ... had one or more statutes attempting to regulate in whole, or in part, the law of commercial paper."[165] Because "[b]ills and notes were the oil for running the American business machine, ... [c]ourts were clogged with questions of negotiability and transfer."[166] Disuniformity in state law necessitated the development of uniform commercial statutes,[167] including

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161. *See* Clark, *supra* note 6, at 1293; *see also id.* at 1290.

162. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 355 (1973) ("[E]ach state from Maine to the Pacific was a petty sovereignty, with its own brand of law."); Lyman D. Brewster, *The Promotion of Uniform Legislation*, 6 YALE L.J. 132, 140 (1897) (arguing for "statutory unity rather than diversity, in matters of common interest"). Many changes in commercial law were due to the enactment of specialized statutes by state legislatures. *See* E. ALLAN FARNSWORTH & JOHN HONNOLD, CASES AND MATERIALS ON COMMERCIAL LAW 5 (4th ed. 1985) ("By 1890 every state had at least one statute on negotiable instruments.").

163. *See* TONY ALLAN FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY 123 (1979) (describing the need "to bring some uniformity to the tangled local law"); 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, 367 (1983) (describing "the confusion in the law of bills and notes"); Frederick K. Beutel, *The Development of State Statutes on Negotiable Paper Prior to the Negotiable Instruments Law*, 40 COLUM. L. REV. 836, 849 (1940) (describing the multiplicity of state commercial statutes).

164. Beutel, *supra* note 163, at 849.

165. *Id.*

166. Bane, *supra* note 163, at 367. "In the *Century Edition of the American Digest*, covering cases up to 1896, the subject of bills and notes took up virtually one entire volume of more than 2,700 pages." *Id.*

167. *See* FRIEDMAN, *supra* note 162, at 355 ("By 1900, ... [the Uniform Negotiable Instruments Law] had been widely enacted.").

the Uniform Negotiable Instruments Act.[168] Such laws were designed to perform the function historically performed by the law merchant—that is, to encourage trade by subjecting commercial transactions to uniform rules across state lines.[169] By adopting the Negotiable Instruments Act, which codified many law merchant rules, states incorporated much of general commercial law into their local enacted laws.

State legislation, however, did not entirely displace general commercial law. The Negotiable Instruments Act itself expressly stated that "[i]n any case not provided for in this act the rules of ... the law merchant shall govern."[170] Nonetheless, over time, general law grew less uniform as state and federal courts increasingly defined it differently.[171] Moreover, state courts increasingly came to describe their distinctive interpretations of the law merchant as local state law, not general commercial law. In particular, state courts began to dispute whether, in applying the law merchant, they were bound to follow the law of the forum or the law of the place of the contract. State courts thus began to describe general commercial law not as a transnational law over which they exercised independent judgment but rather as the *local law* of a particular sovereign. Eventually, state courts no longer characterized even the question involved in *Swift v. Tyson*—whether a negotiable instrument invalid in the hands of the original holder was enforceable by a bona fide holder in due course—as a question of general law, but rather characterized it as one of local law.[172] Under this view, local law governed the content of commercial law. By the turn of the twentieth century,

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168. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, SIXTH ANNUAL CONFERENCE OF COMMISSIONS FOR THE PROMOTION OF UNIFORMITY OF LEGISLATION IN THE UNITED STATES 8 (1896). In addition to this act, states widely accepted uniform acts on sales (1906), warehouse receipts (1906), bills of lading (1909), and stock transfers (1909). Bane, *supra* note 163, at 369.

169. *See* Brewster, *supra* note 162, at 134 ("[G]reat care is taken to preserve the use of words which have had repeated legal constructions and become recognized terms in the Law Merchant.").

170. UNIF. NEGOTIABLE INSTRUMENTS ACT § 196, 5 U.L.A. 724 (1943).

171. *See* Bellia, *supra* note 7, at 891 (explaining how general law grew less uniform); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1267 (1985) (describing the lack of uniformity that developed in general law).

172. Comment, *What Law Governs the Question of Purchase for Value of Negotiable Instruments*, 27 YALE L.J. 246, 246 (1917).

> the rule adopted in a large majority of the state courts, and announced by text-writers, is that when it becomes necessary to determine the common law of another state, the decisions of the courts of final resort of that state will be followed, regardless of precedents to the contrary in the state where the trial is held, and that this rule applies to the law merchant, as well as to other branches of the common law.[173]

Thus, state courts came to treat the law merchant as local law, not general law.

If federal courts had merely persisted in treating unwritten commercial law as general law in the face of these developments, the *Erie* problem—federal judicial interference with state regulatory authority—would have been confined to a relatively small enclave. By the early twentieth century, states had codified much of the general commercial law and, with a few exceptions,[174] federal courts followed state statutes on commercial questions. In 1934, the Supreme Court settled that federal courts must follow state court interpretations of state statutes, including uniform state legislation codifying general law.[175] Thus, state statutory localization of general commercial law increasingly prevented federal courts from exercising independent judgment over commercial disputes even before *Erie* was decided.[176] Federal courts, however, did not confine their application of the *Swift* doctrine to commercial law. Rather, they broadly expanded their conception of general law throughout the

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173. Sykes v. Citizens Nat'l Bank of Des Moines, 98 P. 206, 207 (Kan. 1908); *see also* Comment, *What Law Governs the Defenses to a Negotiable Instrument in the Hands of a Bona Fide Holder for Value*, 37 YALE L.J. 803, 804-05 (1928) (explaining that although "the Federal courts and some state courts have taken the attitude that both the character of the holder as a holder in due course and the defenses available present a question of the general commercial law as interpreted by the forum," the "great majority of state courts" determine such questions "by the law governing [the] contract contained in the bill or note" (internal citation omitted)); Comment, *supra* note 172, at 246-47 (arguing that "[i]f the law of a particular state is applicable under the rules of the Conflict of Laws of the forum, there is no good reason why these rules should be set aside when the matter in question is one of common law or of general commercial law").

174. *See infra* note 187 and accompanying text.

175. Burns Mortg. Co. v. Fried, 292 U.S. 487, 493-95 (1934).

176. *See* Charles A. Heckman, *Uniform Commercial Law in the Nineteenth Century Federal Courts: The Decline and Abuse of the* Swift *Doctrine*, 27 EMORY L.J. 45, 51 (1978) (arguing that "[a]s a commercial doctrine, *Swift* was rendered superfluous" by uniform commercial legislation).

late eighteenth and early nineteenth centuries to include such traditionally local matters as torts, punitive damages, and real property rights. By generalizing traditional areas of local state regulation—and thereby subjecting them to rules independently determined by federal courts—the *Swift* doctrine significantly expanded federal judicial interference with state governance authority in diversity cases.

B. Federal Judicial Efforts to Generalize Local Law

While states localized general law after *Swift*, federal courts increasingly generalized traditional areas of local law. In *Erie*, the Supreme Court decried the "broad province" that federal courts had "accorded to the so-called 'general law' over which federal courts exercised an independent judgment."[177] The *Erie* Court noted that federal courts had come to apply general law to purely intrastate contracts, questions of tort liability (even concerning real property rights), rights to recover certain kinds of damages, and the construction of instruments conveying property rights[178]—all of which were local matters subject to state governance at the time of *Swift*. One of the earliest and most significant steps in this expansion was the Court's 1862 decision in *Chicago v. Robbins* to disregard state tort law in favor of so-called "general law."[179] The case involved liability for negligence, and the Court declared that "where private rights are to be determined by the application of common law rules alone, this Court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions."[180] Three decades

177. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75 (1938). In addition, federal courts came to exercise independent judgment in many cases over unsettled questions of local state law. *See* Burgess v. Seligman, 107 U.S. 20, 33 (1883) (explaining that where state courts have not settled matters of local state law, "it is the right and duty of the Federal courts to exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence"); *see also* Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 373 (1893) (explaining that "[s]ince the case of *Burgess v. Seligman* the same proposition has been again and again affirmed").

178. *Erie*, 304 U.S. at 75-76; *see also* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 530-31 (1928) (describing how federal courts decided various matters according to general law, including the construction of insurance policies, construction of deeds, and questions of tort law).

179. 67 U.S. (2 Black) 418, 428-29 (1862).

180. *Id.*

later, in *Baltimore & Ohio Railroad Co. v. Baugh*, the Court determined that the question whether a railroad was responsible for the negligence of one employee against another was

> not a question of local law, to be settled by an examination merely of the decisions of the Supreme Court of Ohio, ... but rather one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant.[181]

In dissent, Justice Field famously invoked the Constitution to reject this expansion of general law. According to Field, "there stands, as a perpetual protest against [the federal courts' expansion of general law] the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States" to regulate local matters in the absence of a valid conflicting federal law.[182]

Federal courts nonetheless continued to expand the concept of general law leading up to *Erie*. Scholars noted this expansion while it was occurring,[183] at the time *Erie* was decided,[184] and in the decades that followed.[185] By 1938, federal courts claimed the right to exercise independent judgment over dozens of historically local

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181. *Balt. & Ohio R.R. Co.*, 149 U.S. at 370.

182. *Id.* at 401 (Field, J., dissenting).

183. *See, e.g.*, H. Parker Sharp & Joseph Brennan, *The Application of the Doctrine of* Swift v. Tyson *Since 1900*, 4 IND. L.J. 367, 370-82 (1929) (describing federal courts' application of general law to questions involving commercial paper, simple contracts, insurance, corporations, torts, real property, personal property, damages measures, conflict of laws, evidence, and other matters).

184. *See, e.g.*, Harold M. Bowman, *The Unconstitutionality of the Rule of* Swift v. Tyson, 18 B.U. L. REV. 659, 663 (1938) (explaining that after *Swift* general law came to embrace "torts against both persons and property, and even some aspects of title to real estate"); Robert H. Jackson, *The Rise and Fall of* Swift v. Tyson, 24 A.B.A. J. 548, 611-13 (1938) (describing the expansion of the *Swift* doctrine).

185. *See, e.g.*, FREYER, *supra* note 163, at 81-82 (describing federal judicial expansion of general law after *Swift*); EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 51-52 (2000) (explaining that by the end of the nineteenth century, federal courts "had inflated the domain of general jurisprudence to encompass most common law subjects"); Marian O. Boner, Erie v. Tompkins*: A Study in Judicial Precedent*, 40 TEX. L. REV. 509, 510 (1962) (explaining the expansion of general law after *Swift*); Clark, *supra* note 6, at 1294 ("[F]ederal courts simultaneously expanded the *Swift* doctrine well beyond its commercial law origins to encompass numerous questions traditionally governed by local law.").

law questions including negligence, punitive damages, and property rights.[186] State courts had never understood general law to govern such matters in the way that general law governed commercial disputes. Moreover, certain federal courts even went so far as to announce narrow, but important, exceptions to the traditional rule that they must follow settled state court interpretations of state statutes.[187]

Even as federal courts generalized local law in diversity cases, state courts continued to apply local state law.[188] When state courts ruled in accordance with Supreme Court determinations of general law, they professed to do so not out of obligation but because they either agreed with such determinations or accepted them as a matter of comity.[189] On many occasions, however, state courts chose to adhere to their own conceptions of local and general law. The resulting divergence between the law applied in state and federal courts gave rise to the "political and social" defects famously described by the Court in *Erie*.[190] These defects consisted of a lack of uniformity in state and federal courts on questions of "general law,"[191] uncertainty regarding the line between general and local law,[192] and "discrimination result[ing] from the wide range of persons held entitled to avail themselves of the federal rule by

186. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75-76 (1938) (describing the expansion of the *Swift* doctrine).

187. For instance, federal courts held that they did not have to follow changes in state court interpretations in cases in which the alleged rights vested before the changed interpretation, *see* Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 205-06 (1863); that they could exercise independent judgment in construing state statutes in cases that arose before the first state court interpretation, *see* Burgess v. Seligman, 107 U.S. 20, 35 (1883); and that they could exercise independent judgment in construing statutes that incorporated general law principles, *see* Capital City State Bank v. Swift, 290 F. 505, 509 (E.D. Okla. 1923). The latter decision provoked significant controversy. *See, e.g.*, J.B. Fordham, *The Federal Courts and the Construction of Uniform State Laws*, 7 N.C. L. REV. 423, 428 (1929) (arguing that "the doctrine of *Swift v. Tyson* should not be applied in the construction of uniform state laws").

188. *See* Bellia, *supra* note 7, at 898-901.

189. *See id.* at 898-99. In some cases, federal courts went even further and federalized local law questions based on a broad reading of a federal statute. *See, e.g.*, S. Ry. Co. v. Prescott, 240 U.S. 632, 639-40 (1916) (holding that the Interstate Commerce Act "manifest[ed] the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions").

190. *Erie*, 304 U.S. at 74.

191. *Id.*

192. *Id.*

resort to the diversity of citizenship jurisdiction."[193] According to the Court, these defects demonstrated the "injustice and confusion incident to the [*Swift*] doctrine."[194]

Scholars have suggested various reasons for federal courts' expansion of general law after *Swift*. Some have argued that federal judicial expansion of general law was one aspect of a broader centralization of federal power after the Civil War, including by federal courts.[195] In the late eighteenth and early nineteenth century, the Court expanded its interpretation of the Commerce Clause and Due Process Clause of the Fourteenth Amendment, increasingly holding state economic regulations unconstitutional.[196] In 1867 and 1875, Congress expanded the removability of diversity cases from state courts, thereby enlarging the diversity jurisdiction of federal courts and providing more opportunities for federal courts to apply their own expansive conceptions of general law rather than local state law.[197]

In addition to the general expansion of national regulation after the Civil War, a shift in jurisprudential thought may have contributed to federal courts' increased willingness to exercise independent judgment over matters traditionally subject to local control. Professors Randall Bridwell and Ralph Whitten have argued that "the rise of a body of literature in the late nineteenth and early twentieth centuries that legitimated a process of judge-made law" may have contributed to the federal judicial expansion of the realm of law in which they expressly exercised independent judgment.[198]

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193. *Id.* at 76.

194. *Id.* at 77.

195. *See, e.g.*, FREYER, *supra* note 163, at 93.

196. *See id.* at 93-94; *see also* Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1305-11 (2000) (explaining how the Court transformed general law into general constitutional law); Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1603 (2002) (explaining that general "[f]ederal common law and federal constitutional rights were equally policies of 'judicial centralization'"); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 89-90 (1997) (explaining how "the Court self-consciously gave diversity an expansive reading to facilitate the federal courts' resolution of federal constitutional questions").

197. *See* Jurisdiction and Removal Act of 1875, ch. 137, § 2, 18 Stat. 470, 470-71; Act of Mar. 2, 1867, ch. 196, 14 Stat. 558, *amended by* Act of Mar. 3, 1887, ch. 373, 24 Stat. 552 (amended 1887 and 1888).

198. RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM 123 (1977).

Finally, scholars have argued that the death of Joseph Story in 1845 may have contributed to the expansion—and distortion—of the *Swift* doctrine. According to Professors Bridwell and Whitten, "his passing was bound to remove from the Court a great source of constitutional and common law understanding."[199] Whatever the reasons, the federal courts' expansion of general law while state courts localized general law meant that "an explosive clash of sovereignties was inevitable."[200]

C. Erie *and the Supremacy Clause*

By the time *Erie* was decided, the original rationale for the *Swift* doctrine was largely outmoded. In 1842, *Swift* looked to general commercial law when states did the same. By 1938, however, states no longer purported to apply general law to commercial questions (like the one in *Swift*), and states never understood general law to govern tort questions (like the one in *Erie*). The conclusion was now inescapable that federal courts sitting in diversity had long been disregarding state law with no basis in supreme federal law for doing so. *Erie* held that this practice violated the Constitution but did not clearly spell out the precise grounds for this conclusion.[201] Indeed, commentators continue to debate the constitutional basis for the Court's holding,[202] and some even question whether the Constitution was relevant to the Court's rejection of the *Swift* doc-

199. *Id.*

200. FREYER, *supra* note 163, at 94.

201. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 702 (1974) ("[The *Erie* opinion] has been faulted for failing to indicate precisely what constitutional provision *Swift v. Tyson*'s interpretation of the Rules of Decision Act violated."). In addition to failing to spell out precise grounds for its holding, the *Erie* Court mischaracterized *Swift v. Tyson*, failing to distinguish the actual *Swift* opinion from what would develop into the "*Swift* doctrine." *See supra* notes 177-87 and accompanying text.

202. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3, at 326 (5th ed. 2007) ("The constitutional basis for the *Erie* decision has confounded scholars."); Jack Goldsmith & Steven Walt, Essay, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 676 (1998) ("[*Erie*'s] holding has been subject to disagreement and controversy over the years."); *see also* Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595 (2008) (suggesting that the constitutional grounds cited by the *Erie* majority and the modern application of constitutional limits on federal common law does not bear scrutiny); Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111 (2011) (explaining that Justice Brandeis's argument in *Erie* contained a suppressed constitutionally mandated nondiscrimination principle).

trine.[203] Careful review of the Court's opinion and the Constitution, however, suggests that *Erie* is best understood as resting on the negative implication of the Supremacy Clause.

The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[204] According to procedures specified elsewhere in the Constitution, each source of law recognized by the Supremacy Clause must be enacted by multiple actors subject to the political safeguards of federalism, including the Senate.[205] Amendments to the "Constitution" must be proposed by two-thirds of the House of Representatives and the Senate, or by a Convention called by two-thirds of the states, and then ratified by three-quarters of the states.[206] "Laws of the United States" must pass both the House and the Senate, and then be presented to the President for his approval.[207] If the President disapproves, then a bill can only become a "Law" if it is approved by two-thirds of the House and Senate.[208] Finally, "Treaties" can be made only by the President with the concurrence of "two thirds of the Senators present."[209]

All of these procedures permit the federal government to override state law only with the approval of the Senate acting in concert with

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203. *See* Jackson, *supra* note 184, at 614, 644 ("[T]he Court might well have avoided resort to statutory or constitutional grounds, and placed its decision solely on grounds of sound practice for the Federal courts.").

204. U.S. CONST. art. VI, cl. 2.

205. *See* Clark, *supra* note 6, at 1338-39; *see also* Wechsler, *supra* note 21, at 547-48 ("[T]he Senate is intrinsically calculated to prevent intrusion from the center on subjects that dominant state interests wish preserved for state control.").

206. U.S. CONST. art. V. The original Constitution was proposed by a Convention voting by states and became effective upon "the Ratification of the Conventions of nine States." *Id.* art. VII.

207. *Id.* art. I, § 7, cl. 2.

208. *Id.* Professor Henry Monaghan agrees "that, as an historical matter, 'Laws ... *made* in pursuance thereof' referred only to Acts of Congress," Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 740-41 (2010), but argues that because of changed circumstances "the word 'Laws' in the Supremacy Clause must now be taken to include" "the commands of any institution whose lawmaking authority has been recognized over time." *Id.* at 742. Although a full examination of this claim is beyond the scope of this Article, it seems safe to say that the *Erie* Court did not share Professor Monaghan's view because it read the Constitution to prohibit a doctrine of judicial lawmaking that had been "widely applied throughout nearly a century." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77-78 (1938).

209. U.S. CONST. art. II, § 2, cl. 2.

at least one additional actor. These procedures preserve the governance prerogatives of the states in two related ways. First, requiring the approval of multiple actors makes federal lawmaking more difficult by creating the effect of a supermajority requirement.[210] Second, requiring the approval of the Senate to displace state law was historically understood to make excessive displacement of state law less likely because the Senate was designed to protect the states from federal overreaching.[211] The *Swift* doctrine, as courts came to define it, contradicted these political and procedural safeguards of federalism by permitting federal courts—acting alone—to disregard state law without any basis for doing so in "the supreme Law of the Land."

The underlying issue in *Erie* was one of tort liability within the traditional authority of the states. While walking alongside the railroad tracks, Tompkins, a citizen of Pennsylvania, was struck by an object protruding from a passing train.[212] Tompkins sued the railroad, a New York corporation, in federal court on the basis of diversity of citizenship.[213] Tompkins' ability to recover turned on what duty of care the railroad owed to pedestrians walking along the right of way. The railroad argued that Tompkins was a trespasser under Pennsylvania law and "that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or willful."[214] Tompkins countered that "the railroad's duty and liability is to be determined in federal courts as a matter of general law."[215] The court of appeals agreed with Tompkins,[216] but the Supreme Court reversed.[217]

Without referring to the Supremacy Clause by name, the *Erie* Court nonetheless made clear by paraphrasing the Clause that only those sources of law recognized as "supreme" provide a constitutional basis for disregarding state law. The Court began its constitu-

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210. *See* Clark, *supra* note 6, at 1339; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 74-75 (2001).

211. *See* Clark, *supra* note 6, at 1357-67. The states have equal suffrage in the Senate and senators were originally chosen by state legislators. *Id.* at 1365.

212. *Erie*, 304 U.S. at 69.

213. *Id.*

214. *Id.* at 70.

215. *Id.*

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

217. *Erie*, 304 U.S. at 80.

tional analysis with the following sentence: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."[218] This sentence essentially restates the negative implication of the Supremacy Clause.[219] Because the Clause recognizes only the Constitution, laws, and treaties of the United States as the supreme law of the land, state law continues to govern in the absence of such law. The Court also underscored the federal courts' lack of constitutional power to displace state law on their own initiative. According to the Court, "no clause in the Constitution purports to confer ... power upon the federal courts ... to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."[220]

Applying these constitutional principles, the *Erie* Court rejected the so-called *Swift* doctrine, and required federal courts to apply state tort law to disputes like the one before the Court.[221] The Court emphasized that the "general law" applied by federal courts under the *Swift* doctrine had become "little less than what the judge advancing the doctrine [thought] at the time should be the general law on a particular subject."[222] Absent a governing provision of enacted federal law, federal judicial application of general law rather than local state law contradicted the Supremacy Clause and circumvented the procedural safeguards of federalism that it incorporates. It is not surprising, therefore, that the Supreme Court felt "compel[led]" by the Constitution to abandon the *Swift* doctrine and hold that—absent a contrary provision of the "Federal Constitution" or "Act[ ] of Congress"—federal courts must apply controlling written and unwritten state law in cases subject to state regulatory authority.[223]

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218. *Id.* at 78.

219. Although the Court left out any reference to treaties, there is no reason to think that the Court would not recognize their supremacy under the Supremacy Clause. The omission simply may reflect the domestic nature of the underlying tort question before the Court.

220. *Erie*, 304 U.S. at 78.

221. *Id.* at 79.

222. *Id.* (quoting Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

223. *See id.* at 77-78.

III. GENERAL LAW IN FEDERAL COURT AFTER *ERIE*

In the course of explaining the unconstitutionality of the *Swift* doctrine, the *Erie* Court famously declared that "[t]here is no federal general common law."[224] Commentators have struggled to understand how the Court could make this seemingly unequivocal statement in light of the Court's subsequent application of so-called "federal common law" in disputes between states, admiralty cases, and other specific enclaves.[225] The Court's statement, however, conflated two kinds of unwritten law—general law and common law. As discussed, the common law received by the states included both general law and local law.[226] Although federal courts applied state common law in the exercise of their jurisdiction, the United States as a whole never possessed any municipal common law of its own. Over a century before *Erie*, in *United States v. Hudson & Goodwin*, the Court rejected the idea that the United States had a national common law of crimes.[227] And in *Wheaton v. Peters*, the Court explained more broadly:

> It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.[228]

Thirty years later, *Swift* did not contradict *Wheaton* or suggest the existence of a national common law. Rather, the Supreme Court merely applied general law when the state itself applied general law to the question before the Court.[229] This practice was uncontroversial in the absence of an applicable local state rule of decision. The

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224. *Id.* at 78.

225. *See* Nelson, *supra* note 27, at 505-19 (describing federal common law enclaves in which courts apply general law principles).

226. *See supra* text accompanying note 47.

227. 11 U.S. (7 Cranch) 32, 32 (1812).

228. 33 U.S. (8 Pet.) 591, 658 (1834).

229. *See supra* Part I.C.

Erie problem arose because federal courts began applying "general law" in the teeth of controlling local state rules of decision.[230] *Erie* rejected this federal judicial expansion of general law into areas properly governed by local state regulation.[231] In this sense, under the Constitution, "[t]here is no federal general common law" made by judges that is capable of displacing local state law.

Erie should not be read, however, to suggest that federal courts can never apply general law. In practice, as Professor Caleb Nelson has explained, federal courts continue to apply general law in various contexts—even after *Erie*.[232] The question is under what conditions are federal courts justified in doing so. As we have explained in prior work, federal judicial application of general law in certain circumstances has played a crucial role—before and after *Erie*—in upholding the structure of government established by the Constitution and its precise allocation of powers.[233]

In our view, *Erie*'s categorical rejection of general law should be understood to apply only in cases like *Swift* and *Erie*—that is, cases involving adjudication of matters that fall within the exclusive or concurrent regulatory authority of the states. In such cases, the negative implication of the Supremacy Clause requires respect for controlling state law unless and until it is displaced by "the supreme Law of the Land," adopted in accordance with prescribed federal lawmaking procedures. In theory, this could include respect for a state's decision to apply general law (or the "majority rule" as reflected by a Restatement), should a state adopt such a practice. On the other hand, a different analysis applies to matters that the Constitution places beyond the authority of the states. For example, the Constitution assigns certain matters—such as the exercise of specific foreign relations powers—to the exclusive authority of the federal government. State law has no application to such matters under the Supremacy Clause because the Constitution itself assigns governmental authority elsewhere. In such matters, the Supremacy Clause poses no barrier to the application of general law in federal

230. *See supra* Part II.B.

231. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 80 (1938).

232. Nelson, *supra* note 27, at 505-25.

233. *See* Bellia & Clark, *supra* note 15, at 7 (explaining that principles derived from the law of nations have been used to uphold the Constitution's allocation of power throughout U.S. history).

court. To the contrary, in certain cases, the Supremacy Clause may require judicial application of general law to uphold the Constitution's allocation of specific powers to the federal political branches.[234]

We do not mean in this Section to provide an exhaustive account of post-*Erie* federal judicial application of general law or federal common law (such as in admiralty cases). Rather, we simply make two important points about the role of general law in federal court after *Erie*. First, *Erie* generally holds that federal courts must apply state law governing matters within the exclusive or concurrent regulatory authority of the states, absent a controlling provision of the supreme law of the land. Second, *Erie* does not prohibit federal judicial application of general law to matters beyond the regulatory authority of the states.

A. Matters Within State Authority

In declaring their independence from Great Britain in 1776, the American states held themselves out to be "Free and Independent States," with "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."[235] The states quickly used this power to adopt individual constitutions to govern matters within their respective territories. In 1781, they adopted the Articles of Confederation, by which they "enter[ed] into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare."[236] This arrangement soon proved inadequate, however, because it created a Congress of states dependent upon individual members to provide funding and implement its decisions, but that gave Congress no effective power to enforce its commands.[237]

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234. *See* Bellia & Clark, *supra* note 29, at 732-35.

235. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

236. ARTICLES OF CONFEDERATION of 1781, art. III, para. 1.

237. *See* Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1839-40 (2010); *see also* THE FEDERALIST No. 21, at 138 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that the United States in Congress operated solely through the states and had "no power to exact obedience, or punish disobedience to their resolutions, either by pecuniary mulcts, by a suspension or divestiture of privileges, or by any other constitutional means").

In 1787, the states sent delegates to a Constitutional Convention to consider ways of improving the Articles of Confederation. Some members initially believed that the Articles could be augmented by giving Congress power to coerce states.[238] Others argued that coercive power over states was not a viable option and would lead to a civil war.[239] The Convention quickly abandoned any pretense of improving the Articles of Confederation and instead proposed an entirely new plan of government.[240] The Constitution established a federal government capable of exercising its own legislative, executive, and judicial powers. This meant that the federal government would not be dependent upon the states and could operate directly on the citizenry in carrying out such important functions as raising revenue,[241] raising and supporting the armed forces,[242] punishing violations of the law of nations,[243] and regulating commerce among the several states.[244]

Although the Constitution gave the federal government the means of carrying its powers into execution, it limited the powers assigned to the federal government both substantively and procedurally. As Madison explained, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[245] At least in theory, therefore, the Constitution left the states with exclusive power to regulate numerous matters within their borders, free from federal interference. In practice, however, states appear to possess a vanishingly small sphere of exclusive authority, due primarily to Congress's expansive assertion—and the Supreme Court's expansive interpretation—of

238. Clark, *supra* note 237, at 1843-47.

239. *Id.*

240. *Id.*

241. *See* U.S. CONST. art. I, § 8, cl. 1.

242. *See id.* cl. 12.

243. *See id.* cl. 10. For a discussion of the states' failure to heed the Continental Congress's request that states enact laws to remedy violations of the law of nations, see Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 494-507 (2011).

244. *See* U.S. CONST. art. I, § 8, cl. 3.

245. THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

the commerce power.[246] Thus, today many matters are subject to concurrent regulation by the states and the federal government.

The Founders understood that the establishment of two governments with overlapping powers—operating in the same territory, with respect to the same people, at the same time—would require a mechanism for resolving conflicts between state and federal law. After rejecting the alternative mechanisms of military force and a congressional negative over state law, the Founders chose the Supremacy Clause to perform this function. As discussed, the Clause recognizes only three sources of law as "the supreme Law of the Land"—"[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States."[247] And the negative implication of this provision—as we have explained—is that, absent an applicable provision of the supreme law of the land, the Constitution gives courts no warrant to disregard state law as applied to matters within the concurrent or exclusive authority of the states. *Erie* recognized this principle in declaring that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."[248]

As a constitutional matter, *Erie* makes sense as applied to matters—like ordinary tort liability—that fall within the concurrent or exclusive authority of the states. Under the Supremacy Clause, state law (whether adopted by the state legislature in a statute or by the state's highest court in a decision) governs such questions unless and until the appropriate actors adopt a contrary provision of "the supreme Law of the Land" pursuant to constitutionally prescribed lawmaking procedures. In the absence of such supreme federal law, *Erie* concluded that as far as federal courts are concerned, "[t]he authority and only authority is the State."[249] Thus, absent a controlling provision of supreme federal law, *Erie* requires

246. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2585-91 (2012) (affirming that Congress may regulate local economic activities that in aggregate substantially affect interstate commerce); Gonzales v. Raich, 545 U.S. 1, 15-19 (2005) (same); United States v. Lopez, 514 U.S. 549, 561, 565-66 (1995) (same).

247. U.S. CONST. art. VI, cl. 2.

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

249. *Id.* at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 535 (1928) (Holmes, J., dissenting)).

federal courts to apply controlling state law, including state choice of law rules (and, in theory, even a state's choice to apply general law to a case within its regulatory power). As discussed in the next Section, however, there are some matters that the Constitution places beyond the authority of the states. As to those matters, the Supremacy Clause does not require—but generally forbids—the application of state law.

B. Matters Beyond State Authority

The Constitution places some matters beyond the authority of the states, both expressly and by necessary implication. For example, the Constitution places certain powers relating to foreign relations beyond state authority. The Constitution vested the federal political branches with the exclusive means of recognizing foreign sovereigns, "including the powers to send and receive ambassadors and to make treaties."[250] At the time of the Founding, recognition signified that one nation would treat another as a free and independent state under the law of nations and respect its accompanying rights under such law. It was particularly important that the nation speak with one voice in such matters because the Founders understood that the "Union will undoubtedly be answerable to foreign powers for the conduct of its members."[251] Thus, "Florida's decision to establish diplomatic relations with Cuba, for example, would necessarily undermine the foreign relations of the United States as a whole,"[252] and could even lead to hostilities.[253] In addition to the power of recognition, the Constitution gave the federal political branches exclusive authority to make war, issue reprisals, and authorize captures.[254] State action that commenced, conducted, or escalated hostilities with other nations would violate the Constitution's exclusive vesting of these powers in the federal political branches.[255] As we have recently explained, courts have long applied

250. Bellia & Clark, *supra* note 29, at 762.

251. THE FEDERALIST No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

252. Clark, *supra* note 6, at 1298.

253. *See* THE FEDERALIST No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("All questions in which [ambassadors] are concerned are ... directly connected with the public peace.").

254. U.S. CONST. art. I, § 8, cl. 11.

255. Bellia & Clark, *supra* note 29, at 762-63.

traditional principles of the general law of state-state relations in ways that uphold the exclusive powers of the federal political branches over recognition, war, reprisals, and captures.[256] The best explanation for this practice is not that federal courts possess general common-law lawmaking powers, but that specific constitutional provisions sometimes require federal courts to apply such law.

Accordingly, even after *Erie*, federal courts have properly upheld basic features of the constitutional structure by applying general law to certain matters beyond state regulatory authority. This Section describes two such matters—cases involving the territorial integrity and absolute equality of the states, and cases involving the exclusive powers of the federal political branches to conduct foreign relations. In these matters, the Court has applied general law principles—sometimes (mis)characterized as federal common law—in ways that uphold basic aspects of the constitutional design.

1. Territorial Integrity and Absolute Equality of States

Under the Constitution, state authority is limited by the territorial integrity and absolute equality of the states. Every state—whether present at the Founding or later admitted by Congress —had defined boundaries when it joined the Union. The Constitution protects these boundaries by providing that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."[257] In addition, the Constitution presupposes that all states are coequal sovereigns within the federal union. The constitutional equality of the states is reflected by their equal suffrage in the Senate,[258] and the Constitution even exempts this feature of the constitutional structure from amendment under Article V.[259] The constitutional

256. *Id.* at 733-34, 779-808 & n.207.

257. U.S. CONST. art. IV, § 3, cl. 1.

258. *See id.* art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.").

259. *See id.* art. V (providing, as an exception to the amendment process, that "no State,

equality of the states is the basis for the Supreme Court's longstanding "equal footing" doctrine, under which new states enjoy the same rights and privileges as the original states.[260] Indeed, the Court has long recognized that "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized."[261]

The territorial integrity and constitutional equality of the states provide one basis for the appropriate use of general law in federal court after *Erie*. On the same day that *Erie* declared "[t]here is no federal general common law,"[262] the Supreme Court applied "federal common law" in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* to determine an interstate boundary and apportion water in an interstate stream.[263] The Court explained that "neither the statutes nor the decisions of either State can be conclusive" upon these questions.[264] Rather, the constitutional principle of "equality of right" must resolve such questions because they are beyond the authority of any individual state to govern.[265] Accordingly, in apportioning water in an interstate stream, the Court has pursued "an equitable apportionment, ... having regard to the 'equal level or plane on which all the States stand, in point of power and right, under our constitutional system.'"[266]

Similarly, in resolving boundary disputes between states, the Court has borrowed doctrines from the general law of nations as a means of upholding the constitutional equality of the states. Early on, the Court described such doctrines as founded upon the "perfect equality and absolute independence of sovereigns" under the law of

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without its Consent, shall be deprived of its equal Suffrage in the Senate").

260. *See, e.g.*, Pollard v. Hagan, 44 U.S. (3 How.) 212, 223 (1845) ("When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession."); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 289 (1992) ("The Supreme Court has long treated the equal footing doctrine as having constitutional significance.").

261. Coyle v. Smith, 221 U.S. 559, 580 (1911).

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

263. 304 U.S. 92, 110 (1938).

264. *Id.*

265. Connecticut v. Massachusetts, 282 U.S. 660, 670-71 (1931).

266. *Id.* (quoting Wyoming v. Colorado, 259 U.S. 419, 465, 470 (1922)).

nations,[267] and the Court has applied them to resolve interstate disputes ever since. For example, in *New Jersey v. Delaware*, the Court applied an international principle, the doctrine of the thalweg, to ascertain the location of the states' border in the Delaware River. "The Thalweg, or downway, is the track taken by boats in their course down the stream, which is that of the strongest current."[268] The Court has determined state borders according to the thalweg, rather than the geographical center of the river, to ensure that both states would enjoy equal access to the river for purposes of navigation and commerce.[269] In this way, general law supplied a rule well suited to upholding the constitutional equality of the states.

Although the Court has sometimes characterized the rules applicable in disputes between states as "federal common law,"[270] these rules are often nothing more than general law rules that the Court has borrowed from customary bodies of law to implement some feature of the constitutional structure, such as the constitutional equality of the states.[271] At least in such cases, the application of general law in federal court does not run afoul of *Erie*. Disputes between states are beyond the authority of either state to resolve, and the Constitution itself requires federal courts to apply general law rules designed to uphold the constitutional equality of the states. Thus, the application of general law in such cases does not violate the negative implication of the Supremacy Clause (as it did

267. Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812).

268. 291 U.S. 361, 379 (1934).

269. *See id.* at 380-81 ("Bays and rivers are more than geometrical divisions. They are the arteries of trade and travel.").

270. *See, e.g.*, Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

271. *Cf.* Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975) (identifying examples of "constitutional common law" inspired and authorized by various constitutional provisions, but "subject to amendment, modification, or even reversal by Congress"). In this context, "federal common law" connotes a rule of decision capable of displacing contrary state law, but the source of the displacement is the Constitution rather than any independent policy crafted by judges. Not all rules applied to resolve disputes between states consist of "off-the-rack" general law principles. On occasion, the Court must craft novel rules to deal with novel problems, but even on these occasions the Court is sensitive to the constitutional equality of the states in crafting such rules.

in *Erie*), but rather furthers a basic feature of the Constitution, which is itself part of "the supreme Law of the Land."[272]

2. Foreign Relations Powers of the Political Branches

The Constitution assigns certain foreign relations powers exclusively to the federal political branches, such as recognizing foreign nations,[273] declaring and making war,[274] and authorizing captures and reprisals.[275] From the time of the Founding to the present, federal courts have applied traditional principles of the general law of state-state relations in a way that upholds the Constitution's allocation of foreign relations powers or their exercise. Although the precise scope of the federal courts' power to apply the law of nations is the subject of heated academic debate,[276] we believe that the best understanding of the constitutional structure and Supreme Court precedent is that—at least in some cases—federal courts must apply principles derived from the general law of nations in order to uphold the political branches' exclusive Article I and II powers over recognition, war, captures, and reprisal.

As we have explained elsewhere, the Founders presumed that federal courts would enforce those background principles of the law of nations necessary to respect the sovereignty of other nations and to maintain peace.[277] These principles, well known to the Founders from their political experience and through the writings of

272. This conclusion does not mean that federal courts have complete discretion to adopt general law of their own choosing. To the contrary, separation of powers and the procedural safeguards of federalism constrain federal courts to adopt only those rules necessary to uphold an identifiable feature of the constitutional structure, such as the constitutional equality of the states.

273. *See* U.S. CONST. art. II, § 2, cl. 2 (providing that the President has power to send ambassadors with the consent of the Senate); *id.* § 3 (providing that the President has power to receive ambassadors); Bellia & Clark, *supra* note 29, at 764-69 (explaining that these powers provide the means of recognizing foreign states).

274. U.S. CONST. art. I, § 8, cl. 11.

275. *Id.*

276. *Compare* Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825-27 (1998) (arguing that federal courts have the power to apply the law of nations even if not adopted by the political branches), *with* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1620-24 (1997) (arguing that the law of nations applies only when state or federal law incorporates it).

277. *See* Bellia & Clark, *supra* note 15, at 39, 41-44.

Emmerich de Vattel and others,[278] required respect for other nations' rights to exercise territorial sovereignty, conduct diplomatic relations, exercise neutral rights, and peaceably enjoy liberty.[279] Article III of the Constitution authorizes federal jurisdiction over various categories of cases and controversies likely to implicate these rights under the law of nations.[280] At the Founding, if a federal court failed to protect such rights, the offended nation would have had just cause to retaliate against the United States, including by force.[281] The Constitution, however, vests exclusive authority in the political branches to recognize foreign nations as full sovereigns under the law of nations, to decide questions of war and peace, and to authorize reprisals and captures.[282] Accordingly, federal courts have protected the rights of recognized foreign nations under the law of nations in ways that have upheld the political branches' authority over recognition and avoided usurping their powers to make war and authorize reprisals and captures.

Throughout U.S. history, the Supreme Court has tied the application of traditional principles of the general law of nations to the Constitution's allocation of power to the political branches. In some cases, particularly decisions of the Marshall Court, the Court expressly tied its application of general law to the political branches' recognition, war, reprisal, and capture powers.[283] In other cases, including more recent cases in the twentieth century, the Court either tied such law to the Constitution's allocation of foreign relations powers more generally[284] or simply applied such law in a way that was consistent with the political branches' exclusive power

278. *See id.* at 15-16 ("Vattel's treatise, *The Law of Nations*, was well known in England and America at the time of the founding.").

279. *See id.* at 16-19 (describing perfect rights).

280. *See id.* at 37-44.

281. EMMERICH DE VATTEL, THE LAW OF NATIONS § 17, at 5 (London, J. Newberry et al., 1759) ("The perfect right is that to which is joined the right of constraining those who refuse to fulfill the obligation resulting from it.").

282. *See supra* notes 273-75 and accompanying text.

283. *See, e.g.*, The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815) ("[T]he Court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them ... is a political not a legal measure. It is for the consideration of the government not of its Courts.").

284. *See, e.g.*, United States v. Pink, 315 U.S. 203, 233 (1942) (concluding that New York's failure to apply the act of state doctrine, derived from the law of nations, was not a "power ... accorded a State in our constitutional system").

over recognition, war, reprisals, and captures.[285] We argue in recent work that the best reading of the Court's decisions—consistent with the Constitution's original public meaning—is that the judiciary must apply certain traditional principles of general law when necessary to uphold these specific powers of the political branches.[286] The application of "general law" in such cases does not run afoul of *Erie* because they concern matters within the exclusive constitutional authority of the federal government and therefore beyond the power of the states. In addition, the Constitution itself requires the application of general law, thus satisfying the Supremacy Clause. Two principles derived from traditional general law—the act of state doctrine and head of state immunity—illustrate these points.

a. The Act of State Doctrine

The act of state doctrine establishes that neither federal nor state courts may "examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles."[287] The doctrine has deep roots in traditional principles of territorial sovereignty recognized by the general law of nations. The Supreme Court upheld such foreign sovereignty in several cases that arose during the first decades after ratification. For example, in 1812, the Marshall Court observed that sovereignty confers upon nations "absolute and complete jurisdiction within their respective territories."[288]

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285. *See* Bellia & Clark, *supra* note 29, at 799-805.

286. *See id.* at 732. This approach does not rely on "freestanding" conceptions of separation of powers. To the contrary, our understanding of the Constitution relies on specific constitutional provisions read in light of the background principles of the law of nations against which they were drafted. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944-45 (2011); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2467 (2003) (explaining that "background conventions, if sufficiently firmly established, may be considered part of the interpretive environment in which [the lawmaker] acts").

287. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

288. Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812); *see id.* ("[J]urisdiction of the nation within its own territory is necessarily exclusive and absolute."); *see also* Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 336 (1822) (holding that a judicial inquiry into the means by which another nation acquired a public ship "would be to exert the

Although the Supreme Court applied the act of state doctrine numerous times,[289] *Banco Nacional de Cuba v. Sabbatino* required the Court to reconsider the doctrine in light of *Erie*. *Sabbatino* was a diversity action that arose out of Cuba's nationalization of sugar companies located in Cuba and owned in part by American citizens.[290] The parties asked the Court to decide whether the original owner or the Cuban government was entitled to the proceeds of sugar sold by Cuba after the expropriation.[291] The Court observed that "New York has enunciated the act of state doctrine in terms that echo those of federal decisions."[292] Thus, the Court could have resolved the case by applying the act of state doctrine as a matter of state law.[293] Instead, however, *Sabbatino* distinguished *Erie* and held that "the scope of the act of state doctrine must be determined according to federal law."[294]

In reaching this conclusion, the *Sabbatino* Court began by stating that "[i]t seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie*."[295] Without much analysis, the Court noted that the act of state doctrine was most analogous to "the bodies of law applied between States over boundaries and in regard to the apportionment of interstate waters."[296] The Court observed that *Hinderlider* was decided the same day as *Erie*, and identified a strong federal interest in ensuring an equitable apportionment of interstate waters notwithstanding contrary state law.[297] The Court stated that "[t]he problems surrounding the act of state doctrine are, albeit for different

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right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy").

289. *See* United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); Oetjen v. Cent. Leather Co., 246 U.S. 297 (1918); Ricaud v. Am. Metal Co., 246 U.S. 304 (1918); Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Underhill v. Hernandez, 168 U.S. 250 (1897).

290. *Sabbatino*, 376 U.S. at 401.

291. *Id.* at 400-06.

292. *Id.* at 424.

293. *See id.* at 425 ("[O]ur conclusions might well be the same whether we dealt with this problem as one of state law or federal law." (internal citation omitted)).

294. *Id.* at 427.

295. *Id.* at 425.

296. *Id.* at 426.

297. *Id.* at 426-27.

reasons, as intrinsically federal as are those involved in water apportionment or boundary disputes."[298]

Those "different reasons" relate to the Court's understanding that "[t]he act of state doctrine does ... have 'constitutional' underpinnings."[299] These "underpinnings" trigger the Supremacy Clause and render *Erie* inapplicable. According to the Court, the doctrine "arises out of the basic relationships between branches of government in a system of separation of powers,"[300] and "its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."[301] The act of state doctrine reflects the judiciary's sense "that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole."[302] In other words, it reflects "a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community."[303] In light of these considerations, the Court has come to understand the act of state doctrine as "a consequence of domestic separation of powers."[304]

The separation of powers rationale for the act of state doctrine has federalism implications as well. Because the doctrine rests on the Constitution's allocation of exclusive powers to the political branches of the federal government, the states are not free to depart from it. Doing so, under the Court's rationale, would usurp the exclusive power of the political branches to decide when, whether, and how the United States should override the doctrine and retal-

298. *Id.* at 427.

299. *Id.* at 423.

300. *Id.*

301. *Id.* at 427-28.

302. *Id.* at 423.

303. *Id.* at 425. For wrongs created by foreign acts of state, the Court suggested that the remedy lies not with the judiciary, but "along the channels of diplomacy" conducted by the executive. *Id.* at 418 (quoting Shapleigh v. Mier, 299 U.S. 468, 471 (1937)).

304. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 404 (1990). As we explain elsewhere, the *Sabbatino* Court could have invoked original constitutional meaning and a long line of Court precedent to rest its decision more explicitly on the Constitution's specific allocation of recognition and reprisal powers to the federal political branches. Bellia & Clark, *supra* note 29, at 815-18.

iate against other nations. Accordingly, the *Sabbatino* Court properly concluded that *Erie* is inapplicable in this context.[305] If the Constitution prevents states from abrogating the act of state doctrine, then the Constitution does not require federal courts sitting in diversity to apply state law purporting to do so. *Erie* rests on the premise that in the absence of "the supreme Law of the Land," state law continues to govern in both state and federal court.[306] In *Erie*, the general law applied by federal courts had no grounding in supreme federal law, and thus the judiciary's displacement of state law contradicted the negative implication of the Supremacy Clause. In act of state cases, by contrast, the Constitution itself displaces contrary state law under the Supremacy Clause by allocating exclusive powers over recognition, war, reprisals, and captures to the political branches of the federal government. All of these powers—especially the recognition of foreign sovereigns—imply that courts and states should not take it upon themselves to abrogate the traditional territorial rights of foreign sovereigns under the general law of nations. The *Sabbatino* Court thus distinguished *Erie* and concluded that "the act of state doctrine is a principle of decision binding on federal and state courts alike."[307]

b. Head of State Immunity

The Constitution's assignment of specific foreign relations powers to the federal political branches also sheds light on post-*Erie* cases involving other rules drawn from the general law of nations. For example, the Constitution's allocation of powers to the political branches suggests that courts should apply general law to recognize immunity for heads of recognized foreign states even after *Erie*. Head of state immunity is one of the most important and well-known principles of the law of nations not yet codified. The Supreme Court has acknowledged its importance since the Founding,[308] and

305. *Sabbatino*, 376 U.S. at 425-27.

306. *See supra* Part II.C.

307. *Sabbatino*, 376 U.S. at 427.

308. *See* Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812) ("[T]he whole civilized world" recognizes "the exemption of the person of the sovereign from arrest or detention within a foreign territory.").

nations continue to respect it. Because it derives from the general law of nations, head of state immunity presents the same potential *Erie* issues as the act of state doctrine and doctrines applied in disputes between states. Like those doctrines, head of state immunity is a form of general law derived from traditional principles of the law of nations. And like those doctrines, head of state immunity is necessary to uphold an important feature of the constitutional design—in this case, the exclusive constitutional powers of the political branches to recognize foreign states, make and conduct war, and authorize reprisals and captures. Accordingly, application of head of state immunity in federal court is both consistent with *Erie* and necessary to uphold the Constitution's allocation of powers.[309]

As we have discussed in prior work, head of state immunity is closely related to the broader doctrine of foreign sovereign immunity.[310] Prior to *Erie*, federal and state courts resolved claims to immunity by looking to the general law of nations.[311] In 1976, Congress specified the requirements of foreign sovereign immunity in U.S. courts in the Foreign Sovereign Immunities Act (FSIA or Act).[312] Most federal courts interpreted the FSIA to encompass immunity for high-ranking foreign officials as well as foreign states.[313] In 2010, however, in *Samantar v. Yousuf*, the Supreme Court held that the term "foreign state" as used in the Act does not "include an official acting on behalf of the foreign state,"[314] thus leaving head of state immunity uncodified. *Samantar* involved a suit against the former Prime Minister of Somalia for acts of torture and extrajudicial killing that he allegedly authorized while head of state.[315] Although the Court found the FSIA to be inapplicable, it

309. *See* Bellia & Clark, *supra* note 15, at 90.

310. *See* Bellia & Clark, *supra* note 29, at 825.

311. *See* Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 924 (2011).

312. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11 (2006)).

313. *See In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 83 (2d Cir. 2008); Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002); Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999); El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990).

314. 130 S. Ct. 2278, 2289 (2010).

315. *Id.* at 2282.

indicated that, on remand, the defendant "may be entitled to immunity under the common law."[316] The Court did not discuss the content of such "common law" or why it might be applicable in federal court.[317]

Under the Constitution's allocation of powers to the political branches, however, there is a strong argument that the Constitution itself requires state and federal courts to grant immunity to heads of recognized foreign states until the political branches themselves decide to abrogate it.[318] Recognition of a foreign state or government by the political branches signifies that the United States will respect the rights of that sovereign under the law of nations.[319] Accordingly, failure by either state or federal courts to accord immunity to a sitting head of a recognized state would countermand the political branches' decision to recognize that state and possibly usurp the political branches' exclusive powers to make war and to authorize reprisals and captures.[320] For this reason, courts should continue to apply general law immunity to heads of recognized foreign states not because Article III empowers them to make "federal common law," but rather because the Constitution's

316. *Id.* at 2292-93.

317. The Court did, however, suggest that the State Department may have a "role in determinations regarding individual official immunity" similar to the role it played in determinations of foreign sovereign immunity prior to the enactment of the FSIA. *Id.* at 2291. Commentators are divided on the propriety and effect of case-by-case suggestions of immunity by the executive branch. *Compare* Wuerth, *supra* note 311 (arguing against judicial deference to executive suggestions of immunity), *with* Lewis S. Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911 (2011) (arguing in favor of judicial deference to executive suggestions of immunity).

318. Accordingly, we do not categorically accept the conclusion of Professors Bradley and Goldsmith that "[a]fter *Erie*, ... a federal court can no longer apply [customary international law] in the absence of some domestic authorization to do so, as it could under the regime of general common law," Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852-53 (1997), at least insofar as they suggest that domestic authorization must be an act of the political branches. *See id.* at 870. In our view, the Constitution itself provides domestic authorization—indeed, a domestic prescription—that federal courts apply traditional principles of the law of nations when necessary to uphold the allocation of powers to the political branches.

319. *See* Bellia & Clark, *supra* note 29, at 735.

320. In the absence of recognition, courts have greater latitude to reject claims of head of state immunity. *See* United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) (denying head of state immunity to General Manuel Noriega because the President had never recognized Noriega as the legitimate head of Panama and had manifested an intent to deny such immunity by capturing and prosecuting him).

allocation of exclusive powers to the political branches over recognition, war, reprisals, and captures in Articles I and II requires courts to do so.

From this perspective, it would be fallacious to read *Erie* to permit federal courts to apply certain traditional principles of the law of nations only if state law has adopted them. If the Constitution requires the application of such principles, then *Erie* and the Supremacy Clause are satisfied. A Second Circuit case that arose just ten years after *Erie* is illustrative. In *Bergman v. De Sieyes*, Bergman, a New Yorker, sued De Sieyes, an accredited minister of France, by serving him as he passed through New York on his way to his diplomatic post in Bolivia.[321] De Sieyes removed the case to federal court on the basis of diversity of citizenship jurisdiction and asserted diplomatic immunity under general principles of international law.[322] Although Congress codified diplomatic immunity in the Diplomatic Relations Act of 1978,[323] such immunity was not codified at the time of *Bergman*. Thus, the case presented the question whether the court should apply state law or the general law of nations in determining the applicability of the defense. Under the apparent influence of *Erie*, Judge Learned Hand explained for the Second Circuit that "the law of New York determines [the validity of service], and, although the courts of that state look to international law as a source of New York law, their interpretation of international law is controlling upon us."[324] Upon examining New York decisions and other sources, the court was "disposed to believe that the courts of New York would today hold that a diplomat in transitu would be entitled to the same immunity as a diplomat in situ."[325]

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321. 170 F.2d 360, 361 (2d Cir. 1948).

322. *Id.* at 360-61.

323. *See* 22 U.S.C. §§ 254a-254e (2006).

324. *Bergman*, 170 F.2d at 361; *see* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1558 (1984) ("So great a judge as Learned Hand apparently assumed that international law was part of state common law for this purpose and that a federal court in diversity cases had to apply international law as determined by the courts of the state in which it sat.").

325. *Bergman*, 170 F.2d at 363. Judge Hand did leave open the possibility that a state's departure from international law could give rise to a federal question: "Whether an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, would present a federal question we need not consider, for neither is present here." *Id.* at 361.

In our view, treating the question in *Bergman* as one of state law under *Erie* represents a significant category mistake. *Erie*'s Supremacy Clause rationale applies only to matters—such as torts and commercial transactions—that fall within the exclusive or concurrent authority of the states. In such cases, judicial reliance on general law to disregard state law circumvents the political and procedural safeguards of federalism built into the Supremacy Clause. *Erie*'s Supremacy Clause rationale does not apply to matters—such as the rights of diplomats in transit—that fall outside the constitutional authority of the states. In such cases, the Constitution itself displaces state law by assigning exclusive authority over such matters to the political branches of the federal government. Specifically, *Bergman* implicated at least two powers assigned by the Constitution exclusively to the political branches: the recognition power and the power to declare war.[326] For these reasons, Judge Hand should have concluded—as the Supreme Court later did in *Sabbatino*—that *Erie* was inapplicable in this context because the Constitution's allocation of powers preempted state law and required the application of general law.

CONCLUSION

Despite the widespread assumption that *Erie* banished general law from federal court, the Constitution itself continues to require the application of general law in certain contexts. The key to understanding the place of general law in federal court after *Erie* is to distinguish between matters that the Constitution leaves within the exclusive or concurrent authority of the states and matters that the Constitution places beyond state power. As to the former category, the negative implication of the Supremacy Clause requires federal courts to apply controlling state law, including state judge-made law, unless and until constitutionally designated actors take the steps necessary to adopt a contrary provision of "the supreme Law of the Land." As to the latter category, the Supremacy Clause poses no absolute barrier to the application of general law in federal court. In fact, sometimes the judiciary must apply such law in order to uphold key features of the constitutional structure, including the

326. *See* Bellia & Clark, *supra* note 15, at 82-84; Bellia & Clark, *supra* note 29, at 824.

Constitution's exclusive allocation of specific foreign relations powers to the federal political branches.