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A Critical Guide to *Erie Railroad Co. v. Tompkins*

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A CRITICAL GUIDE TO *ERIE RAILROAD CO. v. TOMPKINS*

CALEB NELSON*

TABLE OF CONTENTS

INTRODUCTION	922
I. THE RELATIONSHIP BETWEEN STATE AND FEDERAL COURTS BEFORE <i>ERIE</i>	924
A. <i>The Bottom Line</i>	925
B. <i>Were People Crazy Then?</i>	929
1. <i>The Nature and Sources of Unwritten Law</i>	931
2. <i>Who Should Defer to Whom About What?</i>	938
a. <i>Deference on Questions of “Local” Law</i>	941
b. <i>Non-Deference on Questions of “General” Law</i>	944
II. JUSTICE BRANDEIS’S ARGUMENTS IN <i>ERIE</i>	950
A. <i>Justice Brandeis’s Historical Argument</i>	951
B. <i>Justice Brandeis’s Practical Arguments</i>	960
1. <i>The Murkiness of the Distinction Between “General” and “Local” Law</i>	960
2. <i>Disuniformity and Forum Shopping</i>	964
3. <i>“Discrimination” Against Citizens of the Forum State</i>	970
C. <i>Constitutional Arguments</i>	973
CONCLUSION	984

* Emerson G. Spies Distinguished Professor of Law, University of Virginia. I am grateful to Michael Green, Emily Kadens, Jeff Pojanowski, Mel Urofsky, and participants in this symposium for helpful comments. I owe special thanks to Michael Collins, John Harrison, and Ann Woolhandler, both for reading drafts of this Article and for honing my thoughts about *Erie* over the years. I am also indebted to Joseph Ashbrook for his excellent work as a research assistant. Last but not least, I hope it is apparent that I have stolen my title from Professor Van Alstyne. Readers who are not familiar with his critical guides to *Marbury v. Madison* and *Ex parte McCordle* should put this Article down and read his instead.

INTRODUCTION

No informed observer has ever been in doubt about the importance of Justice Brandeis's opinion in *Erie Railroad Co. v. Tompkins*.¹ Almost as soon as it was issued, the cognoscenti were calling it a “transcendently significant opinion,”² a “thunderclap decision,”³ and “one of the most dramatic episodes in the history of the Supreme Court.”⁴ Seventy-five years later, *Erie* remains an “iconic case[]”—one that “every lawyer knows ... by name” and that “is thought to express something basic about the United States legal system.”⁵ Above and beyond its immediate holding (which is obviously important in its own right), *Erie* has become the starting point for many modern arguments about federalism and the separation of powers.

Unfortunately, *Erie* is a shaky foundation for legal reasoning. From the standpoint of technical, lawyerly craftsmanship, Justice Brandeis's opinion has many vices. It relies on contestable premises that it does not make explicit. It delivers grand statements that are misleading in the absence of careful qualification (which it does not supply). Upon close examination, some of the arguments that it endorses fall apart entirely, and others are—at best—much more complicated than it acknowledges. Insofar as it purports to rest on the Constitution, moreover, it advances arguments so cavalierly and impressionistically as to impede responsible analysis. In the words of a contemporaneous student note, “The opinion in *Erie Railroad v. Tompkins* lacks much of the precision which an important reexamination of constitutional distribution of power might be expected to contain.”⁶

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

2. Arthur Krock, *In the Nation: A Momentous Decision of the Supreme Court*, N.Y. TIMES, May 3, 1938, at 22.

3. Charles T. McCormick & Elvin Hale Hewins, *The Collapse of “General” Law in the Federal Courts*, 33 ILL. L. REV. 126, 126 (1938).

4. Robert H. Jackson, *The Rise and Fall of Swift v. Tyson*, 24 A.B.A. J. 609, 609 (1938).

5. Craig Green, *Repressing Erie's Myth*, 96 CALIF. L. REV. 595, 595 (2008).

6. Note, *Congress, the Tompkins Case, and the Conflict of Laws*, 52 HARV. L. REV. 1002, 1002 (1939) (footnote omitted).

None of this means that *Erie*'s bottom line is necessarily wrong. But lawyers and law professors who seek to extend *Erie*'s analysis need to recognize the shoals concealed in Justice Brandeis's opinion. It is easy to overread *Erie*, and it is also easy to find apparent support in *Erie* for propositions that are false.

Precisely because *Erie* is so iconic, of course, it has been analyzed exhaustively. In recent years, revisionist scholars have made great strides in understanding both *Erie* and what came before *Erie*. To criticize Justice Brandeis's opinion in light of this new learning is surely unfair. But it is still worth doing, because *Erie*'s status in our legal firmament makes it crucial to understand exactly what *Erie* held and how that holding might be supported.

Erie addressed one of the recurring questions of American federalism: What is the status in federal court of precedents established by the courts of a particular state? Throughout our history, the answer has depended on what the precedents are about; federal courts have always felt more need to defer to a state's highest court about certain aspects of the state's own law than about the law of other sovereigns. Before *Erie*, however, federal courts drew the crucial lines in different places than they do now.

As background for analysis of Justice Brandeis's opinion, Part I of this Article provides a brief account of the doctrine that prevailed before *Erie*. Part II then evaluates each of the main arguments—historical, practical, and constitutional—that Justice Brandeis advanced in support of his claim that federal law required a different doctrine. By and large, the criticisms that I will be advancing are not original to me; although I will be sifting through the voluminous literature about *Erie* to highlight what I consider to be the key points, most of what I have to say has already been said in one form or another by others. But what this Article lacks in novelty, I hope that it will make up for in utility. While the new learning about *Erie* is gradually spreading, my sense is that many scholars and most students remain in the grip of outdated understandings. I hope that there is some value in providing a concise assessment of what Justice Brandeis said, what he may have meant, and the extent to which what he said or meant is true.

I. THE RELATIONSHIP BETWEEN STATE AND FEDERAL COURTS
BEFORE *ERIE*

Whatever else it did, *Erie* abandoned what it repeatedly called “the doctrine of *Swift v. Tyson*.”⁷ Justice Brandeis is not to blame for that label, which was common in the law-review articles of his day.⁸ But the label has the potential to mislead, for it suggests that Justice Story’s 1842 opinion in *Swift v. Tyson*⁹ was itself a watershed decision—one that broke dramatically from past understandings of the relationship between state and federal courts. At the time that Brandeis was writing, and for many years thereafter, that was indeed the conventional view of *Swift*.¹⁰ As modern scholars have shown, however, *Swift* was continuous with prior practice.¹¹

Be that as it may, the doctrine that *Erie* abandoned was part of a larger set of practices that had many different moving parts and that could be characterized in many different ways. Rather than delving into too many complications at the outset, Part I.A simply summarizes a few important aspects of the bottom line. Before readers can snicker too much at the idiocy of the nineteenth century, Part I.B then discusses why smart people might have drawn the distinctions that this bottom line reflects.

7. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74, 77, 79 (1938).

8. See, e.g., Armistead M. Dobie, *Seven Implications of Swift v. Tyson*, 16 VA. L. REV. 225, 226-27 (1930); H. Parker Sharp & Joseph B. Brennan, *The Application of the Doctrine of Swift v. Tyson Since 1900*, 4 IND. L.J. 367 (1929).

9. 41 U.S. (16 Pet.) 1 (1842).

10. See, e.g., Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 81-85, 88 n.85 (1923) (portraying *Swift* as a radical departure from previously settled understandings).

11. The seminal article on this point is William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984); see also, e.g., TONY FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM 18 (1981) (“In several ways the *Swift* decision rested upon established assumptions concerning the federal courts’ function in the federal system.”). For an even earlier work that points in the same direction and that also provides an excellent elaboration of the logic behind *Swift* and its antecedents, see RANDALL BRIDWELL & RALPH U. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW* (1977).

A. *The Bottom Line*

To understand the institutional arrangements that prevailed before *Erie*, one must start with a distinction that no longer matters—the distinction between “local” and “general” law. The “local” law of a particular state included both its *written* laws (such as the state constitution and statutes enacted by the state legislature) and at least a portion of its *unwritten* law (such as rules grounded in peculiar local customs and rules about the status of land and other things with a fixed locality in the state).¹² Some aspects of the unwritten law in force in each state, however, addressed “questions of a more general nature”¹³ and reflected sources that were common to all the states. Jurists of the day referred to this sort of unwritten law as “general” law.¹⁴

Within the limits of its legislative competence, each state could enact statutes to handle questions that would otherwise be governed by the unwritten law (whether “local” or “general”). On issues that concededly lay within the state’s legislative jurisdiction, moreover, such statutes would apply in federal court no less than in state court.¹⁵ In the words of one early opinion of the Federal Supreme Court, “That the statute law of the States must furnish the rule of decision to this Court, as far as they comport with the constitution of the United States, in all cases arising within the respective States, is a position that no one doubts.”¹⁶ Similarly, the other aspects of each state’s “local” law were also regarded as binding in federal court. In *Swift v. Tyson* itself, for instance, Justice Story

12. See, e.g., *Swift*, 41 U.S. (16 Pet.) at 18.

13. *Id.* at 18-19.

14. See, e.g., *id.* at 18.

15. By limiting this statement to “issues that concededly lay within the state’s legislative jurisdiction,” I am trying to smuggle in two separate qualifications. First, I am assuming that neither the Federal Constitution nor any other valid aspect of federal law, such as a statute enacted by Congress, stripped the states of lawmaking power over the relevant issues. (If federal law put those issues beyond the reach of the states’ lawmaking powers, then neither state courts nor federal courts were supposed to apply the rules that state law purported to supply.) Second, I am also assuming that standard conflict-of-law principles, of the sort applied in federal courts at the time, favored applying the local law of the particular state in question. (If the conflict-of-law rules applied in federal courts pointed elsewhere, then federal courts would not apply the local law of the particular state in question even if that state required its own courts to do so.)

16. *Shelby v. Guy*, 24 U.S. (11 Wheat.) 361, 367 (1826).

took for granted that not only “the positive statutes of the state” but also “local customs having the force of laws” supplied rules of decision for federal courts.¹⁷

On matters governed by the “local” law of a particular state, moreover, federal courts followed the precedents established by the state’s highest court about the content of the local law. Thus, if a state’s highest court had interpreted one of the state’s statutes in a certain way, and if the propriety of that interpretation was no longer an open question in the state’s own courts, federal judges ordinarily were supposed to defer to the state court’s interpretation (even if they themselves would have read the state statute differently).¹⁸ The same was true for settled decisions of the state’s highest court about the content of the “local” portion of the state’s unwritten law, such as the local law of real property.¹⁹

With respect to questions of “general” law, however, federal judges saw no need to follow precedents established by the courts of any particular state. That was true even when the relevant question

17. *Swift*, 41 U.S. (16 Pet.) at 18-19.

18. *See, e.g.*, *Green v. Lessee of Neal*, 31 U.S. (6 Pet.) 291, 295-301 (1832); *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159-65 (1825); *M’Keen v. Delancy’s Lessee*, 9 U.S. (5 Cranch) 22, 32-33 (1809); *see also* *Thatcher v. Powell*, 19 U.S. (6 Wheat.) 119, 127 (1821) (“In construing the acts of the Legislature of a State, the decisions of the State tribunals have always governed this Court.”).

Questions could arise at the margins of this principle. For instance, to the extent that a state supreme court’s gloss on a state statute reflected the court’s understanding of general jurisprudence rather than anything specific to the statute, did federal courts have to fall into line? *See* Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1280 & n.87 (2000) (citing some nineteenth-century cases that arguably suggest a negative answer). The rise of uniform state laws raised similar questions. To the extent that many different states had all enacted the same statutory language, did federal courts have to follow each individual state supreme court’s understanding of the language as enacted by that state? Did it matter whether the relevant statutory language was simply a codification of principles that would previously have been classified as matters of “general” law? *See* Dobie, *supra* note 8, at 236-38 (noting that as of 1930, the Supreme Court had not definitively answered these questions); J.B. Fordham, *The Federal Courts and the Construction of Uniform State Laws*, 7 N.C. L. REV. 423, 428-32 (1929) (urging federal courts to follow state-court interpretations even of uniform state laws); *see also* *Burns Mortg. Co. v. Fried*, 292 U.S. 487, 495 (1934) (resolving these questions in favor of deference to the courts of each individual state); Richard E. Coulson, *The National Conference of Commissioners on Uniform State Laws and the Control of Law-Making—A Historical Essay*, 16 OKLA. CITY U. L. REV. 295, 338-40 (1991) (noting that these questions had divided lower federal courts before *Burns*).

19. *See, e.g.*, *Detroit v. Osborne*, 135 U.S. 492, 498-500 (1890); *Jackson v. Chew*, 25 U.S. (12 Wheat.) 153 (1827).

(as presented in the case that the federal judges were considering) came within a single state's legislative jurisdiction, and even when the highest court of that state had repeatedly expressed its understanding of the proper answer.²⁰ To be sure, if the state legislature wanted to do so, it could codify that answer in a statute, which the federal courts would then apply (assuming they agreed that the state did indeed have legislative jurisdiction²¹). But even where the state had this sort of power to override the federal courts' view of the general law, doing so required something like a statutory enactment or the development of an indigenous custom among the state's people—something that would take the question out of the realm of “general” law and transform it into a question of “local” law.²² As long as the federal courts continued to classify the question as one of “general” law, they would not feel bound to accept the answer suggested by the state supreme court's precedents.

As John Harrison has observed, the legal status of “general” law during this period might be characterized in different ways.²³ Insofar as the “general” law addressed questions that lay within the legislative competence of individual states (even if they also lay within the legislative competence of the Federal Congress), the Supreme Court sometimes described it as being part of the law of each state. That way of understanding the legal status of the “general” law may have become especially prominent toward the end of the nineteenth century.²⁴ Here, for instance, is how the Supreme Court spoke in one case from 1898:

20. See, e.g., *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 370-79 (1893) (summarizing the doctrine and citing cases).

21. Again, I intend this formulation to incorporate the qualifications described in footnote 15.

22. See, e.g., *Baugh*, 149 U.S. at 378.

23. John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 526 (2000).

24. See Michael G. Collins, *Justice Iredell, Choice of Law, and the Constitution—A Neglected Encounter*, 23 CONST. COMMENT. 163, 175 (2006) (identifying some pre-*Swift* expressions of “[t]he view that the general common law applied in federal courts ... was in fact state law,” but adding that this view “seemed to become prominent only in the latter part of the Nineteenth Century”); cf. *id.* at 171-72 (observing that Justice Iredell's opinion in *United States v. Mundell*, 27 F. Cas. 23 (C.C.D. Va. 1795) (No. 15,834), is a much earlier manifestation of this view).

The question [presented by this case] ... is ... one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the State in which the cause of action arises. But the law to be applied is none the less the law of the State.²⁵

On this way of thinking, state law came in two flavors—“local” and “general.” The flavor affected how federal judges handled precedents established by the state supreme court: federal judges would defer to the state supreme court about the content of state law on “local” questions, but federal judges felt free to exercise independent judgment about the content of state law on “general” questions. But despite that difference in the federal courts’ practices, the “general” law in force within any particular state on questions that lay within the state’s legislative competence was properly regarded as state law.

I personally am drawn to this way of characterizing the legal regime before *Erie*. But a competing account is possible. On this competing account, “general” law consisted of “a body of rules and principles separate from the law of any state,” and the conflict-of-law rules applied in federal court sometimes told federal judges to draw rules of decision from this body of law rather than from state law.²⁶ People who took this view of the “general” law would have acknowledged that with respect to matters within a particular state’s legislative competence,²⁷ the conflict-of-law rules applied in federal court pointed toward the “general” law only in the absence of state statutes; if the state wanted to supersede the “general” law, the state could pass a statute to that effect, and federal as well as state courts would then look to the statute rather than the “general” law for rules of decision. But it was possible to acknowledge that fact without describing any portion of the “general” law as state law.

25. *Chi., Milwaukee & St. Paul Ry. Co. v. Solan*, 169 U.S. 133, 136 (1898); *accord* *Smith v. Alabama*, 124 U.S. 465, 478 (1888).

26. See Harrison, *supra* note 23, at 526 (describing this alternative way of conceptualizing the world before *Erie*); see also FREYER, *supra* note 11, at 37-38 (casting *Swift* in these terms).

27. As above, I intend this formulation to import the qualifications described in footnote 15.

Still, whether people regarded the “general” law on such matters as state law or as something else, it is clear that they did *not* regard it as *federal* law, at least in any ordinary sense of that term. Except in unusual situations when the “general” law had been federalized by a federal statute or the Federal Constitution,²⁸ state courts were not obliged to defer to the Federal Supreme Court about its content.²⁹ (By contrast, state courts were expected to follow the Federal Supreme Court’s precedents about the meaning of federal statutes, just as federal courts followed state precedents about the meaning of state statutes.³⁰) Likewise, “general” law was not considered federal law for purposes of triggering the Supreme Court’s appellate jurisdiction to review judgments rendered by state courts.³¹

B. Were People Crazy Then?

To modern readers, the doctrine articulated by *Swift v. Tyson* might seem baffling. Especially to the extent that the “general” law in force in each state was considered part of that state’s law, how could federal courts even have contemplated making independent judgments about its content? After all, to say that “general” law is state law is to say that it is part of the unwritten law of each particular state. And what is the unwritten law of each state but what that state’s highest court says it is?

28. See, e.g., *Chesapeake & Ohio Ry. Co. v. Kuhn*, 284 U.S. 44, 46-47 (1931) (reversing a state court’s judgment in a case under the Federal Employers’ Liability Act, and asserting that “in proceedings under that Act, wherever brought, the rights and obligations of the parties depend upon it and applicable principles of common law as interpreted and applied in the federal courts”); *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 491 (1916) (reversing a state court’s judgment and observing that “the proper measure of damages ... in cases arising under the Federal Employers’ Liability Act ... must be settled according to general principles of law as administered in the Federal courts”); see also Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 520 (2006) (discussing these cases).

29. See, e.g., *Stalker v. McDonald*, 6 Hill 93 (N.Y. 1843) (Walworth, C.) (declining to accede to the Supreme Court’s decision in *Swift v. Tyson* with respect to the question of commercial law at issue in that case).

30. See *id.* at 95 (“Upon questions arising under the constitution and laws of the United States, and upon the construction of treaties, the decisions of [the United States Supreme Court] are binding upon the state courts; and we are bound to conform our decisions to them.”).

31. See, e.g., *San Francisco v. Itsell*, 133 U.S. 65, 67 (1890); *San Francisco v. Scott*, 111 U.S. 768, 768-69 (1884); *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 286 (1876).

Modern lawyers often speak in precisely those terms. They tend to assume that the unwritten law of each state is fundamentally like the written law of each state, except that it is made by a different branch of the state government: written law is made by legislatures and unwritten law is made by appellate courts. Of course, modern lawyers acknowledge that appellate courts articulating new rules of unwritten law are subject to two constraints that do not apply to legislatures enacting new statutes. First, courts making unwritten law are constrained not only by constitutional provisions (which also constrain legislatures) but also by ordinary statutes and other applicable forms of written law. Second, courts making unwritten law are also constrained by the unwritten law that they or their hierarchical superiors made in the past; under prevailing norms of *stare decisis*, appellate courts cannot “repeal” their prior rules of unwritten law with the same ease that legislatures can repeal their prior statutes. But modern lawyers often speak as if these are the *only* constraints that courts face in devising new rules of unwritten law—with the result that the content of such rules is mostly a matter of judicial discretion. The more firmly one accepts that conclusion, the more one will equate the unwritten law with whatever courts say it is. And if one combines that understanding of the nature of law with certain understandings of federalism, which put each state in charge of making its own law, one might well gravitate toward *Erie*.

Before going any further, then, I want to explain how it might be possible *not* to gravitate toward *Erie*. Without getting too deep into the history of jurisprudential views (a topic that I am capable of treating only shallowly), Part I.B.1 flags the possibility of a distinction between the unwritten law in force in each state and the state courts’ decisions about the content of that law. Part I.B.2 then discusses why smart people might have thought it sensible for federal courts to defer to state judicial decisions with respect to the content of the “local” portion of the unwritten law in each state but not with respect to the content of the “general” portion of the unwritten law in each state.

1. *The Nature and Sources of Unwritten Law*³²

Neither the authority nor the content of *written* law is particularly puzzling. A statute is law because a legislature with lawmaking power enacted it. As the label “written law” reflects, moreover, each statute has a single authoritative formulation. To be sure, questions are bound to arise about how that formulation should be interpreted, and courts or other relevant actors may end up ascribing some meanings to the statute that the legislature did not make explicit. But subject to the need for interpretation, the law consists of the words that the legislature enacted, and those words are law because the legislature enacted them.

“Unwritten” law is different. While it does find written expression in judicial opinions, treatises, and the like, traditionalists would say that the unwritten law does not owe its authority to those written expressions, and those written expressions do not necessarily give it a single authoritative formulation. In particular, courts do not *enact* the common law³³ in the way that a legislature enacts a statute.

If unwritten law is not enacted as a statute is, what supplies its content, and what gives it its authority? One traditional answer, endorsed and propagated by Blackstone, was that it is shaped from the bottom up by the very people who are subject to it (or their predecessors). On this account, the unwritten law is at least partly *customary* law, the content of which grows out of practices that the people themselves have adopted over time.³⁴

32. A version of this Section was part of the fourth annual David Aldrich Nelson Lecture in Constitutional Jurisprudence that I recently delivered under the auspices of the Alexander Hamilton Institute. I am indebted to the Institute for its hospitality.

33. The common law is the prototypical example of “unwritten” law, but that term also encompasses principles of equity jurisprudence and rules that were typically enforced in admiralty.

34. See 1 WILLIAM BLACKSTONE, COMMENTARIES *64 (asserting that rules of unwritten law “receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom”); see also, e.g., BRIDWELL & WHITTEN, *supra* note 11, at 13-28 (elaborating upon the view that the common law drew much of its content from “customary norms” established by “the autonomous activities of individuals,” but noting that Americans did not accept Blackstone’s suggestion that only “immemorial” customs counted); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 23 n.65 (2001) (citing early American references to custom as a source of unwritten law); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 754 (1993) (“The common

This story may fit some areas of law (such as certain aspects of contract and property law) better than others (such as certain aspects of tort law). But to understand how customs might give rise to rules of decision for courts, let us consider one of the areas of law in which the story seems most natural. Imagine that the merchants throughout a particular region—or, perhaps, the commercial world as a whole³⁵—start transacting with each other. As they engage in

law ... has often been understood as a result of social custom rather than an imposition of judicial will.”).

35. There is a burgeoning academic literature about the geographic scale of mercantile customs in the distant past. For a long time, conventional wisdom maintained that as long-distance trade increased during the Middle Ages, a fairly uniform set of commercial practices—based partly on prior law but partly on merchants’ own choices—spread throughout the commercial world and came to be reflected in legal rules. *See, e.g.*, WILLIAM MITCHELL, *AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT* (1904); Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT’L L.J. 221, 224-26 (1978); Philip W. Thayer, *Comparative Law and the Law Merchant*, 6 BROOK. L. REV. 139 (1936); Leon E. Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage*, 12 J. MAR. L. & COM. 1 (1980). More recently, however, historians have raised grave doubts about whether there really was a substantive “law merchant” across medieval Europe and, to the extent that there was, whether its content can properly be attributed to custom. *See, e.g.*, MARY ELIZABETH BASILE ET AL., *LEX MERCATORIA AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY TREATISE AND ITS AFTERLIFE* 124 (1998) (arguing that at least in England, “the concept of a transnational mercantile law was ... essentially a creation of seventeenth-century lawyers”); Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153, 1158-61 (2012) (arguing that if the term “custom” refers only to practices that were not codified in statutes or reflected in written instruments like insurance policies and bills of exchange, the commercial customs that existed in medieval Europe were “primarily local”); *see also* Charles Donahue, Jr., *Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica*, 5 CHI. J. INT’L L. 21, 27-30 (2004) (deeming it plausible that medieval Europe had some common practices with respect to the carriage of goods by sea, but doubting the existence of similarly widespread customs with respect to other aspects of commerce).

Even if there were relatively few widespread mercantile customs in the Middle Ages, however, the eighteenth and nineteenth centuries might well be a different story. By then, Anglo-American jurists commonly referred to a “law merchant” that had an international flavor and that allegedly was consonant with mercantile customs. *See* 1 BLACKSTONE, *supra* note 34, at *264 (“[T]he affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in and take notice of. And in particular the law of England does in many cases refer itself to [this law], and leaves the causes of merchants to be tried by their own peculiar customs.”); JOSEPH STORY, *COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE, FOREIGN AND INLAND, AS ADMINISTERED IN ENGLAND AND AMERICA* 25 (1843) (“[T]he jurisprudence, which regulates Bills of Exchange, can hardly be deemed to consist of the mere municipal regulations of any one country. It may, with far more propriety, be deemed to be founded upon, and to embody, the usages of merchants in different commercial countries, and the general principles, *ex aequo et bono*, as to the rights, duties, and obligations, of the parties, deducible from those usages, and from the principles of natural

the same kinds of transactions over and over, they might collectively establish some settled practices about how things are done—what formalities are necessary for the formation of a binding agreement, what subsidiary terms go along with agreements of certain sorts, and so forth. To the extent that such customs do indeed develop, courts might well use them as a basis for conclusions about the legal rights and duties associated with particular transactions. When courts rely on custom in this way, moreover, they will not necessarily think that they are simply choosing as a matter of their own discretion to make the unwritten law match the established customs. Instead, they may see the established customs as controlling their decision in the way that a statute might—as supplying a rule of decision that they are bound to apply.³⁶

law applicable thereto.”); *see also, e.g.*, *Bank of the U.S. v. United States*, 43 U.S. (2 How.) 711, 736 (1844) (describing “the law-merchant” as “that law which pervades the commercial world, and which, though founded on usage, has become as fixed and definite as any other branch of the law”). To be sure, merchants of that era would have had to pay attention to the commercial codes of individual nations. *See* Nikitas E. Hatzimihail, *The Many Lives—and Faces—of Lex Mercatoria: History as Genealogy in International Business Law*, 71 *LAW & CONTEMP. PROBS.*, Summer 2008, at 169, 179-80, 186-87 (summarizing some modern scholars’ differing takes on those codes). Insofar as the codes either incorporated or left room for the play of customs, moreover, American judges acknowledged that “the custom of merchants somewhat varies in different countries.” *Brown v. Barry*, 3 U.S. (3 Dall.) 365, 368 (1797). Still, many nineteenth-century judicial opinions asserted the existence of fairly widespread mercantile practices. *See, e.g.*, *Turner v. Yates*, 57 U.S. (16 How.) 14, 26 (1854) (referring to a “universal usage of the commercial world”); *Townsley v. Sumrall*, 27 U.S. (2 Pet.) 170, 180 (1829) (referring to “the general custom of merchants in the United States”); *Bank of Wash. v. Triplett*, 26 U.S. (1 Pet.) 25, 31 (1828) (“The allowance of days of grace [for payment on a bill of exchange] is a usage, which pervades the whole commercial world. It is now universally understood to enter into every bill, or note, of a mercantile character.”).

36. The following passage, written by a state judge at the end of the eighteenth century, expresses this idea crisply:

[One] branch of common law is derived from certain usages and customs, universally assented to and adopted in practice by the citizens at large, or by particular classes of men, as the farmers, the merchants, etc. as applicable to their particular business, and to all others of the same description, which are reasonable and beneficial.

These customs or regulations, when thus assented to and adopted in practice, have an influence upon the course of trade and business, and are necessary to be understood and applied in the construction of transactions had and contracts entered into with reference to them: To this end the courts of justice take notice of them as rules of right, and as having the force of laws formed and adopted under the authority of the people.

Jesse Root, *On the Common Law of Connecticut*, in 1 Root ix, xi-xii (Conn. 1798).

In addition to custom, early American lawyers and judges also identified *reason* as a source of unwritten law.³⁷ The interaction between custom and reason is a tricky subject, and jurists of the eighteenth and nineteenth centuries probably did not all understand it in the same way.³⁸ But there are certainly some respects in which custom and reason might work together to dictate rules of decision for courts. Suppose, for instance, that a particular dispute raises a question on which the relevant community has yet to establish a specific custom. Using analogical reasoning, courts might be able to identify an appropriate rule of decision grounded in a custom that exists on some other matter, and the analogy might be sufficiently strong for the courts to consider it binding upon them. Likewise, the data points supplied by existing customs might sometimes guide courts toward broader principles that are supported by social practices and that dictate answers to various questions of first impression.³⁹ Indeed, customs of a different sort might even provide a basis for more instrumental forms of reasoning: perhaps established social practices or accepted principles of moral philosophy identify some uncontroversial metrics for evaluating policy outcomes, and perhaps courts applying those metrics can sometimes conclude that one possible rule of decision will produce better results than any of the logical alternatives. Admittedly, this style of thinking might not seem distinctively judicial; if such uncontroversial metrics do exist, legislatures too are likely to use them. But such metrics might conceivably be understood to bind courts in a way that they do not bind legislatures—so that there is

37. See, e.g., 1 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 39 (1795) (indicating that “the dictates of reason[] and the science of morals” supplied “first principles” of the unwritten law, though acknowledging that “our courts have erected an artificial fabrick of jurisprudence” on the foundation of these principles); see also JOSEPH HOPKINSON, *CONSIDERATIONS ON THE ABOLITION OF THE COMMON LAW IN THE UNITED STATES* 19, 21 (1809) (calling the common law “the law of *reason* and *justice*”).

38. See James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1325 (1991).

39. See *id.* at 1326 (noting that “a number of scholars have argued that the best of common law theory down through the ages has offered precisely this kind of sophisticated reconciliation of custom and reason,” under which “reason” refers to “a body of sound principles revealed through the lived experience of custom”). *But cf. id.* at 1326-27 (noting that many writings of revolutionary-era lawyers instead “speak of ... ‘immutable maxims of reason and justice’ to be discovered through deductive thought, not through lived experience,” and observing that “such a deductive concept of reason is very difficult to reconcile with custom”).

a sense in which courts would be acting unlawfully if they based the rules of decision that they articulate on their own preferences rather than the preferences reflected in these accepted metrics.

The point of this discussion is not to persuade readers that the unwritten law is entirely “discovered” by judges and not at all “made” by judges. Even in the eighteenth century, lawyers did not take such a categorical stance: while they saw external sources like custom and reason as dictating some rules of unwritten law, or at least as constraining the range of possibilities, they acknowledged that judicial decisions were “another important source of common law.”⁴⁰ But the idea that judicial decisions were the *only* source of unwritten law was a fringe position, associated with radicals like Jeremy Bentham.⁴¹

Of course, even if the unwritten law had some external sources, and even if those external sources played a substantial role in dictating rules of decision for courts in cases of first impression, the conclusions reached by judges could still take on great significance in later cases. Thus, despite all his talk about the common law as customary law, Blackstone called judicial decisions “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.”⁴² Yet Blackstone still saw a distinction between the unwritten law and

40. Root, *supra* note 36, at xiii.

41. In the late eighteenth and early nineteenth centuries, Bentham mounted a persistent attack on then-orthodox understandings of the common law. Bentham insisted that the common law was entirely the invention of the courts: whenever a judge needed to determine its content, “either he makes for the purpose a piece of law of his own, ... or ... he refers to, and adopts, ... a piece of law already made ... by some other Judge or Judges.” JEREMY BENTHAM, SUPPLEMENT TO PAPERS RELATIVE TO CODIFICATION AND PUBLIC INSTRUCTION 108 (1817). That was bad enough; Bentham considered judge-made law illegitimate, and he contrasted the common law with what he called “real” law (to wit, written law). *See, e.g., id.* at 105-08. But in Bentham’s view, the illegitimacy of the common law was compounded by the fact that judges articulated it after the fact, in cases about events that had already occurred. In a broadside that he wrote in 1792, Bentham expressed this point with customary flair:

It is the Judges ... that make the common law[.] Do you know how they make it? Just as a man makes laws for his dog. When your dog does any thing you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the Judges make law for you and me.

JEREMY BENTHAM, TRUTH VERSUS ASHHURST; OR LAW AS IT IS, CONTRASTED WITH WHAT IT IS SAID TO BE 11 (1823).

42. 1 BLACKSTONE, *supra* note 34, at *69.

what judicial decisions said about the unwritten law. As he expressed this point, “*the law*, and the *opinion of the judge* are not always ... one and the same thing; since it sometimes may happen that the judge may *mistake* the law.”⁴³ In keeping with this view, Blackstone observed that when subsequent judges identified such a mistake and concluded that a former decision should therefore be overruled, they did not “pretend to make a new law, but [rather] to vindicate the old one from misrepresentation.”⁴⁴ They would say “not that such a [precedent] was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.”⁴⁵

For practical purposes, this distinction might sometimes seem artificial.⁴⁶ Especially after courts had begun to develop strong doctrines of stare decisis, a lawyer who was asked to identify the unwritten law on some point might naturally begin by investigating whether the courts had established a settled doctrine on that point. If they had, the lawyer might proceed to investigate whether that doctrine was so well settled that the courts were unlikely to overrule it. And if it was, the lawyer might report that the unwritten law on this point was what the judicial decisions said it was, even if those decisions had been mistaken about the customs of the relevant community. To be sure, as people in that community received this legal advice, they might change their customs to conform to the judicial decisions, with the result that the judicial decisions and the prevailing customs might eventually come into alignment. But as long as a gap between the two remained, practically minded people—including lawyers trying to advise clients about how courts were likely to handle their cases—might well identify the unwritten law (or at least the unwritten law that mattered) with the doctrine

43. *Id.* at *71.

44. *Id.* at *70.

45. *Id.*; see also, e.g., BRIDWELL & WHITTEN, *supra* note 11, at 11-12 (noting that insofar as the content of the common law was thought to be supplied by the customs of the people rather than the decrees of the government, “precedent and custom would be viewed as distinct”).

46. See, e.g., William H. Rand, Jr., *Swift v. Tyson Versus Gelpcke v. Dubuque*, 8 HARV. L. REV. 328, 329 (1895) (“The majority of philosophical and non-judicial writers ... have regarded Blackstone’s conclusions as superficial and unsound.”).

defined by the judicial decisions rather than the alternative doctrine suggested by the actual customs of the relevant community.⁴⁷

Still, when this same phenomenon arises in other areas of law whose external sources are more obvious, many lawyers see some value in speaking precisely enough to distinguish between the law as dictated by the external sources and the law as understood by the courts. Thus, modern lawyers conversing about constitutional law might say something like this: “The Constitution plainly establishes Rule X, but the Supreme Court has interpreted it to establish Rule Y instead, and the Court is not going to overrule that interpretation.” All modern lawyers would understand the distinction that this statement draws, and relatively few would consider it completely artificial or incoherent.

Lawyers of the eighteenth and early nineteenth centuries sometimes drew this sort of distinction not only with respect to *written* law, but also with respect to *unwritten* law. In particular, they did not always and automatically treat the content of the unwritten law as being identical to the sum total of whatever courts said about it. A remark made by Virginia Chancellor Creed Taylor in 1809 nicely illustrates this point. In 1776, a Virginia convention had specified that notwithstanding independence, “the common law of England ... shall be the rule of decision [in Virginia], and shall be considered as in full force, until the same shall be altered by the legislative power of this colony.”⁴⁸ As Chancellor Taylor observed, however, this ordinance did not require him to accept English judicial opinions as accurately stating the content of the common law of England. In Taylor’s words, “it was the *common law* we adopted, and not English decisions.”⁴⁹

47. Cf. Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6, 12 (1910) (“[T]he acceptance and application of the common-law principle of the authority of precedent in a given jurisdiction eats up and destroys the theory that the decisions of the court are only evidence of the law. The two principles are entirely inconsistent; if you accept one you cannot have the other.”).

48. An Ordinance to Enable the Present Magistrates and Officers to Continue the Administration of Justice, and for Settling the General Mode of Proceedings in Criminal and Other Cases Till the Same Can Be More Amply Provided For (July 3, 1776), in ORDINANCES PASSED AT A GENERAL CONVENTION, OF DELEGATES AND REPRESENTATIVES, FROM THE SEVERAL COUNTIES AND CORPORATIONS OF VIRGINIA 9, 10 (1816).

49. *Marks v. Morris*, 14 Va. (4 Hen. & M.) 463, 463 (Super. Ct. Ch. 1809). Admittedly, Taylor proceeded to reveal a rather indefinite understanding of what the common law commanded. *See id.* (“[W]e should take the standard of that law, namely, that we would live

2. *Who Should Defer to Whom About What?*

To say that “common law” (or “unwritten law” more generally) is not just another name for “judicial decisions” is a preliminary step in helping to make sense of the doctrine that existed before *Erie*, but it does not itself account for that doctrine. After all, the doctrine that existed before *Erie* did not tell federal judges to make independent judgments about the content of all aspects of state law that had sources external to the state courts. The legal rules established by state statutes and state constitutions certainly have such sources, but the doctrine that existed before *Erie* nonetheless told federal courts to defer to the relevant state’s highest court about their content. The same goes for the unwritten law in force in each state on questions that the federal courts classified as “local” rather than “general.” Like “general” law, the “local” portion of the

honestly, should hurt nobody, and should render to every one his due, for our judicial guide.”); see also 1 BLACKSTONE, *supra* note 34, at *40 (quoting the same three precepts, which trace back to the Institutes of Justinian); cf. Max Radin, Book Review, 24 N.Y.U. L.Q. REV. 941, 943 (1949) (reviewing READINGS IN AMERICAN LEGAL HISTORY (Mark De Wolfe Howe ed., 1949)) (“That the learned Chancellor has taken the famous three principles of Ulpian as a full and adequate guide to the common law, is an indication of a certain vagueness in the current understanding of the common law.”). But whatever Taylor’s own sense of the underlying sources or content of the common law, he was not alone in refusing to equate “the common law of England” with the decisions of English courts. Indeed, such statements persisted into the twentieth century. See, e.g., *Callet v. Alioto*, 290 P. 438, 440 (Cal. 1930) (agreeing that although California’s reception statute adopted “[t]he common law of England,” California courts are “not ... bound by the English interpretation of the common law,” and explaining that “judicial decisions do not themselves constitute the common law, but are merely evidence of the common law”); *State v. Wilson*, 161 S.E. 104, 110 (S.C. 1931) (“While the common law of England is of force in this state, except where it has been abrogated or modified by legislative enactment, the courts of this state, in construing the common law, are not bound by the decisions of the courts of England, for ‘We have a right to take our own view of the Common Law.’” (quoting *Shecut v. McDowel*, 6 S.C.L. (1 Tread.) 35 (1812))); *Ingram v. Fred*, 210 S.W. 298, 300 (Tex. Civ. App. 1918) (“The decisions of the English courts are not conclusive proof of what the common law of England really is, although they are entitled to great weight.”); cf. *In re Heaton’s Estate*, 96 A. 21, 29 (Vt. 1915) (“Some courts hold to the view that the common law thus adopted is identical with the decisions of the courts; or, in other words, they regard the common law of England as what the English courts make it. The predominating view, however, is that precedents do not constitute the common law, but only serve to illustrate its principles.”). But see *Musser v. Musser*, 221 S.W. 46, 48 (Mo. 1920) (“[T]he common law in this country is inseparably identified with the decisions of the courts.”); cf. Pope, *supra* note 47, at 12-14 (acknowledging that “[w]e shall find many state courts repeating the statement that it was the English common law that was adopted and not the decisions of English courts,” but arguing that this distinction is chimerical).

unwritten law was understood to have sources external to judicial decisions, but the doctrine that existed before *Erie* still told federal courts to follow the state supreme court's settled precedents about its content.

Different cases offered different explanations for these patterns of deference. Section 34 of the Judiciary Act of 1789 (which went on to play an important role in Justice Brandeis's argument in *Erie* and which Part II of this Article will therefore discuss in more detail) specified that except when written federal law otherwise required, "the laws of the several states ... shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."⁵⁰ In *Swift v. Tyson*, Justice Story seemed to read this language as obliging federal courts to heed not only "the positive statutes of [each] state" but also "the construction thereof adopted by the local tribunals."⁵¹ In actions at law, then, it was possible to argue that Congress itself had instructed the federal judiciary to accept the settled doctrines of each state's courts about the meaning of that state's statutes. According to some modern scholars, however, the Supreme Court did not firmly embrace that argument until the second half of the nineteenth century.⁵² In any event, section 34 of the Judiciary Act covered only "trials at common law,"⁵³ and federal courts sitting in equity also routinely followed state-court decisions about the meaning of state statutes. Chief Justice Marshall attributed the federal courts' practice on this point to the commands of *unwritten law*: in his view, the need to accept the state courts' interpretations of state statutes reflected the

50. 1 Stat. 73, 92 (1789).

51. 41 U.S. (16 Pet.) 1, 18 (1842); *see also, e.g.*, *Bucher v. Cheshire R.R. Co.*, 125 U.S. 555, 582-83 (1888) ("It has been held by this court that the decisions of the highest court of a State in regard to the ... meaning of the constitution of that State, or its statutes, are to be considered as the law of that State, within the requirement of this section.").

52. *See* Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1388-89 (1992) (arguing that "[u]ntil 1863, ... the Court never based its deference [to state-court decisions about the meaning of state statutes] on the 1789 Act," but "[i]nstead ... founded its deference on a number of practical and political considerations").

53. 1 Stat. at 92; *see also* *United States v. Reid*, 53 U.S. (12 How.) 361, 363 (1852) ("The language of this section cannot, upon any fair construction, be extended beyond civil cases at common law, as contradistinguished from suits in equity."). That limitation in section 34 and its successors persisted until 1948, when Congress revised the provision to cover all "civil actions." *See* 62 Stat. 869, 944 (1948) (enacting the current version of 28 U.S.C. § 1652).

application to American federalism of a principle that was “universally recognised” among separate sovereigns.⁵⁴ Given the uniqueness of America’s federal system, though, the unwritten law of nations did not necessarily supply determinate answers to questions about the relationship between state and federal courts. Thus, federal judges often described their patterns of deference to state-court precedents as being “a matter of policy” rather than something that preexisting law had dictated.⁵⁵

To avoid complicating my exposition with technical distinctions (such as the distinction between cases that were subject to section 34 of the Judiciary Act and cases that were not), the rest of this Part will proceed as if the federal courts’ practices about deferring to state-court precedents were entirely up for grabs in the

54. *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159 (1825). Here is a fuller version of the relevant passage from Chief Justice Marshall’s opinion in *Elmendorf* (which was a suit in equity):

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 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. On this principle, the construction given by this Court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the Courts of the several States to the legislative acts of those States, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States.

Id. at 159-60.

55. *Woolsey v. Dodge*, 30 F. Cas. 606, 609 (C.C.D. Ohio 1854) (No. 18,032) (discussing deference to state-court precedents about the meaning of state statutes), *aff’d*, 59 U.S. (18 How.) 331 (1856); *see also, e.g.*, *Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 363 (1828) (Story, J.) (“In the construction of local statutes we have been in the habit of respecting and following the judgments of the local tribunals.”); *Springer v. Foster*, 22 F. Cas. 1007, 1008 (C.C.D. Mass. 1841) (No. 13,265) (Story, J.) (similarly calling this practice “the constant habit of the courts of the United States”); *cf.* *Beauregard v. City of New Orleans*, 59 U.S. (18 How.) 497, 502 (1856) (describing the Supreme Court’s practice of deferring to each state’s courts about the local aspects of that state’s unwritten law as “the habit of the [C]ourt,” though adding that “[n]o other course could be adopted with any regard to propriety”).

early Republic. Thus, I will be assuming that neither preexisting rules of unwritten law nor anything in written federal law identified any particular circumstances in which federal courts were bound to follow state-court precedents about the content of any particular type of law. When we get to *Erie*, I will relax that assumption; Part II will examine Justice Brandeis's arguments about both section 34 of the Judiciary Act and the Federal Constitution. For now, though, I simply want to explain why the doctrines that existed before *Erie* might have seemed sensible to judges who thought that they had some choice in the matter.

a. Deference on Questions of "Local" Law

Even in the absence of any legal compulsion, one can readily understand why federal courts might have developed the practice of accepting the settled decisions of each state's highest court about the meaning of that state's written laws. In addition to comports with abstract notions of state sovereignty (which were surely significant despite being abstract), this practice had some very practical benefits for the citizenry. After all, the question of whether federal courts should defer to the established precedents of a state's highest court about the meaning of that state's statutes would arise only after the state's highest court had established such precedents. If the federal courts chose not to follow those precedents but instead to exercise independent judgment about the meaning of the state's statutes, some state statutes would have accumulated at least two different sets of glosses—one that applied in the state's courts and one that applied in the federal courts. (Indeed, if the courts of other states followed the federal courts' lead and exercised their own judgment about the meaning of sister states' written laws, it is conceivable that three or four different sets of glosses might have accumulated on some questions.) That sort of disuniformity about the content of the applicable legal rule "would produce unfortunate conflicts and encourage litigation."⁵⁶ But those "unfortunate conflicts" about the meaning of each state's statutes would be avoided, or at least substantially reduced, if the federal courts *did* defer to the settled decisions of each state's highest court about the

56. *Woolsey*, 30 F. Cas. at 609.

meaning of that state's written laws. The precedents established by the highest court of the enacting state provided a natural coordination point for both the federal courts and the courts of other states,⁵⁷ and the practice of deferring to those precedents therefore made good practical sense.

That was true even though nineteenth-century treatises tended to portray the principles of statutory interpretation as matters of general jurisprudence that looked much the same in each American state,⁵⁸ and even though the Federal Supreme Court might have been just as good at applying those general principles as the supreme court of any particular state. Indeed, perhaps the Federal Supreme Court would have been somewhat *better* at this task than the typical state supreme court—with the result that independent federal interpretations of state statutes might, in the aggregate, have been more accurate than the state supreme courts' interpretations. Even so, federal courts could sensibly have concluded that this prospect was not enough to justify perpetuating two different interpretations when it would have been possible for the courts to coordinate on one.⁵⁹

57. *Cf.* *Bank of the U.S. v. Daniel*, 37 U.S. (12 Pet.) 32, 53 (1838) (implicitly suggesting that it is natural to defer to the settled constructions adopted by the courts of the state “where [the statutes] are exclusively in force”).

58. *See, e.g.*, JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES 45-79 (1873) (collecting “the leading principles of statutory interpretation” and supporting them with citations drawn from many different jurisdictions); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 24 (1857) (“[T]he rules governing the application of statutes may, as a general proposition, be considered the same in both [England and the United States].”).

This portrayal of the principles of statutory interpretation was perfectly reasonable. To be sure, patterns of linguistic usage often show some regional variations. Other things that can vary from state to state, like governmental structures, may also generate some differences in interpretive methods. *Cf. Bell*, 26 U.S. (1 Pet.) at 359-60 (noting that even though a Kentucky statute was worded substantially the same as a prior English statute, the construction of the Kentucky statute “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, than those of any foreign tribunal, however respectable”). But one still would have expected the common aspects of the interpretive principles used in the United States to swamp the state-specific aspects.

59. Admittedly, having federal courts defer to the state courts' settled interpretations of state statutes was not the only conceivable way of avoiding disuniformity. Even if the federal courts had chosen not to follow the state courts' interpretations of state statutes, the resulting disuniformity could have been eliminated if the *state* courts subsequently abandoned their precedents and deferred to the views expressed by the federal courts. But federal judges could sensibly have concluded that there was little realistic prospect that the courts of each state

The same practical arguments also support the federal courts' practice of following each state supreme court's settled precedents about the content of the state's unwritten law on matters that were localized to that state. Of course, people might disagree about which matters were sufficiently localized to warrant this treatment.⁶⁰ But everyone agreed that there was some core set of questions that were properly regarded as matters of "local" law—such as various questions about the powers and immunities of municipal governments within a state,⁶¹ or the customary law established by certain peculiar local usages,⁶² or rules of decision about the transmission of real property located within a particular state.⁶³ Again, the precedents of the highest court of the state where these questions were localized provided a natural coordination point for both federal courts and the courts of other states. By following the settled precedents of the relevant state's highest court on matters of that state's "local" law, federal and state courts could avoid "[t]he injustice, as well as the absurdity of the former deciding by one rule, and the latter by another," on such questions as the ownership of land within the state.⁶⁴ In the words of the Federal Supreme Court, "There should be, in all matters of a local nature, but one law within the State; and that law is not what this court might determine, but what the Supreme Court of the State has determined."⁶⁵

would consistently follow this course. For various reasons, the decisions of each state's supreme court provided a more natural coordination point for interpretation of that state's statutes than the decisions of the federal courts.

60. Compare BRIDWELL & WHITTEN, *supra* note 11, at 119-22 (describing the Supreme Court's growing tendency after 1860 to characterize various questions of tort law as "general" rather than "local"), *with id.* at 121 (criticizing this development and arguing that "tort law was vastly different in kind from the general customs of the commercial world").

61. *See, e.g.*, *Detroit v. Osborne*, 135 U.S. 492, 499 (1890).

62. *See, e.g.*, HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS § 154 (1896).

63. *See, e.g.*, *Bucher v. Cheshire R.R. Co.*, 125 U.S. 555, 583 (1888) (providing examples of this "well settled" point).

64. *Golden v. Prince*, 10 F. Cas. 542, 543-44 (C.C.D. Pa. 1814) (No. 5509). To the extent that local law grew out of peculiar local customs, the federal courts' practice of deferring to the highest court of the relevant state might also have increased the accuracy of the federal courts' decisions. After all, the state supreme court could be expected to have more local knowledge than the Federal Supreme Court.

65. *Osborne*, 135 U.S. at 498.

b. Non-Deference on Questions of “General” Law

One might think that the same ideas would have led the federal courts to defer to the settled precedents of each state’s highest court on questions about the content of the “general” law too. But that assumption neglects the crucial difference between questions of “general” law and questions of “local” law. To the extent that rules of “general” law were thought to reflect the customs and usages of some broad community, or the dictates of widely accepted principles of moral philosophy, or even just the collective thrust of judicial decisions from a multitude of different jurisdictions, neither the sources of these rules nor the matters that they governed were confined to any single state. As a result, there was no single state whose courts supplied a natural coordination point about the rules’ content.

A stylized example helps illustrate one aspect of the problem. Suppose that a certain type of transaction becomes popular in the commercial world, and the courts of various jurisdictions all confront cases about the rights and duties of the merchants who participate in such transactions. Suppose further that these courts all agree that if merchants throughout the commercial world have established customary practices with respect to these transactions, those practices dictate the applicable rules of decision. The supreme court of State *A* ultimately concludes that merchants in the commercial world have indeed established a relevant custom, and the court proceeds to express its understanding of that custom (and hence the applicable rule of decision). The courts of the other states facing the same question would surely give respectful consideration to that understanding. But at least until a consensus emerges across jurisdictions, each of the other states’ courts is likely to exercise some independent judgment about the content of the relevant custom—and if the supreme court of State *B* concludes that its counterpart in State *A* was mistaken, the supreme court of State *B* is likely to follow its own understanding and articulate a different rule of decision.⁶⁶ In the nineteenth century, indeed, the supreme

66. Professors Teply and Whitten, whose casebook on civil procedure discusses *Swift v. Tyson* better than any other modern casebook, explain this point as follows:

The general commercial law was, by definition, a body of world-wide custom. A state choosing to follow the general commercial law was, therefore, choosing to

court of State *B* was likely to exercise its own judgment about the customs of merchants in the commercial world even if the transaction at issue in the case had occurred within State *A*.⁶⁷

Of course, the fact that most *state* courts did not feel bound to accept a single sister state's understanding of the general law does not necessarily mean that *federal* courts also had to exercise independent judgment on this topic. Whatever the state courts' practices on this point, one could imagine federal courts applying the rule of decision identified by the supreme court of State *A* in cases about transactions within State *A* and the contrary rule of decision identified by the supreme court of State *B* in cases about transactions within State *B*. Admittedly, some transactions might cross state lines in such a way as to impede assigning them to a single state for this purpose: if a merchant in State *A* enters into a long-distance contract with a merchant in State *B*, what determines whether courts should treat the contract as having been made in State *A* or State *B*? But that was a standard problem in conflict-of-law analysis, and nineteenth-century courts already had to face it in cases about the applicability of rules of "local" law. For instance, if a particular state's legislature had enacted a special local statute that supplanted the "general" law in some respect, courts throughout the country would have had to use conflict-of-law analysis to identify the cases that were governed by this statute.⁶⁸ One could

follow law whose content had been "fixed" over centuries by the practices of merchants trading internationally. Therefore, the task for the state courts in general commercial law cases was one of identifying the worldwide custom. A single state's opinion on a general commercial law matter could not bind all other states and nations.

LARRY L. TEPLY & RALPH U. WHITTEN, *CIVIL PROCEDURE* 428 (4th ed. 2009); *cf. supra* note 35 (adding qualifications about the supposed universality of mercantile custom).

67. See Michael Steven Green, *Erie's Suppressed Premise*, 95 MINN. L. REV. 1111, 1122 (2011) ("At the time that *Swift* was decided, most state courts followed the decisions of sister-state courts only concerning local usages and the interpretations of sister-state statutes. If the matter concerned the general common law—such as commercial law or the law merchant—they would opine about this law without any special deference to what the sister state's courts had said." (footnote omitted)); *id.* at 1113 (making clear that this point applied even with respect to common-law actions that had accrued in the sister state). *But see id.* at 1124 (noting that "not every state" followed this practice, and citing Connecticut as a counterexample); *id.* at 1124-25 (citing the counterexample later provided by *Forepaugh v. Delaware Railroad*, 128 Pa. 217 (1889)).

68. See, e.g., TEPLY & WHITTEN, *supra* note 66, at 424 (noting the relevance of conflict-of-law principles in determining which state's "local law" governed which questions).

imagine the federal courts using the same conflict-of-law principles not only when a particular state had explicitly enacted a special rule of “local” law, but also when the courts of a particular state had embraced a controversial understanding of the content of the “general” law.

That approach, however, would have had some disadvantages. For one thing, it would have substantially increased the number of cases in which federal courts had to ascribe cross-border transactions to a single state, and the conflict-of-law doctrines that existed in the early nineteenth century may not have been sufficiently well developed to handle this added pressure effectively.⁶⁹ Even if federal courts could surmount this problem, moreover, they would not be guaranteeing uniformity in the rules of decision applicable to the transactions that they assigned to a particular state. After all, even if the *federal* courts bowed to the understanding of the general law expressed by the highest court of that state, neither the courts of other states nor the courts of foreign countries would necessarily do so.⁷⁰

Perhaps more important, the federal courts would be sacrificing the opportunity to promote a different sort of uniformity. Especially in the nineteenth century, when the United States was not the economic hegemon that it later became, there might have been real value to harmonizing American understandings of the general commercial law with the prevailing views in other commercial countries. To see why, imagine that merchants throughout the commercial world had thought that if they dealt with American merchants, there was a significant risk that their legal rights and duties would later be assessed according to the idiosyncratic understanding of the courts of a particular American state. To avoid this uncertainty (and the transaction costs associated with regularly

69. See, e.g., R.H. Helmholz, *Continental Law and Common Law: Historical Strangers or Companions?*, 1990 DUKE L.J. 1207, 1222-23 (describing the state of Anglo-American jurisprudence about the conflict of laws before 1834, when Joseph Story published his treatise on the subject); Jenny S. Martinez, *International Courts and the U.S. Constitution: Reexamining the History*, 159 U. PA. L. REV. 1069, 1121 (2011) (“The field of conflict of laws was still immature in Anglo-American law in the 1820s.”).

70. That prospect itself amounted to a significant distinction between matters of “general” law and matters of “local” law. The federal courts could be fairly confident that if they deferred to the highest court of each state about the meaning of that state’s statutes, so too would the courts of other states and foreign countries. See *supra* note 54.

having to consult local lawyers who had access to local case reports), they might have been inclined to take their business elsewhere. By contrast, if foreign merchants knew that federal courts throughout the United States would exercise independent judgment about the content of the general commercial law, and if foreign merchants also knew that they were likely to have access to federal courts through diversity jurisdiction, they might have been fairly confident that their transactions with merchants in any particular American state would end up being assessed according to the “normal” rules of decision. To the extent that federal courts could inspire that confidence, their willingness to exercise independent judgment about the content of the general law might have promoted various benefits associated with uniformity, such as greater predictability and lower transaction costs.⁷¹

Just as the doctrine that the Supreme Court articulated in *Swift v. Tyson* might have helped make merchants in foreign countries more willing to deal with merchants in the United States, so too it might have helped create favorable conditions for purely domestic transactions between merchants located in different states. Again, picture a merchant in one state who was thinking about whether to limit himself to in-state transactions or instead to expand his business dealings to other states. The prospect of having access to federal courts that would apply a uniform understanding of the general commercial law might well have made the latter course seem more appealing than it otherwise would have.

These arguments presuppose that merchants were sophisticated enough to anticipate the possibility of legal disputes before engaging in transactions. That premise is surely plausible, but let us suppose that it is false. Even apart from the idea that American commerce might benefit from the arrangements reflected in *Swift*, federal courts might well have thought that simple fairness to the parties pointed in the same direction. Especially if merchants were relatively unsophisticated about the law, they presumably entered into transactions according to the *actual* customs of merchants throughout the commercial world rather than according to whatever

71. Cf. Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1184 (2006) (“Nations and states followed the law merchant in order to facilitate international and interstate trade by establishing uniform rules to govern transactions among diverse citizens.”).

the courts of a single jurisdiction had said about those customs. To the extent that the courts of two different states disagreed with each other about the customs of merchants throughout the commercial world, moreover, at least one of them was wrong. The federal courts might not have seen any need to assess transactions according to an erroneous view of the customary law simply because those transactions happened to have occurred within a state whose courts did not understand mercantile practices very well.⁷²

Much the same point helps explain why even if the general law on most questions was classified as *state* law, federal courts would not have thought that notions of state sovereignty required them to defer to the highest courts of individual states about its content. Within the limits of each state's legislative jurisdiction, each state certainly had sovereign authority to decide whether to let the general law operate or instead to prescribe a special statutory code of its own. But a state's decision to *adopt* the general law did not necessarily *localize* the general law in such a way that federal courts had to treat the state courts' precedents about its content in the same way that federal courts would have treated precedents about the meaning of a local state statute.⁷³

By expressing their own considered views about the content of the general law, moreover, federal courts could conceivably help to promote uniform understandings of the general law even in the state courts. The Federal Supreme Court arguably had an especially good opportunity to do so. After all, if any American court could serve as a coordination point for other American courts on questions about the content of the general law, that court was the Supreme Court of the United States (as opposed to the highest court of any individual state).⁷⁴ To be sure, state courts were not thought to have

72. Cf. Green, *supra* note 67, at 1129 ("Since commercial custom is a matter of fact, [Professor Lessig] argues that it was not odd that Story thought that courts of different sovereigns could exercise their own judgment about what the law merchant was."); Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1792 (1997) (arguing that *Swift* made sense as long as the common law was understood to be "reflective, or mirroring of private understandings," as opposed to being "directive, or normative over those private understandings").

73. See TEPLY & WHITTEN, *supra* note 66, at 424-25 (explaining this point and linking it to "the nature of the sovereign choice that New York had made in deciding to follow general commercial law rather than local law").

74. See J. Benton Hurst, Note, *De Facto Supremacy: Supreme Court Control of State Commercial Law*, 98 VA. L. REV. 691, 712 (2012) (discussing the Federal Supreme Court's

any legal obligation to follow what the Federal Supreme Court said about the content of the general law. Nonetheless, federal judges sometimes suggested that there were policy reasons for state courts to do so,⁷⁵ and state courts sometimes agreed.⁷⁶ Apart from this argument for deference, the federal courts' considered opinions about the content of the general law might simply have been salient and persuasive to the courts of individual states. Consistent with this hypothesis, some scholars have concluded that the doctrine associated with *Swift* did help homogenize the common law as it was applied in the courts of the various states.⁷⁷

capacity to "creat[e] centers of gravity that state courts could gather around").

75. See, e.g., *Browning v. Andrews*, 4 F. Cas. 452, 453 (C.C.D. Mich. 1845) (No. 2040) ("The reason which influences the [federal] supreme court to follow the states in the construction of their statutes, it would seem, should influence the state courts to follow the rule of decision of the supreme court of the Union on questions of general law."); *Riley v. Anderson*, 20 F. Cas. 801, 802 (C.C.D. Ohio 1841) (No. 11,835) (advancing a similar argument for the broader proposition that "on all questions of a general and commercial character, the rule established by the federal courts should be followed by the local tribunals").

76. Before *Swift v. Tyson*, for instance, the Supreme Court of Ohio had taken a relatively narrow view of the circumstances in which the transferee of a negotiable instrument could defeat defenses that would have been good against the transferor. See *Riley v. Johnson*, 8 Ohio 526, 528-29 (1838). Immediately after the Federal Supreme Court expressed a broader view in *Swift*, however, the Ohio court overruled *Riley*. The Ohio court offered the following explanation:

It is believed that the law, as ... settled [in *Swift*] by the highest judicial tribunal in the country, will become the uniform rule of *all*, as it now is of *most* of the states. And, in a country like ours, where so much communication and interchange exists between the different members of the confederacy, to preserve uniformity in the great principles of commercial law, is of much interest to the mercantile world.

Carlisle v. Wishart, 11 Ohio 172, 191-92 (1842); see also *Atkinson v. Brooks*, 26 Vt. 569, 581 (1854) (asserting that "the course of decision in the several states since the date of [*Swift v. Tyson*] show a general disposition to adopt [*Swift's* holding]"); cf. *Robinson v. Smith*, 14 Cal. 94, 98 (1859) (acknowledging that "[t]here is unquestionably very great conflict in the cases," but aligning *Swift* with "the more modern decisions, especially in new States, not trammelled or foreclosed by previous adjudications"). But see *Roxborough v. Messick*, 6 Ohio St. 448, 456-58 (1856) (limiting *Carlisle* and declining to follow what the court characterized as "*obiter dictum* of Justice Story"); see also *Stalker v. McDonald*, 6 Hill 93 (N.Y. 1843) (declining to bring New York case law into harmony with *Swift v. Tyson*).

77. See Hurst, *supra* note 74, at 705 (studying antebellum case law about commercial paper and concluding that at least before the Civil War, "state high courts tended to conform their own rulings to those of the Supreme Court"); see also Arthur John Keeffe et al., *Weary Erie*, 34 CORNELL L.Q. 494, 504 (1949) (studying a longer period and concluding that the Federal Supreme Court's decisions about the content of general law "did promote uniformity to a substantial degree"). In private correspondence with Judge Friendly, Richard Posner both echoed this idea and argued that it retains some truth even after *Erie*. In his view, "pre- and

II. JUSTICE BRANDEIS'S ARGUMENTS IN *ERIE*

Federal courts applied the doctrine described in the previous Part until 1938. In that year, however, Justice Brandeis's opinion in *Erie* instructed federal judges to follow state-court precedents on all questions that lie within the states' legislative competence, even if those questions would previously have been classified as matters of "general" law.⁷⁸ Brandeis left various details to be worked out in later cases.⁷⁹ But on the basic issue raised in *Erie* itself, Brandeis's opinion was clear: within the limits of the states' lawmaking powers, precedents that a particular state's highest court had established and to which it continued to adhere were to have the same status in federal court as statutes enacted by the state's legislature.

Justice Brandeis advanced three different categories of arguments for this conclusion. First, he argued that Justice Story's opinion in *Swift v. Tyson* had misinterpreted section 34 of the Judiciary Act of 1789 and that the original meaning of the statute compelled the result in *Erie*.⁸⁰ Second, he observed that "the doctrine of *Swift v. Tyson*" was having bad effects in practice.⁸¹ Third, he argued that the course pursued by the federal courts under *Swift* was "unconstitutional[]" (and, seemingly relatedly, that

post-*Erie* federal diversity decisions have in fact been a force for bringing about a greater uniformity in the common law of the states." William Domnarski, *The Correspondence of Henry Friendly and Richard A. Posner 1982-86*, 51 AM. J. LEGAL HIST. 395, 404 (2011) (emphasis added) (quoting letter from Richard Posner to Henry Friendly (Jan. 3, 1983)). I am indebted to John Harrison for calling my attention to Judge Posner's observation.

78. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938).

79. For instance, how should federal courts decide which state's precedents governed which questions? See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). Did federal courts owe any deference to the precedents of a state's intermediate appellate courts on matters that the state's supreme court had not yet addressed? See *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *King v. Order of United Commercial Travelers of Am.*, 333 U.S. 153, 158 (1948); *West v. AT&T Co.*, 311 U.S. 223, 236-38 (1940); *Fid. Union Trust Co. v. Field*, 311 U.S. 169, 177-80 (1940). What about precedents that the state's supreme court had established, but that it seemed likely to overrule at its next opportunity? See *Mason v. Am. Emery Wheel Works*, 241 F.2d 906, 908-10 (1st Cir. 1957) (anticipating that the Supreme Court of Mississippi would overrule an old precedent, and following the view of state law that the federal court expected the state supreme court to adopt).

80. *Erie*, 304 U.S. at 71-73.

81. *Id.* at 73-77.

it rested on a “fallacy” about the nature of law).⁸² This Part examines each of those arguments in turn.

A. Justice Brandeis’s Historical Argument

Justice Brandeis opened with an argument about history. As mentioned above, section 34 of the Judiciary Act of 1789 had specified that “the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”⁸³ (By the time of *Erie*, this statutory provision was known as the “Rules of Decision Act”⁸⁴ and was found at section 721 of the Revised Statutes of 1874. But section 721 of the Revised Statutes was substantively identical to section 34 of the original Judiciary Act, and Justice Brandeis’s opinion therefore referred throughout to section 34.) In *Swift v. Tyson*, Justice Story had held that the phrase “laws of the several states” in section 34 covered (1) written state laws, (2) “long established local customs having the force of laws,” and perhaps (3) settled precedents of the state courts about the content of these “local” laws, but not (4) decisions of the state courts on “questions of a more general nature,” such as “questions of general commercial law.”⁸⁵ According to Justice Brandeis, however, “the more recent research of a competent scholar” had “established” that “th[is] construction ... was erroneous” and that section 34 had been intended to make federal courts follow state-court precedents about the “general” aspects of the state’s unwritten law as well as the “local” aspects.⁸⁶

The “competent scholar” whom Brandeis cited was Charles Warren, who had unearthed new information about the drafting history of section 34.⁸⁷ Warren had located (“in the attic of the Capitol”) the original version of the Judiciary Act as introduced in

82. *Id.* at 77-80.

83. 1 Stat. 73, 92 (1789).

84. See, e.g., Benno Schmidt, *Substantive Law Applied by the Federal Courts—Effect of Erie R. Co. v. Tompkins*, 16 TEX. L. REV. 512, 513 (1938).

85. 41 U.S. (16 Pet.) 1, 18-19 (1842).

86. *Erie*, 304 U.S. at 72-73.

87. See *id.* at 73 n.5 (citing Warren, *supra* note 10).

the Senate, and he had also located (“in a cellar room, under a heap of miscellaneous papers of confused and intermingled dates and subjects”) a copy of the bill as approved by the Senate and sent to the House.⁸⁸ Warren saw that section 34 did not appear in the former document but did appear in the latter document, meaning that it was added at some point during the Senate’s consideration of the bill.⁸⁹ What is more, Warren found evidence of the amendment that added it. Among other “odd, loose slips of paper of different sizes and shapes” that set forth proposed amendments to the judiciary bill and that had been “preserved in a bundle, in the Senate Files [in the Capitol’s attic],”⁹⁰ Warren discovered a sheet—apparently in the handwriting of Senator Oliver Ellsworth⁹¹—setting forth both a draft of what became section 34 and the edits that produced the final version. Although some words in the draft are struck out, they are still legible, and they show that the draft referred to “the Statute law of the several States in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise.”⁹² Through emendations that appear on the same sheet, this passage was replaced with the shorter phrase “the laws of the several States,” yielding the provision that appears as section 34 of the Judiciary Act. From this progression, Warren inferred that “the [phrase] ‘laws of the several States’ was intended to be a concise expression and a summary of the more detailed enumeration of the different forms of State law, set forth in the original draft,”⁹³ and hence that section 34 encompassed not only each state’s “Statute law” but also its “unwritten or common law.” For Warren, it followed that section 34 dictated the result that Justice Brandeis would later reach in *Erie* rather than the result that Justice Story had reached in *Swift v. Tyson*. Indeed, Warren wrote as if this conclusion were obvious: “Had Judge Story seen this

88. Warren, *supra* note 10, at 50 & n.5.

89. *See id.* at 81.

90. *Id.* at 50 & n.5.

91. *Id.* at 85.

92. *See id.* at 87 (providing a photostatic copy of this handwritten sheet).

93. *See id.* at 86.

original draft of the amendment, it is almost certain that his decision would have been the reverse of what it was.”⁹⁴

Even if one were otherwise to accept Warren’s argument (and, as we shall see, that would be a serious mistake), the idea that information about the drafting history of section 34 would have changed the result in *Swift v. Tyson* is anachronistic. While the practice of consulting drafting history in statutory interpretation had become common by Warren’s day, neither Justice Story nor his predecessors would have considered it appropriate.⁹⁵ Indeed, even modern judges who are sympathetic to this practice⁹⁶ might resist invoking the particular type of document unearthed by Warren—a sheet that (1) was not publicly available for the first 135 years after the Judiciary Act became law and (2) reflected a drafting change that might not have been widely known even among members of the enacting Congress.⁹⁷

Still, these threshold objections are not themselves fatal to Warren’s position. Even if the type of drafting history unearthed by Warren is not something that the early Supreme Court would have used to interpret early statutes, and even if it also is not the sort of thing that the modern Supreme Court would use in interpreting modern statutes, perhaps it is still useful when the *modern* Court needs to interpret an *early* statute—that is, when modern interpret-

94. *Id.* at 52.

95. See CALEB NELSON, STATUTORY INTERPRETATION 251-52 (2011) (summarizing the rise of reliance upon legislative history in American courts, and tracing the Federal Supreme Court’s use of drafting history to the second half of the nineteenth century); see also, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 897 n.60 (1985) (reporting remarks by an early member of Congress to the effect that the journals of each House, which provide information about drafting history, would not affect the Supreme Court’s interpretation of a federal statute).

96. Justice Scalia remains opposed. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 668 (2006) (Scalia, J., dissenting); *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in the judgment).

97. It is entirely possible that most senators voted on the Judiciary Act of 1789 without ever having seen Senator Ellsworth’s initial draft of section 34. See Warren, *supra* note 10, at 86 (asserting that the changes reflected on Senator Ellsworth’s sheet occurred “[b]efore the Amendment was actually submitted” in the Senate); see also WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789*, at 131 (Wythe Holt & L.H. LaRue eds., 1990) (noting that even the final version of section 34 does not appear to have been voted upon by the Senate “individually,” but instead “only as a part of the bill as it finally passed”). In any event, there is no reason to think that either members of the House of Representatives or President Washington would have been familiar with this drafting history.

ers have to try to recreate the understandings of a past world. If Warren's arguments were valid, they might shed light on how at least one distinguished lawyer of the late eighteenth century used the phrase "laws of the several States." And unless we have some reason to think that Senator Ellsworth had a different understanding of that phrase than his contemporaries, perhaps this evidence sheds light on the original meaning of section 34 after all.⁹⁸

For the sake of argument, then, let us set aside any objections to Warren's willingness to consult drafting history in the first place, and let us also assume that whatever the drafting history shows about Senator Ellsworth's understanding of section 34 can properly be treated as the original meaning of that provision. Warren's argument still has two serious flaws.

The first flaw is well known to modern scholars. The crucial premise of Warren's argument is that when Senator Ellsworth or his colleagues decided to use the phrase "the laws of the several States" as a substitute for the earlier draft's reference to "the Statute law of the several States in force for the time being and their unwritten or common law now in use," the change was mostly stylistic rather than substantive: the shorter phrase was intended to refer to all the same types of law as the more detailed phrase.⁹⁹ As modern scholars have pointed out, though, Warren offered no support for this assumption, and the assumption is not obviously

98. That could be true even though the Supreme Court of the late eighteenth century would not have considered this sort of information. After all, the early Court might not have needed any outside help to determine how lawyers of its own era understood the phrase "laws of the several States"; the Justices were themselves lawyers of that era, and they were familiar with the legal vocabulary of their day. Modern lawyers trying to understand that vocabulary might therefore need to use sources that the early Court would not have consulted. Cf. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 558 n.151 (2003) (explaining why it might sometimes be appropriate for present-day originalists to draw conclusions about the original meaning of the Constitution on the basis of sources that eighteenth-century lawyers would not have consulted, and making an analogy to the methods that federal courts currently use to identify the content of the law of foreign countries).

99. See Warren, *supra* note 10, at 86, 88. Warren acknowledged that the change was not *purely* stylistic, because it dropped the qualifying phrases "in force for the time being" and "now in use." See *id.* at 86 (describing this change as having "removed [a] limitation [c]ontained in [the] original draft"); cf. 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 867 (1953) (asserting that the phrase "for the time being" in the draft was a fluctuating reference to the time of suit, but that the word "now" would have referred forever afterward to 1789).

correct.¹⁰⁰ After all, legal draftsmen often change the language of a bill in order to alter its meaning, not to keep its meaning the same.

Suppose, however, we could somehow know that Senator Ellsworth's changes were indeed primarily stylistic. There is still a second major flaw with Warren's argument—one that is less familiar to modern scholars than the first flaw, but more devastating. Suppose that section 34 had explicitly said what Warren took it to mean: "the Statute law of the several States ... and their unwritten or common law ... shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply" (except where the Federal Constitution, federal treaties, or federal statutes shall otherwise require or provide). Warren's conclusion still would not follow. In 1789, people did not automatically treat the phrase "unwritten or common law" as a synonym for "judicial decisions."¹⁰¹ Thus, even if section 34 had explicitly instructed federal courts to draw rules of decision from the "unwritten or common law" in use in each state, section 34 would not necessarily have been ordering federal courts to accept state-court precedents about the content of the unwritten or common law. Instead, lawyers of the day could have read section 34 in the same way that Chancellor Taylor read the ordinance specifying that "the common law of England ... shall be the rule of decision" in Virginia: even if section 34 adopted the common law in use in each state, it did not necessarily adopt the decisions of each state's highest

100. See, e.g., Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 134 (2011) ("In the absence of any further evidence ... there is no way to determine whether the change ... was or was not intended to change the substantive meaning of the statute.").

Warren based his diagnosis of a stylistic change largely on a single fact: in addition to dropping the draft's reference to the "unwritten or common law" of the several states, Ellsworth also struck the word "Statute," so that section 34 referred to "the laws of the several States" rather than simply "the Statute law of the several States." Warren, *supra* note 10, at 86. As Warren argued, this change suggests that Ellsworth understood the final version of section 34 to cover more than just statutes. But it does not prove that Ellsworth intended the phrase "laws of the several States" to refer to all the same types of law as the earlier draft. He could have believed that the phrase "laws of the several States" covered not only state statutes but also state constitutions and even "strictly local" aspects of the unwritten law (such as "long established local customs having the force of laws"), without believing that it also covered the more "general" aspects of the unwritten law. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842).

101. See *supra* Part I.B.1.

court.¹⁰² More generally, section 34 need not be read to address the deference that federal courts owe to the decisions of each state's highest court about the content of *any* of the sources of law that section 34 invokes.¹⁰³

Contrary to Justice Brandeis's claims, then, the drafting history uncovered by Charles Warren failed to show that *Swift v. Tyson* was "erroneous" as a historical matter, or that the original meaning of section 34 supported the result in *Erie* rather than the result in *Swift*. Modern scholars with an interest in history now generally agree that Warren's discovery was "inconclusive[]." ¹⁰⁴

The late Professor Wilfred J. Ritz would have taken this revisionism even farther: in his view, not only was *Erie* wrong about the

102. See *supra* notes 48-49 and accompanying text.

103. For an interesting counterpoint to section 34 that highlights the contrast between the sources of law that are regarded as rules of decision and state-court precedents about the content of those sources of law, consider the parallel provision in the Judiciary Act that the Provisional Congress of the *Confederate* States of America enacted in March 1861, after the purported secession of seven states from the Union. That provision read as follows:

The laws of the several states, except where the constitution, treaties or statutes of the Confederate States shall otherwise require or provide, shall be regarded as rules of decision in the courts of the Confederate States, in cases where they apply. And where the decision of the highest court in a state has become a rule of property, the same shall be adopted as a rule in the courts of the Confederate States, in cases in which the laws of such state apply.

Act of Mar. 16, 1861, ch. 61, § 13, *in* THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 75, 77 (James M. Matthews ed., 1864). This provision is interesting for two reasons. First, the contrast between the first and second sentences strongly suggests that a provision requiring courts to treat "[t]he laws of the several states" as rules of decision was not itself understood to address the deference that courts owed to "the decision of the highest court in a state" about their content. Second, the fact that the second sentence was limited to decisions that had become "rule[s] of property" suggests that the courts of the Confederate States were not otherwise bound to accept what the highest court of any individual state said about the content of the laws in force in that state. *Cf.* Charles Fairman, Book Review, 55 HARV. L. REV. 172, 174 (1941) (reviewing WILLIAM M. ROBINSON, JR., JUSTICE IN GREY: A HISTORY OF THE JUDICIAL SYSTEM OF THE CONFEDERATE STATES OF AMERICA (1941)) (observing that this sentence, "by clear implication, conceded the ground seized for the federal judiciary in *Swift v. Tyson*").

104. FREYER, *supra* note 11, at 112-13; see also Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 903-04 (1986) (describing Warren's argument as "shaky"); G. Edward White, *A Customary International Law of Torts*, 41 VAL. U. L. REV. 755, 792-93 (2006) (calling Justice Brandeis's historical argument "defective" and observing that Justice Story's reading of section 34 "was consistent with the Supreme Court's jurisprudence in common law cases prior to *Swift*"); *cf.* Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 389-90 (1964) (supporting *Erie* for other reasons, but conceding that the historical argument is at best inconclusive).

original meaning of section 34, but even *Swift* may have yoked the federal courts too closely to the local law of individual states. Ritz began by observing that eighteenth-century legal draftsmen, including those responsible for the Judiciary Act of 1789, often used the phrase “the several states” to refer to “the states as a group” rather than to each state individually.¹⁰⁵ To convey the latter idea, Ritz argued, draftsmen preferred to use the phrase “the respective states” or “the states respectively.”¹⁰⁶ Although Ritz acknowledged that this usage was not a “hard-and-fast rule,”¹⁰⁷ he believed that section 34 reflected it: according to Ritz, when section 34 told federal courts to regard “the laws of the several states” as rules of decision, it was referring to “American law generally” rather than “the law of a particular state.”¹⁰⁸ Ritz concluded that section 34 had not been intended to require federal courts to apply even the statutory law of any individual state (*pace* Justice Story’s opinion in *Swift*), let alone what the courts of any individual state had said about the unwritten law of that state (*pace* Justice Brandeis’s opinion in *Erie*).¹⁰⁹ For other reasons, Ritz himself believed that section 34 was probably intended to address only *criminal* trials at common law and to have no bearing on civil cases.¹¹⁰ But if section 34 *did* reach civil cases, Ritz took it to be an instruction to apply “the ‘laws of the several states’ viewed as a group of eleven states in 1789, and not viewed separately and individually.”¹¹¹

105. RITZ, *supra* note 97, at 83.

106. *Id.* at 83-87.

107. *Id.* at 83.

108. *Id.* at 140-41; *see also id.* at 140 (asserting that if the point of section 34 had been to make federal courts apply the laws of *individual* states, “the word used almost certainly would have been ‘respective’ and not ‘several’”).

109. *Id.* at 148, 157-59.

110. *See id.* at 147 (finding it significant that section 34 came immediately after section 33, “which relates exclusively to criminal law matters”); *id.* at 146 (speculating that section 34 was “probably” intended to direct the federal courts to “apply an American common law of crimes, as opposed to the British criminal common law, until Congress could get around to passage of a code of national crimes”). *But see id.* at 149 (conceding that if section 34 was indeed “a temporary gap-filling measure” of this sort, then Congress should have repealed it after enacting the Crimes Act of 1790—which Congress did not do); *see also* United States v. Reid, 53 U.S. (12 How.) 361, 362-63 (1852) (reading section 34 to apply only in “civil cases at common law” and not in “trials for offences against the United States”—a conclusion that is precisely the opposite of Ritz’s). Ritz’s arguments for confining section 34 to criminal trials are idiosyncratic, and this aspect of his book has not attracted much of a following.

111. RITZ, *supra* note 97, at 148.

A number of distinguished modern scholars have accepted Ritz's view about the meaning of the phrase "the several states" in section 34.¹¹² But the evidence does not really bear out that view. Even today, the adjective "several" can be used to refer serially to each discrete unit in a composite group. (Think of what it means to say that all the defendants in a civil case are being held liable not only "jointly" but also "severally.") This usage dates far back in American law,¹¹³ and the First Congress often applied it to states—as when Congress resolved that the Secretary of State should "procure from time to time such of the statutes of the several states as may not be in his office,"¹¹⁴ or when Congress appropriated money "[f]or paying salaries to the late loan-officers of the several states,"¹¹⁵ or when Congress referred to "the requisitions heretofore made upon the several states."¹¹⁶ The Constitution itself used the same locution when it provided that "[t]he House of Representatives shall be

112. See, e.g., Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 81, 105-10 (1993) (accepting the idea that "the term 'several states' connoted the states collectively" and that "Congress did not understand Section 34 as a command to apply the substantive law of any particular state"); Sherry, *supra* note 100, at 134-35 (arguing on the basis of Ritz's research that "the enacting Congress probably did not intend for federal courts sitting in diversity to apply *either* state statutory law or state common law, but rather to apply federal common law").

113. The first good American law dictionary, originally published in 1839, noted that "several" conveyed a sense of "separation or partition" and offered the following examples:

A several agreement or covenant, is one entered into by two or more persons separately, each binding himself for the whole; a several action is one in which two or more persons are separately charged; a several inheritance, is one conveyed so as to descend, or come to two persons separately by moieties.

2 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION 504-05 (2d ed. 1843). This usage was common in the eighteenth century as well as the nineteenth. See 15 THE OXFORD ENGLISH DICTIONARY 97 (2d ed. 1991) (noting that when "several" qualifies a plural noun, it can mean "[i]ndividually separate," and offering examples from the fifteenth through the nineteenth centuries).

114. Res. of Sept. 23, 1789, 1st Cong., 1 Stat. 97.

115. Act of Mar. 26, 1790, ch. 4, § 5, 1 Stat. 104, 105.

116. Act of Sept. 29, 1789, ch. 23, 1 Stat. 95; see also, e.g., Act of Aug. 11, 1790, ch. 43, 1 Stat. 184, 184-85 (consenting to tonnage duties imposed by "the acts of the several states herein after mentioned," and proceeding to list statutes from Rhode Island, Maryland, and Georgia); Act of Aug. 4, 1790, ch. 34, § 3, 1 Stat. 138, 139 (referring to certificates "issued by the commissioners of loans in the several states"); Res. of Sept. 23, 1789, 1st Cong., 1 Stat. 96 (resolving "[t]hat it be recommended to the legislatures of the several States to pass laws" of a certain description).

composed of Members chosen every second Year by the People of the several States.”¹¹⁷ Just as the phrase “the People of the several States” in this provision refers to the people of each state individually rather than the people of the states as an undifferentiated mass, the standard reading of section 34 takes the phrase “the laws of the several states” to refer to the law of each state individually. Not only is that reading consistent with the drafting habits of the late eighteenth century, but I am not aware of any persuasive evidence that Ritz’s contrary reading of section 34 even occurred to a single lawyer or judge in the early Republic. By contrast, there *is* clear evidence of lawyers and judges adopting the standard reading.¹¹⁸

But while I think we can safely conclude that Ritz was wrong about the original meaning of section 34, that conclusion does nothing to rehabilitate Justice Brandeis’s historical argument in *Erie*. Even though section 34 is naturally understood to refer to the laws of each state individually, and even though that reference can readily be understood to include unwritten as well as written forms of law, section 34 still need not be interpreted to address whether federal courts must defer to each state’s highest court about the content of the unwritten law in force within that state. At any rate, the drafting history unearthed by Charles Warren has no real bearing on this point: it does not establish—or even suggest—that the original meaning of section 34 foreclosed Justice Story’s position in *Swift*.

117. U.S. CONST. art. I, § 2. I would say the same about the Privileges and Immunities Clause of Article IV, which reads as follows: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” *Id.* art. IV, § 2; *see also* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1400-01 (1992) (observing that under what appears to have been the “mainstream interpretation” of this provision, the clause required each state to accord traveling citizens from other states the same privileges and immunities that the state accorded its own citizens). *But see* RITZ, *supra* note 97, at 85 (interpreting this clause to refer to “the privileges and immunities ... that are common ... to *all* the states”).

118. *See* Collins, *supra* note 24, at 171-72 (noting that Justice Iredell’s opinion in *United States v. Mundell*, 27 F. Cas. 23 (C.C.D. Va. 1795) (No. 15,834), which discusses section 34 in detail, takes for granted that section 34 requires reference to the law of particular states).

B. Justice Brandeis's Practical Arguments

Aside from making a specious historical argument, Justice Brandeis also offered practical reasons to dislike the doctrine associated with *Swift*. Here, he was on somewhat sounder ground, although he overstated his case and ignored plausible counterarguments.

1. The Murkiness of the Distinction Between "General" and "Local" Law

To begin with, Justice Brandeis observed that "the distinction between questions of general and of local law," which was central to the *Swift* regime, had proved both arbitrary and murky: no natural "line of demarcation" separated the two types of questions, and the federal courts' efforts at classification had introduced a "well of uncertainties."¹¹⁹ That is true. But as students of civil procedure can confirm, *Erie* has not eliminated all line-drawing problems. According to Suzanna Sherry, indeed, *Erie* "simply traded one set of uncertainties for another," because it requires federal courts to draw equally murky distinctions between "substantive" questions (which *Erie* potentially instructs federal courts to answer in accord with the precedents of a particular state's supreme court) and "procedural" questions (which, in federal court, are instead governed by some form of federal law).¹²⁰

Evaluating Professor Sherry's specific argument about the distinction between "substance" and "procedure" is harder than one might think, because federal courts had to draw that distinction even before *Erie*. One of the main reasons why they needed to do so, however, was a federal statute called the Conformity Act,¹²¹ which

119. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 & n.8 (1938).

120. Sherry, *supra* note 100, at 141-42.

121. *See* Rev. Stat. § 914 (1874) ("The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."); *see also* Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197 (enacting the original version of this statute). By virtue of this statute, federal courts entertaining actions at law before *Erie* often had to determine whether a particular question was about "practice ... [or] modes of

was largely superseded in September 1938 and completely repealed in 1948.¹²² Given the demise of the Conformity Act, modern federal courts may indeed have to distinguish “substance” from “procedure” somewhat more often because they follow *Erie* than would be necessary if they still followed *Swift*.¹²³ But to the extent that this

proceeding” (in which case the Conformity Act might tell them to follow the practice of the courts of an individual state) or was instead more substantive (in which case they might follow their own understanding of the “general” law unless they classified the question as one of “local” law).

Before Congress enacted the Conformity Act in 1872, federal courts had to draw a similar distinction under the so-called Process Acts. *See* Act of Aug. 1, 1842, ch. 109, 5 Stat. 499; Act of May 19, 1828, ch. 68, 4 Stat. 278; Act of May 8, 1792, ch. 36, 1 Stat. 275; Act of Sept. 29, 1789, ch. 21, 1 Stat. 93. Although the Process Acts were understood to call for “static” conformity (with the forms of proceeding that the relevant state had been using in either 1828 or 1789) rather than “dynamic” conformity (with whatever practices the state courts used at the time of suit), they too often required federal courts to treat procedure differently than substance. *See generally* CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 61 (6th ed. 2002) (discussing both the Process Acts and the Conformity Act).

122. The process of superseding the Conformity Act began in 1934, when Congress authorized the Supreme Court to promulgate “general rules” prescribing “the practice and procedure in civil actions at law” in the federal district courts. Rules Enabling Act, ch. 651, § 1, 48 Stat. 1064, 1064 (1934); *see also id.* § 2 (adding that the Supreme Court “may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both”). Congress specified that rules promulgated by the Supreme Court pursuant to this authority “shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.” *Id.* § 1.

By the time that *Erie* was decided in April 1938, the Supreme Court had used this authority to promulgate the Federal Rules of Civil Procedure, but those rules had not yet taken effect. When they did so in September 1938, they superseded the Conformity Act at least with respect to the topics that they covered, but the Conformity Act arguably remained in force with respect to other topics. *See Young v. Garrett*, 149 F.2d 223, 227 (8th Cir. 1945) (“Where there are no specific national statutes ... or governing Rules, the Conformity Act ... applies and State law controls.”); *see also* Thomas F. Green, Jr., *The Admissibility of Evidence Under the Federal Rules*, 55 HARV. L. REV. 197, 204 (1941) (discussing the status of the Conformity Act after the effective date of the Federal Rules of Civil Procedure). In 1948, Congress finally repealed the Conformity Act in its entirety. *See* Act of June 25, 1948, § 39, 62 Stat. 869, 992-93 (repealing Rev. Stat. § 914).

123. The difference between *Swift* and *Erie* does not affect how federal courts behave with respect to matters covered by written federal law. For instance, consider matters covered by the Federal Rules of Civil Procedure. With or without *Erie*, federal courts would have to follow all valid aspects of the Federal Rules, and they would also have to use the same test to determine the validity of those Rules. That test, which is supplied by the Rules Enabling Act, does require federal courts to draw some distinctions between “procedure” and “substance.” *See* 28 U.S.C. § 2072(a) (2006) (delegating authority to prescribe “general rules of practice and procedure and rules of evidence”); *id.* § 2072(b) (adding that “[s]uch rules shall not abridge, enlarge or modify any substantive right”). But that would be true even if federal courts were still operating under *Swift*, as they were when Congress initially supplied this test in 1934.

conclusion depends on legal changes that occurred after *Erie* (such as the repeal of the Conformity Act in 1948), blaming Justice Brandeis for it may be unfair.

Even apart from the distinction between “substance” and “procedure,” though, there is a different reason why Professor Sherry is

Just as the difference between *Swift* and *Erie* does not affect how federal courts handle matters that are covered by written federal law, so too it does not dramatically affect how federal courts handle matters that are covered by written state law (or other types of state law that would have been classified as “local” under *Swift*). At any rate, the difference between *Swift* and *Erie* does not affect the need for modern federal courts to classify such matters as “substantive” or “procedural.” To appreciate this point, suppose that a federal court is confronting a question that written federal law does not address and that a state statute would govern if the case were in state court. If the federal court classifies the question as “substantive,” then the Rules of Decision Act will lead the federal court too to follow the state statute (assuming that the applicable conflict-of-law principles favor using this particular state’s law). Even during the *Swift* era, though, courts and commentators recognized a category of “procedural” questions that state law does not govern of its own force in federal court. See, e.g., BENJAMIN ROBBINS CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 218 (George Ticknor Curtis & Benjamin R. Curtis eds., 1880) (“[T]he State legislatures have not, under the Constitution of the United States, any power to legislate respecting the practice, pleading, and modes of proceeding of the courts of the United States.”); Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 609 (2001) (“According to the Supreme Court, under the Process Acts, state procedures did not operate of their own force in federal courts, but rather because they had been adopted by Congress.”). Now that the Conformity Act no longer exists, federal law leaves federal courts free to follow their own customary practices on such questions. As a result, even if modern federal courts still accepted *Swift*, they would apply state statutes and other aspects of local state law to “substantive” questions that lie within the states’ legislative competence, but not to questions that the federal courts classify as “procedural.” What is more, federal courts probably would draw the line between “substance” and “procedure” for this purpose in exactly the same place that they have drawn it for purposes of *Erie* analysis. (After all, the reason why *Erie* does not oblige federal courts to follow state law on “procedural” matters, including even matters that written federal law does not address, is that the Constitution puts those matters beyond the states’ power to regulate in federal court. That is precisely the logic that federal courts would be likely to use if they still accepted *Swift* but were no longer subject to the Conformity Act.)

With respect to matters that are not covered *either* by any written federal law *or* by any written state law, however, the difference between *Swift* and *Erie* may well affect the frequency with which modern federal courts have to distinguish “substance” from “procedure.” Insofar as some such matter comes within the states’ legislative competence, in the sense that a state court handling the matter would be thought of as applying state law, *Erie* tells federal courts to ask whether the matter is “substantive” (in which case they should handle the matter as the state court would) or “procedural” (in which case they can handle the matter according to the customary practices of the federal courts). By contrast, if modern federal courts still accepted *Swift*, and if they classified the matter as one of “general” law, they might not need to worry about whether the matter is “substantive” or “procedural”; either way, they would handle it according to their own best understanding of the unwritten law.

correct that *Erie* “traded one set of uncertainties for another.”¹²⁴ In fields over which the states enjoy legislative jurisdiction, *Erie* did eliminate the need for federal courts to separate questions of “general” law from questions of “local” law. But wherever federal courts following *Swift* would have characterized a question in one of those fields as “general” (and hence not controlled by the decisional law of any individual state), federal courts now have to identify the particular state whose decisional law matters. As a result, federal courts following *Erie* face horizontal conflict-of-law questions substantially more often than they did under *Swift*—and the lines that conflict-of-law analysis requires courts to draw may be just as murky as the line between “local” and “general” law.¹²⁵

At first glance, the Supreme Court’s 1941 decision in *Klaxon Co. v. Stentor Electric Manufacturing Co.*¹²⁶ might seem to mitigate this problem. In one sense, after all, *Klaxon* established a clear rule: in cases covered by *Klaxon*, each federal district court is supposed to borrow the conflict-of-law doctrines that would be used by the highest court of the state in which it sits.¹²⁷ But unless that state has achieved clarity in conflict-of-law analysis, this approach does not eliminate the need for federal courts to draw murky lines; it simply tells federal courts to try to apply the same murky lines that the state courts would use. This instruction, moreover, has its own costs. Indeed, it arguably destroys one of the principal practical advantages that the diversity jurisdiction of the federal courts used to serve.¹²⁸

124. See *supra* text accompanying note 120.

125. See, e.g., Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 12 (1991) (“In the states that have adopted one of the modern choice of law approaches, the parties may litigate at length over the application of indeterminate criteria.”).

126. 313 U.S. 487 (1941).

127. *Id.* at 496-97.

128. In the old days, when federal courts faced questions of “local” law and had to decide which state’s local law to use, they applied their own understanding of conflict-of-law jurisprudence. See, e.g., *Ex parte Heidelberg*, 11 F. Cas. 1021, 1022 (D.C.D. Mass. 1876) (No. 6322) (“When we have ascertained what local law applies to the case, we follow it; but the ascertainment itself is not a local question.”). Professor McConnell has powerfully explained the practical benefits of this approach. See Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, in *NEW DIRECTIONS IN LIABILITY LAW* 90, 91-97 (Walter Olson ed., 1988); see also Nelson, *supra* note 28, at 566-67 (summarizing McConnell’s argument and concluding that “[l]argely because of *Klaxon*, diversity jurisdiction no longer checks states’ tendencies to favor in-state interests by extending the reach of certain laws beyond [the limits

2. *Disuniformity and Forum Shopping*

Aside from the line-drawing necessitated by *Swift*, Justice Brandeis also pointed to a more serious problem. As Part I suggested, people of Justice Story's day may well have hoped that the practice reflected in *Swift* would promote national uniformity on questions of general law; although the courts of individual states were not *bound* to accept what the Federal Supreme Court said about the content of the general law, people hoped that they would usually *choose* to do so (either because they found the Supreme Court's opinions persuasive or simply because those opinions provided a natural coordination point).¹²⁹ According to Justice Brandeis, however, this hope had not been realized, or had been realized only very imperfectly: state courts often "[p]ersist[ed] ... in their own opinions on questions of common law."¹³⁰ In at least some states, then, the state courts applied different rules of decision than the federal courts on some questions of general law. The result was that "[i]n attempting to promote uniformity of law throughout the United States, the doctrine [associated with *Swift*] ... prevented uniformity in the administration of the law of the State."¹³¹

This disuniformity had various bad consequences. Justice Brandeis himself emphasized the incentives that it created for what is now called "forum shopping": lawyers contemplating litigation on behalf of a client sometimes knew that a state court would take a different view of the applicable law than a federal court located in the same state, and they sometimes could maneuver their client's case into the court whose view favored their side.¹³² But forum

suggested by traditional conflict-of-law principles").

129. *See supra* text accompanying notes 74-77.

130. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 & n.7 (1938).

131. *Id.* at 75.

132. *See id.* at 74-75 (discussing the importance under *Swift* of "the privilege of selecting the court"). For Justice Brandeis and other critics of *Swift*, the leading example of manipulative forum shopping was *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928). At the time of that case, federal courts exercising diversity jurisdiction effectively treated every domestic corporation as a citizen of whichever state had incorporated it. A taxicab company that did business in Kentucky, and that wanted to sue a local competitor on a matter as to which the federal courts and the Kentucky courts had different understandings of the unwritten law, therefore reincorporated itself in Tennessee so as to be able to bring its suit in federal court. This stratagem worked, though it produced a famous dissent by Justice Holmes and provided extra ammunition for attacks

shopping was an artifact of a more fundamental problem that had bad effects at an even earlier stage. In Henry Hart's words, the arrangements reflected in *Swift* "subject[ed] citizens at the crucial level of everyday activity to dual and often inconsistent systems of substantive law, without means of foretelling which system, in the unforeseeable contingency of litigation, was going to apply."¹³³ If state and federal courts have different understandings of the legal rights and duties associated with conduct in the real world, and if someone who might engage in that conduct cannot know in advance which court system will adjudicate any lawsuits arising from his conduct, the resulting uncertainties may well produce both inefficiencies and injustices.¹³⁴

Still, as various scholars have explained, when we consider whether *Erie* is better than *Swift* in this respect, we need to keep in mind two different sorts of uniformity (and two different sorts of disuniformity).¹³⁵ *Swift* offered the prospect of uniformity on

on the *Swift* regime. See *Erie*, 304 U.S. at 73-74 & n.6 (noting that "[c]riticism of the [*Swift*] doctrine became widespread" after the taxicab case); see also, e.g., Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 527-28 (1928) (using the taxicab case as the lead example of *Swift*'s bad effects).

There is no doubt that the taxicab case reflected an unattractive manipulation of diversity jurisdiction and that the *Swift* regime had provided the incentive for this manipulation. But instead of concluding that the *Swift* regime should be abandoned, one could simply have concluded that Congress should make the statutory grant of diversity jurisdiction less manipulable. After all, if courts determine the citizenship of corporations for purposes of diversity jurisdiction by focusing solely on the state of incorporation, they are practically inviting the sort of manipulation that occurred in the taxicab case, because corporations often can choose their state of incorporation without substantial cost. Had Congress been concerned about this problem enough to want to reduce it, Congress could have overridden the then-existing judicial doctrine about corporate citizenship and established a test with more connection to the real world—as Congress eventually did even after *Erie*. See Act of July 25, 1958, § 2, 72 Stat. 415, 415 (specifying that for purposes of 28 U.S.C. §§ 1332 and 1441, a corporation should be deemed to be a citizen not only of "any State by which it has been incorporated" but also of "the State where it has its principal place of business") (current version at 28 U.S.C. § 1332(c)(1)); see also *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1195 (2010) (noting that "a major reason for the insertion of the 'principal place of business' language in the diversity statute" was to impede "jurisdictional manipulation").

133. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 505 (1954).

134. Cf. *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) ("*Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs.>").

135. See, e.g., Jed I. Bergman, Note, *Putting Precedent in Its Place: Stare Decisis and*

questions of general law across all *federal* courts throughout the country: once the United States Supreme Court had addressed and resolved a question of general law, all other federal courts were supposed to accept and apply its view.¹³⁶ But *Swift* achieved this “horizontal” uniformity among federal courts at the expense of “vertical” uniformity between the state and federal courts located in a particular state. To be sure, *Swift* did not sacrifice the latter sort of uniformity completely; the courts of many states might share the Federal Supreme Court’s understanding of the general law, whether because (1) they independently arrived at the same conclusion, (2) they found the Supreme Court’s opinions persuasive, or (3) they opted to defer to those opinions for the sake of uniformity. On contested questions of general law, though, the courts of some states could be expected to disagree with the Federal Supreme Court (or with the lower federal courts on issues that the Supreme Court had

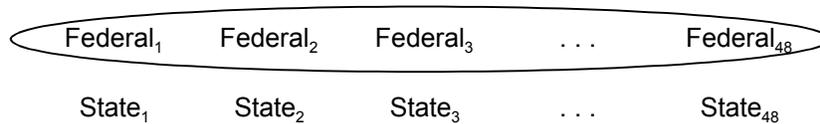
Federal Predictions of State Law, 96 COLUM. L. REV. 969, 980 n.60 (1996) (“*Erie* sacrificed horizontal uniformity among different courts in the federal system in favor of vertical uniformity between federal and state courts in the same state.”); Sherry, *supra* note 100, at 138-39, 141 (casting the point in terms of forum shopping); cf. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 715 n.125 (1974) (agreeing that “a choice between horizontal uniformity among all federal courts and vertical uniformity between the federal and state courts of a given state ... was at the heart of the disagreement between *Swift* and *Erie*,” but asserting—erroneously, in my view—that the Rules of Decision Act compels the choice that *Erie* made).

136. Because of changes in the nature of the Supreme Court’s jurisdiction, the *Swift* regime may have done more to promote this sort of uniformity in the nineteenth century than in the years immediately before *Erie*. Until 1891, the Supreme Court’s appellate jurisdiction was mandatory: the Court could not pick and choose which appeals to hear. Starting in 1891, though, Congress began allowing the Court to proceed instead through the discretionary writ of certiorari in certain kinds of cases, including cases that were properly in the new federal circuit courts of appeals but that did not involve questions of federal law. See Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891); see also Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1649-704 (2000) (discussing the progression of certiorari from the Evarts Act to the so-called “Judges’ Bill” of 1925, ch. 229, 43 Stat. 936). According to contemporary observers, the result of this shift toward discretionary jurisdiction was that “relatively few cases where rights under the Federal Constitution and statutes are not involved are likely to get beyond the Circuit Courts of Appeals.” *Cole v. Pa. R.R. Co.*, 43 F.2d 953, 957 (2d Cir. 1930). To the extent that the Supreme Court chose to concentrate on resolving questions of federal law, as opposed to promoting uniformity in the federal courts’ understanding of the nonfederal general law, the rise of discretionary jurisdiction arguably undercut one of the possible advantages of the *Swift* regime. See *id.* at 956-57 (emphasizing this point in the course of attacking *Swift*); cf. *Erie*, 304 U.S. at 74 n.7 (citing *Cole* for the proposition that “decisions of this Court on common law questions are less likely than formerly to promote uniformity”).

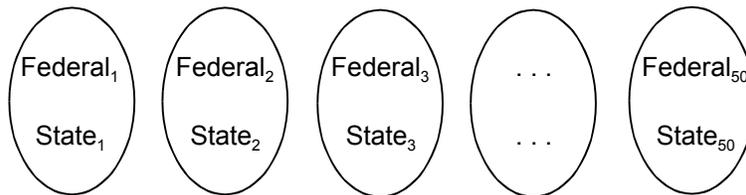
not addressed), and in those states the *Swift* regime tolerated vertical disuniformity between the rule of decision in state court and the rule of decision in federal court.

Together, *Erie* and *Klaxon* offer the prospect of more vertical uniformity between state and federal courts located in the same state. But *Erie* does so at the cost of some horizontal uniformity: on various substantive questions that would previously have been classified as matters of general law but over which the states have lawmaking power, different federal district courts now feel bound by the precedents of the supreme courts of different states.¹³⁷

Two stylized diagrams help to convey the different types of uniformity that *Swift* and *Erie* promise. Each column in the diagrams represents the federal and state courts located in a particular state, and the ovals linking different courts reflect the relevant type of uniformity. The horizontal uniformity promoted by *Swift* (with respect to questions of general law that the Federal Supreme Court had definitively addressed) might be represented as follows:



Likewise, the vertical uniformity promoted by *Erie* and *Klaxon* (with respect to questions that the supreme court of each state has definitively addressed) can be represented as follows:



Insofar as we are trying either (1) to enable real-world actors to have advance notice of the legal rules that will be applied to their

137. Cf. Patrick J. Borchers, *The Real Risk of Forum Shopping: A Dissent from Shady Grove*, 44 CREIGHTON L. REV. 29, 32 (2010) (“[T]he *Erie*-and-*Klaxon* doctrine’s suppression of vertical forum shopping encourages the horizontal variety.”).

actions in the event of litigation or (2) to reduce lawyers' incentives for forum shopping once litigation is at hand, we might well want to promote both *Swift's* horizontal uniformity throughout all federal courts and *Erie's* vertical uniformity throughout the courts located in any particular state. Unless all courts across the country are willing to take the same view of the common law, however, it is impossible to achieve both types of uniformity simultaneously. As a result, whether federal courts follow *Swift* or *Erie*, there is bound to be some sort of disuniformity that makes planning harder ex ante and that creates incentives for forum shopping ex post.

One might think that those problems would be worse under *Swift* than under *Erie*. But to the extent that state courts ever deferred to federal courts on questions of general law (or were persuaded by the federal courts' independent judgment on those questions), the arrangements reflected in *Swift* may have done something to promote vertical uniformity at the same time that they achieved horizontal uniformity.¹³⁸ In any event, some kinds of real-world actors might well have found the horizontal uniformity produced by *Swift* more conducive to planning than the vertical uniformity produced by *Erie*. Imagine a company that does business in many different states and that might be sued in any of them. Insofar as the company could count on being able to remove most suits to federal court on the basis of diversity of citizenship,¹³⁹ *Swift* offered some predictability: no matter where the company was sued, it was likely to be able to get the suit into federal court, where the federal courts' (horizontally uniform) understanding of the general law would apply. Under *Erie* and *Klaxon*, by contrast, removing a suit from state to federal court no longer suppresses horizontal variations in the state courts' understanding of either conflict-of-law principles or substantive rules of decision. As a result, businesses cannot know the rules of decision that will be applied to their conduct until they know the particular state in which they will be

138. See *supra* notes 74-77 and accompanying text.

139. Admittedly, removability might have been a safer bet in the early days of the *Swift* regime than by the end. As states liberalized their rules about the joinder of parties in actions at common law, they made it easier for plaintiffs to include nondiverse parties whose presence would defeat removal. Cf. 7 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1651 (3d ed. 2001) (describing history of permissive joinder).

sued—information that they might not have at the time that they need to act.¹⁴⁰

In the decades after *Erie*, moreover, this sort of uncertainty has arguably increased. When *Erie* was decided, *Pennoyer v. Neff*¹⁴¹ had not yet given way to *International Shoe Co. v. Washington*,¹⁴² and so the Constitution was still thought to impose substantial restrictions on each state’s ability to assert personal jurisdiction over out-of-state defendants who had not appointed an agent for service of process within the state. With the relaxation of those restrictions, potential defendants now face a broader array of states in which they might be sued in connection with any particular transaction.¹⁴³ Because of the “choice-of-law revolution” that began gathering steam in the 1960s, moreover, the courts of those different states are more likely to reach different conclusions about which state’s law governs which issues.¹⁴⁴ While Justice Brandeis could not necessarily have foreseen these developments, they exacerbate the type of uncertainty tolerated by *Erie* and *Klaxon*.

I do not want to overstate this argument. Even if *Erie* had never overruled *Swift*, state courts located in different states would still sometimes take different views of the common law, and the resulting disuniformity would create some problems for potential litigants who do not know in advance where they will sue or be sued. To be sure, *Erie* and *Klaxon* mean that removing a suit from

140. In contractual settings, businesses can try to mitigate this problem by insisting upon choice-of-forum or choice-of-law clauses. But tort suits often do not lend themselves to this solution.

141. 95 U.S. 714 (1878).

142. 326 U.S. 310 (1945).

143. See, e.g., Hans Smit, *Federalizing International Civil Litigation in the United States: A Modest Proposal*, 8 *TRANSNAT’L L. & CONTEMP. PROBS.* 57, 60 (1998) (suggesting that this development provides good reason to overrule *Erie*, and observing that the combined effect of modern long-arm statutes and modern conflict-of-law doctrines “permits horizontal forum shopping on a scale that veritably dwarfs the vertical forum shopping that Justice Brandeis ruled an undesirable consequence of *Swift v. Tyson*”); see also MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 234 (2012) (similarly condemning the interaction between *Erie* and *International Shoe*).

144. See Borchers, *supra* note 137, at 30-32 (noting that the “unravel[ing]” of the traditional consensus about conflicts rules has made “horizontal ... forum shopping” a more serious problem than it used to be, and observing that *Erie* and *Klaxon* contribute to that problem); see also SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* (2006) (chronicling the breakdown of consensus in the United States about conflict-of-law questions).

state to federal court will no longer tend to dampen the problems generated by this sort of disuniformity. But it is certainly possible that the sort of disuniformity tolerated by *Erie* and *Klaxon* (involving the rules of decision that federal courts located in different states would apply to a particular suit) is less troublesome than the sort of disuniformity tolerated by *Swift* (involving the rules of decision that state and federal courts located in the same state would apply to the suit). What is more, the type of uniformity promoted by *Swift* may be harder to achieve now than it was in the nineteenth century.¹⁴⁵

Contrary to Justice Brandeis's rhetoric, though, *Erie* cannot rest on a simple condemnation of disuniformity (or forum shopping), because some sort of disuniformity (and some sort of forum shopping) is inevitable whether federal courts apply *Erie* or *Swift*. To establish that concerns about disuniformity justify replacing *Swift* with *Erie*, one would need to show that vertical disuniformity between state and federal courts located in the same state poses more practical problems than horizontal disuniformity between federal courts located in one state and federal courts located in another state. Indeed, even that showing would not be enough: achieving vertical uniformity between state and federal courts located in the same state requires *Klaxon* as well as *Erie*, and so one would need to show that the benefits of this sort of uniformity are large enough to justify the collateral damage that *Klaxon* inflicts upon our federal system.¹⁴⁶ Neither Justice Brandeis's opinion in *Erie* nor Justice Reed's opinion in *Klaxon* took up those challenges.

3. "Discrimination" Against Citizens of the Forum State

In addition to launching a general attack on the disuniformity associated with *Swift*, Justice Brandeis also complained about one of the specific consequences of that disuniformity. In his view, *Swift* "introduced grave discrimination by non-citizens [of a state] against citizens [of the state]."¹⁴⁷ Under *Swift*, he explained, rights varied "according to whether enforcement was sought in the state or in the

145. See *supra* notes 136, 139.

146. See *supra* note 128. For a forceful argument that the net effects of *Erie* and *Klaxon* may be negative, see GREVE, *supra* note 143, at 221-42.

147. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938).

federal court,” and the noncitizen had “the privilege of selecting the court.”¹⁴⁸ According to Justice Brandeis, indeed, this arrangement offended the concept of “equal protection of the law.”¹⁴⁹

Justice Brandeis did not make explicit exactly what he was talking about; when a noncitizen of the forum state had a dispute with a citizen of the forum state, in what sense did the law give the noncitizen more say than the citizen over whether the suit proceeded in state court or federal court? In the first instance, whoever was the plaintiff could certainly choose whether to file the suit in state or federal court. If the plaintiff chose to file in federal court, moreover, there was no way for the defendant to get the suit transferred to state court. But that was true regardless of which party was a citizen of the forum state. Instead of giving noncitizens a special advantage over citizens, this feature of the system simply gave plaintiffs an advantage over defendants.¹⁵⁰

The “discrimination” that Justice Brandeis had in mind applied to the subset of cases that the plaintiff chose to file in *state* court. By statute, Congress had authorized defendants to remove cases from state to federal court on the basis of diversity of citizenship, but only if the forum state was not the home of any of the defendants.¹⁵¹ Thus, if a citizen of the forum state sued a noncitizen defendant in state court, the defendant could remove the case to federal court. But if the roles were reversed, so that a noncitizen plaintiff was proceeding in state court against a citizen defendant, the case would remain in state court; the defendant would not have the option of removal, because Congress had not authorized citizens of the forum state to remove cases on the basis of diversity jurisdiction.

This statutory restriction on removal did indeed give noncitizens of the forum state somewhat more power than citizens to determine whether a diversity suit proceeded in state or federal court. But Justice Brandeis’s argument was nonetheless highly misleading.

148. *Id.* at 74-75.

149. *Id.* at 75.

150. See White, *supra* note 104, at 794.

151. See Judicial Code of 1911, ch. 231, § 28, 36 Stat. 1087, 1094 (authorizing removal on the basis of diversity of citizenship only if the defendants are “nonresidents of [the forum] State”); see also 28 U.S.C. § 1441(b)(2) (Supp. V 2011) (setting forth the current version of this restriction); cf. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (authorizing removal “if a suit be commenced in any state court ... by a citizen of the state in which the suit is brought against a citizen of another state”).

First, as Professor Purcell has noted, Justice Brandeis's statement was "obviously inaccurate" as a general matter; the asymmetry that he had in mind "applied only in a specific subcategory of cases," where the plaintiff wanted to proceed in state rather than federal court and the defendant was contemplating removal.¹⁵² Second, the asymmetry was a product of Congress's own statutes, not the *Swift* regime. While the *Swift* regime did add to the practical importance of the asymmetry, *Swift* certainly did not create the asymmetry—and if Congress had agreed with Justice Brandeis's fears about "discrimination," Congress could have eliminated the problem simply by repealing the statutory restriction on removal.¹⁵³

If one treats Justice Brandeis's invocation of "equal protection" as an argument about constitutional law, then the fact that the key distinction originated with Congress might be irrelevant; perhaps Congress lacked the constitutional authority to draw distinctions between citizens and noncitizens of the forum state, at least if those distinctions were going to have the consequences that the *Swift* regime attached to them. But Justice Brandeis's reference to "equal protection" did not appear in the constitutional section of his opinion, and most modern scholars agree that he probably understood that reference less as a constitutional claim than as a policy argument about fairness.¹⁵⁴ As various scholars have noted, the rhetoric of "equal protection" would not have been the most natural way for Justice Brandeis to attack the constitutionality of actions by the federal government, because the Fifth Amendment had not yet been held to have an equal-protection component.¹⁵⁵ In any event, the sort of "discrimination" that Justice Brandeis decried would not be understood to violate equal-protection doctrine even today.¹⁵⁶

152. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 162 (2000). *But cf.* Ely, *supra* note 135, at 712 & n.111 (agreeing that Justice Brandeis was referring to the statutory restrictions on removal, but considering this point so obvious that the opinion was not misleading).

153. *See* White, *supra* note 104, at 794.

154. *See* Bradford R. Clark, *Erie's Constitutional Source*, 95 CALIF. L. REV. 1289, 1299-300 & n.74 (2007) (citing scholars); *see also, e.g.*, Ely, *supra* note 135, at 713 (opining that Justice Brandeis's reference to equal protection "surely ... was a metaphor," because the argument would have been considered untenable as a matter of constitutional law).

155. *See, e.g.*, *Steward Mach. Co. v. Davis*, 301 U.S. 548, 584 (1937) ("The Fifth Amendment unlike the Fourteenth has no equal protection clause.").

156. *See, e.g.*, Green, *supra* note 5, at 604 ("Brandeis's use of the term 'equal protection' was

Of course, to say that this “discrimination” was constitutional is not to say that it was good policy. Even though the distinction between citizens and noncitizens of the forum state originated with Congress, one could certainly complain about the consequences that the *Swift* regime attached to that distinction. Such complaints, however, are not naturally limited to the fact that noncitizens of the forum state could remove suits to federal court more readily than citizens could. Instead, modern scholars who endorse the “anti-discrimination” strain of Justice Brandeis’s opinion in *Erie* tend to make a broader argument: in their view, it is arbitrary and unfair for the substantive outcomes of cases to depend on whether the parties have access to federal court or instead are proceeding in state court.¹⁵⁷ So conceived, the complaint about “discrimination” may simply be a different way of packaging Justice Brandeis’s concerns about vertical disuniformity and opportunities for forum shopping.

C. Constitutional Arguments

According to Justice Brandeis, if *Swift* had involved “only a question of statutory construction,” the practical problems that he identified would not have been enough to overcome stare decisis and persuade the Court “to abandon a doctrine so widely applied throughout nearly a century.”¹⁵⁸ But Justice Brandeis believed that stare decisis should be weaker in constitutional cases than in statutory cases,¹⁵⁹ and he further believed that *Erie* was a constitutional case: in his view, “the unconstitutionality of the course pursued [under *Swift*] has now been made clear.”¹⁶⁰ Although some of the Justices who joined the majority opinion may not really have

not constitutionally serious at the time, and modern equal protection jurisprudence has likewise ignored it.”).

157. See, e.g., Peter Westen, *After “Life for Erie”—A Reply*, 78 MICH. L. REV. 971, 980-81 (1980).

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

159. See, e.g., *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting); cf. Lee J. Strang & Bryce G. Poole, *The Historical (In)Accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents*, 86 N.C. L. REV. 969 (2008) (arguing that although Justice Brandeis claimed historical support for this idea, the Federal Supreme Court’s practice on this point actually originated with him).

160. *Erie*, 304 U.S. at 77-78.

shared that view,¹⁶¹ Brandeis certainly wrote as if constitutional arguments were crucial to his own vote in *Erie*.

Still, Justice Brandeis did not make clear exactly what his constitutional arguments were. The summary that he offered at the end of his opinion sounded in federalism: “We ... declare that in applying the [*Swift*] doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.”¹⁶² But the rationale for that conclusion was opaque.

Early in his opinion, Justice Brandeis did observe that some of the questions that the federal courts had classified as matters of “general” law lay beyond the reach of the legislative powers that the Constitution vests in Congress. With respect to such questions, Justice Brandeis noted, federal courts applying *Swift* had “assumed ... the power to declare rules of decision which Congress was confessedly without power to enact as statutes.”¹⁶³ The rhetoric of this passage suggests that the *Swift* regime amounted to an impermissible end run around the fact that the Constitution gives the federal government only limited and enumerated legislative powers.¹⁶⁴

161. See PURCELL, *supra* note 152, at 108-14 (pointing to internal correspondence and subsequent statements by other members of the Court); *cf. Erie*, 304 U.S. at 90-92 (Reed, J., concurring in part and concurring in the judgment) (endorsing the majority opinion “except in so far as it relies upon the unconstitutionality of the ‘course pursued’ by the federal courts”).

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

163. *Id.* at 72.

164. To be sure, Justice Brandeis probably believed that the particular question at issue in *Erie* came within the reach of the federal government’s legislative powers. The Supreme Court had long held that in the exercise of its powers to regulate interstate commerce, Congress could impose legal duties on interstate railroads “to secure the safety of the persons and property transported [in interstate commerce] and of those who are employed in such transportation.” *S. Ry. Co. v. United States*, 222 U.S. 20, 27 (1911) (upholding the Safety Appliance Acts); see also *Second Employers’ Liability Cases*, 223 U.S. 1, 46-52 (1912) (upholding the Federal Employers’ Liability Act). Given his position in other debates about congressional power, Justice Brandeis probably would have read these precedents broadly enough to let Congress regulate interstate railroads to protect the safety of passersby too. *Cf. Ely*, *supra* note 135, at 703 n.62 (“Congressional legislation based upon the commerce clause certainly could have covered the specific question at issue in *Erie*.”). Still, *Swift*’s interpretation of the Rules of Decision Act did leave room for the federal courts to articulate substantive rules of decision on matters that the federal government’s legislative powers did *not* reach. Ordinarily, moreover, when courts are choosing between two interpretations of a federal statute, the fact that one would have some unconstitutional applications is a reason

Subsequent commentators have added a separation-of-powers theme.¹⁶⁵ Even if Congress has the power to make law in a particular area, federal courts do not automatically have the same power. Under the Constitution, after all, the federal government’s legislative power is vested in Congress, not the judiciary.¹⁶⁶ If one thinks that articulating rules in the style of the common law is essentially “legislative,” then one might conclude that federal courts applying the *Swift* regime were doing things that the federal government can properly do only through Congress.

At least when stated so simply, both of these arguments rest on a common premise: what courts do when they articulate rules of common law (or unwritten law more generally) is the same sort of thing that legislatures do when they enact statutes. This analogy was certainly in the air in the 1920s and 1930s.¹⁶⁷ But legal thinkers of the day did not take it literally. Unlike a legislature (which, within constitutional limits, can prescribe whatever rules of decision it likes), courts articulating the content of the unwritten law were not thought to enjoy unfettered creative power. While Justice Brandeis surely believed that the process of deciding common-law cases entailed some element of policymaking,¹⁶⁸ he presumably

to prefer the other. *See id.* (“The *Erie* opinion’s point was that there was no constitutional basis for the sort of general lawmaking authority exercised under the *Swift* doctrine; that Congress therefore could not have delegated such general authority to the courts; and that the Act consequently should not be construed to have done so.”).

165. *See* Green, *supra* note 5, at 615 (noting that for the past few decades, scholars who play up *Erie*’s constitutional basis have “focus[ed] on separation of powers” and have suggested that “*Erie*’s principal concern was to eliminate undue judicial policymaking”); Sherry, *supra* note 100, at 144 (similarly identifying a shift away from arguments about “federalism-derived limits on congressional authority” and toward arguments about “judicial federalism and separation of powers”).

166. *See* U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in ... Congress.”).

167. *See, e.g.*, BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 119 (1921) (“Everywhere there is growing emphasis on the analogy between the function of the judge and the function of the legislator.”); *cf.* Helen Silving, *Analogies Extending and Restricting Federal Jurisdiction: Erie R. Co. v. Tompkins and the Law of Conflict*, 31 IOWA L. REV. 330, 334 (1946) (“[J]urisprudence has of late discovered decisional law to be Law in somewhat the same sense as is statutory law.”).

168. *See, e.g.*, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) (“Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.”); *cf.* Robert F. Cochran, Jr., *Editor’s Introductory Essay*, in LOUIS D. BRANDEIS’S MIT LECTURES ON LAW (1892-1894) ix, xxii-xxviii (Robert F. Cochran, Jr. ed., 2012) [hereinafter BRANDEIS’S

believed that the process also involved many other elements, including fidelity to accepted modes of legal reasoning, customs, and other preexisting principles that constrain courts even though they are unwritten.¹⁶⁹ That was certainly the view of other mainstream jurists of his time.¹⁷⁰

In keeping with this view, *Erie*'s modern supporters do not all insist that unwritten law is always and inevitably judge-made law. Professor Bradford Clark (who is the most vigorous and sophisticated defender of the idea that the Federal Constitution provides a solid basis for *Erie*) concedes that at the time of *Swift v. Tyson*, courts applying the general commercial law "were not engaged in unrestrained judicial lawmaking."¹⁷¹ Even today, indeed, Professor Clark acknowledges that something similar can be said in many enclaves of what is now called "federal common law." As Professor Alfred Hill explained nearly fifty years ago, certain realms of domestic American law have been "federalized" either by the Constitution or by federal statutes that occupy particular fields to the exclusion of state law.¹⁷² But while written federal law strips the states of lawmaking authority in these enclaves, it does not itself answer every legal question that might arise. To handle certain kinds of questions that arise within these enclaves but that written federal law does not answer, courts have articulated rules of so-called "federal common law"—rules that are thought to have the status of federal law even though they have not been enacted in written form. Although the content of these rules is a matter of unwritten law, Professor Clark denies that it simply reflects the naked policy preferences of whichever judge is articulating it. In his

MIT LECTURES] (noting that Brandeis became less celebratory of the common law, and more appreciative of legislation, after violence connected with the Homestead Strike of 1892).

169. Cf. Louis D. Brandeis, *The Nature and Origin of Law* (unpublished lecture), in *BRANDEIS'S MIT LECTURES*, *supra* note 168, at 125, 127 (discussing origins of the common law and emphasizing custom as a source of rules of decision).

170. See, e.g., CARDOZO, *supra* note 167, at 141 ("The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure."); cf. BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 6* (2010) (debunking modern caricatures of the "legal realists" of the 1930s and invoking Cardozo as an exponent of the "balanced realism" that Professor Tamanaha takes to have been dominant).

171. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1287 (1996).

172. Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1028, 1031 (1967).

view, many of the relevant rules instead grow out of structural inferences derived from the Constitution itself.¹⁷³ One might also trace various rules of “federal common law” to other external sources, including policies reflected in federal statutes, customs supplied by the private sector, and the collective thrust of the written and unwritten law in force in each state.¹⁷⁴ To the extent that these sources impose legal constraints on the content of the rules that courts articulate, Professor Clark agrees that those rules are not best described as “federal judge-made law.”¹⁷⁵

But while Professor Clark does not endorse the simplistic view that judges are automatically engaging in “legislative” behavior when they articulate and expound rules of unwritten law, he nonetheless defends Justice Brandeis’s conclusion that *Erie* has a constitutional basis. The key to his argument is the claim that the arrangements reflected in *Swift v. Tyson* eventually led federal courts to “disregard state law” (and to do so even though federal law had not validly displaced the state law that the courts were disregarding).¹⁷⁶ In Professor Clark’s view, *Swift* did not necessarily have this effect in the early days, because the state courts themselves may not have considered their understanding of the general commercial law to be “state law”; at the time of *Swift*, “state and federal courts appeared to be jointly administering a customary body of rules common to many jurisdictions,”¹⁷⁷ and state courts articulating the content of those rules “did not clearly conceive of themselves as establishing binding principles of state law distinct from the general law merchant.”¹⁷⁸ But as time wore on, Professor Clark asserts, “state courts increasingly abandoned reliance on the general law merchant in favor of ... localized commercial doctrines” that were properly characterized as “state judge-made law.”¹⁷⁹ During the same period, moreover, “the federal courts vastly expanded the range of legal questions subject to the *Swift* doctrine”

173. Clark, *supra* note 171, at 1251.

174. See generally Nelson, *supra* note 28 (discussing where courts get the content of the “federal common law” that they recognize in enclaves federalized by Congress or the Constitution).

175. Clark, *supra* note 171, at 1251.

176. Clark, *supra* note 154, at 1302.

177. Clark, *supra* note 171, at 1276.

178. *Id.* at 1286.

179. *Id.* at 1290.

so as to encompass various topics that the state courts had thought of as state law all along.¹⁸⁰ Because of these twin developments, Professor Clark concludes that the *Swift* doctrine eventually led federal courts to disregard substantive rules of state law (as declared by state courts). That result, he argues, violated constitutionally grounded principles of “judicial federalism”: federal courts are obliged to apply state law on topics that lie within the states’ legislative competence, unless the Federal Constitution, federal statutes, or federal treaties supply supervening rules.¹⁸¹

This argument has long and respectable roots.¹⁸² It also dovetails with certain jurisprudential premises that Justice Brandeis endorsed in *Erie* and that he presented as being intertwined with his constitutional argument.¹⁸³ The constitutional section of Brandeis’s opinion quoted liberally from Justice Holmes’s famous dissent in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*¹⁸⁴ There, Holmes had opined that the *Swift* doctrine might have made sense if the common law were “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”¹⁸⁵ According to Holmes, however, that conception of the common law was a “fallacy,” because “law in the sense in which courts speak of

180. *Id.*

181. *See, e.g., id.* at 1291 (“[F]ederal courts violated principles of judicial federalism by disregarding state law in areas over which the states possessed undoubted legislative competence and over which Congress either lacked constitutional power or at least had failed to exercise such power.” (footnotes omitted)). For people who want to locate the relevant constitutional principles in a particular provision, Professor Clark points to the Supremacy Clause. In his view, “the Supremacy Clause establishes the exclusive basis for overriding state law,” meaning that “federal courts ... lack constitutional authority to disregard state law” unless “the ‘Constitution,’ ‘Laws,’ or ‘Treaties’ of the United States” so require. Clark, *supra* note 154, at 1302.

182. *See, e.g.,* Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 427-28 (1958) (“*Erie* does indeed have a constitutional basis—in the sense that our system of federalism is rooted in the Constitution, and that the failure of a federal court to give due regard to state law ... inevitably thwarts the constitutional scheme of things.”).

183. *But see* Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 673, 675 (1998) (arguing that whatever Justice Brandeis may have thought, *Erie*’s “jurisprudential commitment to legal positivism” does not dictate a particular answer to the constitutional question that Brandeis was addressing); Green, *supra* note 67, at 1128 (agreeing that “the *Swiftian* view of the common law is compatible with positivism”).

184. 276 U.S. 518 (1928); *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting Holmes’s dissent in the taxicab case).

185. *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting).

it today does not exist without some definite authority behind it.”¹⁸⁶ To the extent that the common law is enforced in any particular state on matters lying within that state’s legislative jurisdiction, Holmes insisted that it “is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.”¹⁸⁷ In *Erie*, Justice Brandeis used these statements to support his suggestion that when federal courts applied the *Swift* doctrine, they were “ignoring” what Brandeis characterized as “the law of the State” under circumstances that gave them no warrant to do so.¹⁸⁸

As a rhetorical matter, both Holmes and Brandeis emphasized the first part of this argument—the claim that on matters lying within the legislative jurisdiction of individual states, even the “general” portion of the unwritten law in force in each state should be regarded as state law. But one could readily accept that claim without rejecting *Swift*. Even during the heyday of *Swift*, in fact, the Federal Supreme Court often *did* accept that claim; long before *Erie*, the Court repeatedly described much of the general law as state law.¹⁸⁹ While conceding that (1) federal courts are obliged to apply state law in the absence of supervening federal law and (2) the “general” portion of the unwritten law in force within each state is properly characterized as state law, defenders of *Swift* could still maintain that (3) it is possible for a state’s supreme court to be wrong about the content of the state’s law and (4) federal courts are not “ignoring the [state’s] common law”¹⁹⁰ when they follow their own understanding of the state’s common law rather than state-court precedents that they believe to be incorrect.

To be sure, this response would puzzle many modern lawyers. Perhaps because those lawyers have integrated *Erie* into their understanding of judicial federalism, they assume that federal courts have a legal obligation to follow the precedents of each state’s highest court about the content of every type of state law in force in that state. But the basis of this assumption is obscure. What is the

186. *Id.*

187. *Id.* at 533-34.

188. *See Erie*, 304 U.S. at 78-79.

189. *See supra* notes 24-25 and accompanying text.

190. *See Erie*, 304 U.S. at 78.

source of the alleged obligation to accept what each state's highest court says about the content of state law?

Holmes himself tried to answer that question by pointing to *state* constitutional law. For the most part, the people of each state are in charge of how to structure their state's government and how to allocate the state's lawmaking power among the different branches of that government; subject to a few relatively minor exceptions, the Federal Constitution neither regulates that topic itself nor empowers Congress to do so.¹⁹¹ Thus, if the constitution of a particular state explicitly declared that "on all matters of general law [within the state's legislative competence] the decisions of the highest [state] Court sh[all] establish the [state's] law until modified by statute or by a later decision of the same Court," Holmes thought it clear that federal courts would have no basis for "refus[ing] to follow what the State Court decided in that domain."¹⁹² Of course, no state constitution actually includes such an explicit allocation of the state's lawmaking authority to the state's highest court. But Holmes believed that this allocation was *implicit* in each and every state constitution: simply by virtue of the fact that each state constitution establishes a state supreme court, each state constitution "by implication does make that declaration as clearly as if it had said it in express words, so far as it is not interfered with by the superior power of the United States."¹⁹³

As Michael Steven Green and other modern scholars have concluded, this premise about *state* constitutional law helps account for Justice Brandeis's claim that the course pursued by the federal courts under *Swift v. Tyson* violated the *Federal* Constitution.¹⁹⁴ If

191. See, e.g., *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) (Cardozo, J.) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.")

192. *Black & White Taxicab*, 276 U.S. at 534 (Holmes, J., dissenting).

193. *Id.* at 534-35.

194. See Green, *supra* note 67, at 1125-26 (noting that if Holmes were correct that each and every state constitution had the meaning that he attributed to it, then Brandeis's conclusion in *Erie* would follow); Steven Walt, *Before the Jurisprudential Turn: Corbin and the Mid-Century Opposition to Erie*, 2 WASH. U. JURISPRUDENCE REV. 75, 86 (2010) (noting the importance of Holmes's argument about state constitutional law to Brandeis's opinion in *Erie*); White, *supra* note 104, at 800 (alluding to the same argument as a possible basis for Justice Brandeis's constitutional claim in *Erie*); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 490-91 (2002) (taking *Erie* to endorse Holmes's claim about state constitutions); W. David Sarratt, Note, *Judicial Takings and the*

each state's constitution gives the state's supreme court authority to prescribe the state's law (subject to override by the state legislature), and if it also specifies that the supreme court exercises this authority whenever it announces a holding about the content of state law, then whatever the state supreme court says about state law *is* state law. Nothing in the Federal Constitution prevents a state from structuring its lawmaking power this way, and nothing in the Federal Constitution instructs federal courts to refuse to enforce rules of state law that have been established by the state's supreme court rather than enacted by the state's legislature. In fact, the Federal Constitution probably does not even authorize *Congress* to give the federal courts that instruction: such an instruction would meddle with the internal structure of state government in a way that probably goes beyond Congress's enumerated powers.¹⁹⁵ As Justice Brandeis expressed this point (at the very start of his constitutional analysis in *Erie*), "whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."¹⁹⁶ On this view, a federal statute that means what *Swift* interpreted the Rules of Decision Act to mean would interfere with state governance in a way that violates the Federal Constitution. Thus, if one starts from the premise that state constitutions do indeed allocate authority to prescribe state law in the way that Justice Holmes believed, then one might well arrive at the bottom line that Justice Brandeis reached in *Erie*.

Course Pursued, 90 VA. L. REV. 1487, 1522-28 (2004) (summarizing and explaining the argument).

195. See, e.g., Robert S. Peck & John Vail, *Blame It on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L. SCH. L. REV. 323, 338 (2006-07) ("Congress ... holds no authority to select among branches of state government that branch which can declare federally cognizable law.").

196. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). After an intervening quotation from Justice Field (which Brandeis expanded during the drafting process to please Chief Justice Hughes, see PURCELL, *supra* note 152, at 179), Brandeis's opinion returned to this theme with a quotation from Holmes's dissent in the taxicab case. In the quoted passage, Holmes began by observing that each state is the "only authority" behind the common law as it is enforced in that state. Holmes concluded that therefore "the voice adopted by the State as its own"—and here Brandeis added in brackets, "whether [that] be of its Legislature or of its Supreme Court"—"should utter the last word." *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab*, 276 U.S. at 535 (Holmes, J., dissenting)).

There are good reasons to think that Brandeis shared Holmes's premise about the prescriptive authority that each state constitution gives the state's supreme court. Not only did Brandeis join Holmes's dissent in the taxicab case, but the portion of *Erie* that focuses on the Federal Constitution both opens and closes with references to the argument that I have just summarized.¹⁹⁷ In addition, Holmes's premise accounts for *Erie*'s precise holding: on matters that lie within the states' legislative competence, federal courts are obliged to follow the precedents that a particular state's supreme court establishes (and continues to accept) to the same extent that federal courts would follow identical rules declared by the same state's legislature. Holmes's premise also explains why, from the start, *Erie* was not thought to bear on the federal courts' practices in enclaves of "federal common law" that lie beyond the states' lawmaking power.¹⁹⁸

To the extent that *Erie*'s constitutional analysis rests on Holmes's premise, though, it is questionable. The typical state constitution certainly does not give the state supreme court the same sort of direct authority to prescribe state law that it gives the state legislature. Subject only to constitutional limits, legislatures can announce whatever legal rules they like, and those rules automatically *are* the law of the state. What courts do is different. In many cases, the rules that they can legitimately articulate are constrained either by preexisting written laws or by preexisting sources of unwritten law (such as real-world customs). Even after the state supreme court has issued an opinion, moreover, people might say that the opinion is wrong about the true content of state law. One could not make the same statement about a state statute.

197. See *supra* note 196 and accompanying text; see also Hart, *supra* note 133, at 512 (identifying "the essential rationale of the *Erie* opinion" as "the need of recognizing the state courts as organs of coordinate authority with other branches of the state government in the discharge of the constitutional functions of the states").

198. See *supra* text accompanying notes 172-175 (discussing "federal common law"); see also, e.g., *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942) ("[T]he doctrine of [*Erie*] is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law."); *Bd. of Cnty. Comm'rs v. United States*, 308 U.S. 343, 349-50 (1939) (distinguishing *Erie*); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (Brandeis, J.) (referring to "a question of 'federal common law' upon which neither the statutes nor the decisions of [a particular] State can be conclusive").

Admittedly, the fact that state supreme courts cannot legitimately exercise unfettered discretion is tempered by the fact that even their erroneous decisions do set precedents for later cases. From the standpoint of the lower state courts, indeed, the precedential effect of those decisions is usually absolute: lower state courts are supposed to apply precedents established by the state supreme court even if they themselves would have understood the law differently. But this effect of the typical state supreme court's decisions is not necessarily connected with the state's lawmaking power. To the contrary, decisions of the state supreme court have the same effect within the state even when they are about the content of other sovereigns' laws. For instance, if the supreme court of a state adopts a particular gloss on a federal statute, the state's lower courts are typically supposed to follow that gloss (at least until the Federal Supreme Court addresses the same issue and adopts a different gloss). As this fact suggests, the doctrines of precedent that determine the effect of the typical state supreme court's holdings may well have less to do with the scope of the state's legislative power than with the scope of the state supreme court's appellate jurisdiction.¹⁹⁹ Relatedly, while there is certainly a sense in which a state supreme court is "making law" when it establishes a precedent that the lower state courts are supposed to follow, it is not necessarily prescribing state law in the same way that a state legislature does. To appreciate the potential complexity of concepts of precedent, just consider the following question: When a state supreme court interprets a federal statute in a way that sets a precedent for lower courts in the same state, has the state supreme court made state law or federal law?

I personally am skeptical of Justice Holmes's premise across the board: I am not sure that any state constitution really gives the state supreme court authority to establish "state law" of a sort that the Federal Constitution obliges federal courts to accept in the same way that they accept state statutes. But as Professor Green has observed, even if some state constitutions do indeed allocate the state's prescriptive authority in the way that Justice Holmes

199. *Cf.* Harrison, *supra* note 23, at 518-19 (discussing the apparent linkage between appellate jurisdiction and doctrines of precedent within the federal judiciary, but cautioning against oversimplification).

imagined, other state constitutions may not. At least as a matter of original understanding, for instance, one might well doubt that the Massachusetts Constitution (which dates back to 1780) really allocates the state's lawmaking authority in a manner consistent with Holmes's modernist philosophy.²⁰⁰ In any event, insofar as the meaning of state constitutions is a matter of state law, Justices Holmes and Brandeis would presumably feel obliged to pay attention if a state supreme court rejected their interpretation of the state's constitution—with the result that even if Justice Holmes's argument were otherwise solid, it might lead to the conclusion that federal courts should apply the *Erie* doctrine “on a state-by-state basis” rather than nationwide.²⁰¹

More can be said about the constitutional dimension of *Erie*, but the essential points are simple. First, Justice Brandeis's constitutional argument may well have rested on a premise about how each and every state constitution allocates the state's prescriptive authority—the power to make “state law” of a sort that the Federal Constitution obliges federal courts to respect. Second, that premise is at least contestable and may be false. In sum, *Erie*'s claim that practice under *Swift* violated the *Federal* Constitution may well have rested on a debatable interpretation of each and every *state* constitution.

CONCLUSION

Insofar as Justice Brandeis read his conclusion into the Rules of Decision Act, I am inclined to think that he was wrong: as originally enacted, and as understood for the first 149 years of its existence, the Rules of Decision Act did not require federal courts to equate the

200. See MASS. CONST. pt. 1, art. XXX (“In the government of this commonwealth, ... the judicial [department] shall never exercise the legislative and executive powers, or either of them.”); cf. Sarratt, *supra* note 194, at 1525 (noting that Holmes's argument rested on “a decidedly legal realist interpretation of state constitutions”). One might also wonder how Holmes's premise would apply to the Texas Constitution, which creates two separate courts of last resort—one for civil cases and another for criminal cases. See TEX. CONST. art. 5, §§ 3, 5 (dividing jurisdiction between the Texas Supreme Court and the Court of Criminal Appeals).

201. Green, *supra* note 67, at 1125; see also *id.* at 1126-27 (noting that the state courts of Georgia “still conceive of the common law in *Swiftian* terms,” and concluding that if the case for *Erie* rests on Holmes's argument, then federal courts should exercise independent judgment about the content of the common law in force in Georgia).

unwritten law in force in each state with whatever the state's highest court says it is. I am also skeptical of Justice Brandeis's constitutional argument. I agree that if the constitution of a particular state gives the state's supreme court the same sort of prescriptive authority that it gives the state's legislature, and if the state's supreme court exercises this authority to make a particular rule of state law, then federal courts should indeed accept and apply that rule to the same extent that they would accept and apply an identical rule made in the form of a statute by the state legislature. But I am inclined to doubt that any state constitution really does give the state's supreme court this sort of prescriptive authority. As I understand the typical state constitution, holdings of the state's supreme court have a different legal character than the state's statutes. As I understand the Federal Constitution, moreover, it does not require federal courts to overlook this difference, and to treat the decisions of each state's highest court as dictating the content of state law in the same way that a state statute would. Thus, I do not think that written federal law compels the result in *Erie* rather than the result in *Swift*.

Still, there are practical reasons why it might be best for federal courts to follow state-court precedents on matters of the sort that *Erie* addresses. And while I do not think that either section 34 of the original Judiciary Act or its descendants can properly be interpreted to *require* this arrangement, they also do not *forbid* this arrangement. In my view, that is the most charitable position that one can take about *Erie*: although Justice Brandeis was wrong to attribute his position to the Constitution and the Rules of Decision Act, written federal law did not foreclose the bottom line that he reached.²⁰²

This line of thinking leads to an ironic conclusion. If I am right, the deference that federal courts owe to state-court precedents about the content of state law is not something that written federal law addresses one way or the other, but it is a question that federal

202. Cf. Harry Shulman, *The Demise of Swift v. Tyson*, 47 YALE L.J. 1336, 1346 (1938) (“[T]he Court in the *Tompkins* case could have left constitution and statute alone and announced its view that present public policy, in the absence of legislation, requires an adherence to state decisions. That would have involved only change of judge-made rule based on a stated policy to conform with a change of judicial view as to that policy in the light of experience.”).

courts face every day and on which they need an answer. In that sense, the *Erie* doctrine might best be characterized as what modern lawyers call “federal common law.”