

## Law's Dark Matter

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## LAW'S DARK MATTER

MICHAEL STEVEN GREEN\*

In this Article, I argue that the spirit of *Swift v. Tyson* is alive today—and that it's a good thing too.<sup>1</sup> As it is usually understood, *Swift* depended on a nonpositivist theory of the common law that few currently share.<sup>2</sup> I will argue that *Swift* was in fact struggling with a question of state law that commonly arises today. This is the question of *extrajurisdictional effect*—that is, whether state authorities intend their legal rules to be used in other court systems.<sup>3</sup>

Extrajurisdictional effect is puzzling because, absent certification, the courts of the state whose rules are at issue have no occasion to discuss it. They are concerned with the rules *they* are obligated to follow, because that is what matters to the parties before them. What the courts of other jurisdictions should do is a question that those courts will face. As a result, extrajurisdictional effect is the

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

2. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 245 (1977); 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, 115-16 (1993) (“In the years that followed *Swift* ... the change that finally brought about *Erie* and *Klaxon* was [positivism,] a revolution in legal philosophy.”); William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 907-08 (1988) (“The general acceptance of positivism in this century virtually dictated the overruling of *Swift v. Tyson*.”).

3. One might understand extrajurisdictional effect to concern whether events beyond the state's borders fall within a legal rule's scope. An example would be whether New York's attorney-client privilege applies to communications between a New York attorney and her client that occur in Pennsylvania. As I use the term here, however, extrajurisdictional effect concerns a different matter, namely whether a state's legal rule is intended to be used by other *court systems*. Assume, for example, that a New York state court would apply its attorney-client privilege to communications made in Pennsylvania. That does not mean that the law has extrajurisdictional effect in the relevant sense, for New York courts may not think that Pennsylvania state courts must apply the New York rule to those same communications. I thank Brian Bix for encouraging me to clarify this point.

legal equivalent of *dark matter*, which can be observed only through its gravitational effect upon other bodies.<sup>4</sup> Unless the question of extrajurisdictional effect is certified to the relevant state's supreme court, the only courts that will discuss it are those not in a position to provide authoritative answers. This gives a misty and jurisprudential aura to what is in fact a straightforward question of state law.

This Article has three Parts. I devote the first to showing that the conception of the general common law expressed in *Swift v. Tyson* was compatible with legal positivism. In the second, I argue that the heart of the disagreement between advocates of *Swift* and *Erie* was a difference of opinion about extrajurisdictional effect: in particular, whether a state's officials wanted the decisions of the state's courts concerning the common law to bind federal and sister state courts when adjudicating events occurring within the state's borders. What made the disagreement so intractable—and what made it appear as if it was a jurisprudential question to be resolved through a priori reasoning—was that it concerned dark matter. The courts of the state whose decisions were at issue never had occasion to settle the question. Had certification been possible, the disagreement could have been quickly resolved.

In the third Part, I argue that the problem of dark matter still arises and produces positions akin to *Swift* and *Erie*. One example concerns the law of choice of law. There is currently a debate about whether federal and sister state courts should respect a state's choice-of-law rules. Courts generally take a *Swiftian* approach to the question. The fact that a state supreme court would not apply the state's law to certain facts does not mean that federal or sister state courts cannot. But a number of scholars have argued that an *Erie* approach should be used. State supreme court decisions should be treated as authoritative concerning the territorial scope of the state's law.

Here too the debate has proved intractable because it is about dark matter. No state supreme court has ever had occasion to decide whether its choice-of-law rules have extrajurisdictional effect. The

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4. For a discussion of dark matter, see Michael D. Lemonick & J. Madeleine Nash, *The Dark Side of the Cosmos*, TIME, Jan. 18, 1993, at 48, 48-49, available at <http://www.time.com/time/magazine/article/0,9171,977502,00.html>.

absence of authoritative decisions has made the debate appear as if it is a jurisprudential matter to be resolved by a priori reasoning. But a very simple solution has been ignored: certification of the question to the relevant state supreme court. I argue that the consequence of such certification would be a vindication of *Swift* over *Erie*.

### I. POSITIVISM

As it is usually described, *Swift v. Tyson* depended upon a nonpositivist conception of the common law.<sup>5</sup> To get a clear view of whether this is in fact true, we need some understanding about what legal positivism and its competitors are.

Current philosophers of law generally identify legal positivism by means of two theses. According to the *social fact thesis*, the law of a jurisdiction is fundamentally a matter of social facts—usually concerning the attitudes and actions of officials within that jurisdiction.<sup>6</sup> According to the *separability thesis*, the content of the law need not overlap with morality, although it often does so as a contingent matter.<sup>7</sup>

A good example of legal positivism is the theory of law offered by H.L.A. Hart in *The Concept of Law*.<sup>8</sup> According to Hart, a norm, such as “do not drive over 25 mph,” is the law if it satisfies the criteria for enforceability that have been accepted by a community of officials—judges, legislators, sheriffs, and the like.<sup>9</sup> For example, the norms identified in the Securities Exchange Act are law because they satisfy the criteria, such as promulgation in accordance with the United States Constitution, that American officials have accepted for identifying norms that may be backed up by their power. Hart calls this official practice of enforcing norms on the basis of

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5. See *infra* note 50.

6. See, e.g., Jules L. Coleman & Brian Leiter, *Legal Positivism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 241, 241 (Dennis Patterson ed., 1996).

7. See, e.g., *id.*

8. H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

9. See *id.* at 94. The existence of a rule of recognition in a legal system also requires that the primary rules that are valid according to the rule of recognition be generally—although not necessarily *always*—obeyed by the population. *Id.* at 116-17.

accepted criteria a *rule of recognition*.<sup>10</sup> Hart's theory of law is positivist because the existence and content of a rule of recognition are matters of social fact, and the criteria in a rule of recognition can identify norms as enforceable even if they deviate from morality.

Positivism and its nonpositivist competitors are *general* theories of law—that is, they are accounts of what is essential to law wherever it occurs.<sup>11</sup> Just as it is essential to all bachelors that they are unmarried males, under Hart's theory it is essential to all laws that a rule of recognition identifies them as such. In this sense, Hart thinks that the law is constituted by social facts. If morality somehow disappeared, but official practices of norm enforcement continued, law would continue too. In contrast, some nonpositivists argue that social facts are necessary but not sufficient for law; moral or evaluative facts are needed as well.<sup>12</sup> If evaluative facts disappeared, so would law, even if official practices of norm enforcement remained.<sup>13</sup> Under a more extreme form of nonpositivism, social facts are not even necessary for law.<sup>14</sup>

Because it claims to be a theory of what is essential for law, positivism—if correct—is a necessary restriction on the law, beyond anyone's control. The fact that officials in a legal system are committed to a nonpositivist theory of law cannot make their law nonpositivist. All it means is that the officials are conceptually confused. They do not understand the law of their own jurisdiction.<sup>15</sup>

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10. *Id.* at 107.

11. *See, e.g.*, Michael Steven Green, *Does Dworkin Commit Dworkin's Fallacy?: A Reply to Justice in Robes*, 28 OXFORD J. LEGAL STUD. 33, 34-36 (2008); Michael Steven Green, *Dworkin v. The Philosophers: A Review Essay on Justice in Robes*, 2007 U. ILL. L. REV. 1477, 1479-82.

12. *See, e.g.*, Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157, 157 (2004).

13. *See id.* at 159.

14. I argue that Hans Kelsen denied that social facts are necessary for law in *Kelsen, Quietism, and the Rule of Recognition*, in THE RULE OF RECOGNITION AND THE UNITED STATES CONSTITUTION 351, 369-71 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) [hereinafter Green, *Rule of Recognition*], and *Hans Kelsen and the Logic of Legal Systems*, 54 ALA. L. REV. 365, 405-07 (2003) [hereinafter Green, *Logic of Legal Systems*]. Kelsen differed from nonpositivists, however, in thinking that moral facts are also not necessary for law. *See* Green, *Rule of Recognition*, *supra*, at 370-71. One way of putting Kelsen's position, as I read it, is that law would still exist if both moral and social facts disappeared.

15. The same point is true of nonpositivism, assuming that it is the correct theory of law. Legal officials committed to a positivist theory of law would be wrong about their own law.

For a possible example of such conceptual confusion, consider Justice Field's opinion in *Pennoyer v. Neff*.<sup>16</sup> According to Field, the Oregon state court whose judgment against Neff was at issue in *Pennoyer* did not have adjudicative power because Neff had not been present in the state, through his person or property, at the initiation of the lawsuit.<sup>17</sup> *Pennoyer* is largely remembered for incorporating these requirements for personal jurisdiction into the Fourteenth Amendment Due Process Clause.<sup>18</sup> But this was dicta because the Oregon state court's judgment was issued two years before the Fourteenth Amendment was ratified.<sup>19</sup> And yet Justice Field still thought it was appropriate to decide whether the Oregon judgment was entitled to recognition in federal court on the basis of these requirements.

What law of personal jurisdiction was Field applying? We know it was not *Oregon* law, positivistically understood—that is, norms identified as enforceable by Oregon authorities. The assertion of personal jurisdiction at issue in *Pennoyer* would have satisfied Oregon state courts.<sup>20</sup> Was it *federal* law then? It could not, of course, have been federal constitutional law. Field was clear that the only relevant constitutional provision, the Fourteenth Amendment, was not yet binding on the Oregon court's actions.<sup>21</sup> But perhaps it was federal common law—that is, common law created by federal courts concerning when they should recognize the judgments of other court systems. So understood, however, Field should have concluded that the Oregon judgment was valid in the Oregon state court system. The judgment would have been unenforceable in federal court only. And yet he insisted that the requirements for personal jurisdiction were binding in Oregon state courts as well:

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16. 95 U.S. 714 (1878).

17. *Id.* at 734. In fact, the enforceability of the Oregon judgment in *Pennoyer* rested on a more detailed issue about the law of personal jurisdiction—whether a state court can have jurisdiction through the defendant's property if the property was not attached at the initiation of the lawsuit. *See id.* at 719-20. I ignore that detail here.

18. *Id.* at 733-34.

19. *Id.* at 719.

20. *See id.* at 720.

21. *See id.* at 733.

[I]f the court has no jurisdiction over the person of the defendant by reason of his nonresidence, and, consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice,—it is difficult to see how the judgment can legitimately have any force within the State.<sup>22</sup>

The law of personal jurisdiction as Field understood it appeared to be nonpositivist. It consisted of norms that were legally binding on Oregon courts in a manner that was not tied to social facts about Oregon—or, indeed, federal—officials.

If positivism is correct, Field was wrong. The norms of personal jurisdiction he spoke of did not have any legal force within the Oregon state court system. He was confusing the law with something else—probably morality—that did not depend upon social facts for its existence and scope. The law he was in fact applying was probably federal common law binding on only federal courts.

Notice, however, that a positivist need not condemn people as conceptually confused simply because they use the word “law” in a manner that is contrary to the positivist theory, for they may be choosing to use the word “law” in connection with something other than the law. Consider a theory of banks, according to which they are necessarily the shores of rivers. It need not follow from this theory that someone who says she put money in a “bank” is conceptually confused, for she might be using the word to speak of financial institutions, rather than the banks with which the theory is concerned. She would be conceptually confused only if she insisted that she was using the word “bank” in connection with the very same stuff that the banks-are-shores-of-rivers theory is about.

Thus, the positivist can condemn Field as conceptually confused only if Field sought to use the word “law,” and related terms, in connection with *the law*—that is, the same stuff with which theories of law like positivism and its nonpositivist rivals are concerned. Given that Field was writing a judicial opinion, it is reasonable to think that he was talking about the law. When he said that the Oregon judgment lacked any force in Oregon courts, he certainly

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22. *Id.* at 732.

meant *legal* force, not simply moral force. And thus, if positivism is correct, he was conceptually confused.

With *Pennoyer* as our model, let us now move on to whether the positivist would condemn Justice Story's opinion in *Swift v. Tyson*—and the *Swiftian* regime more generally—as conceptually confused. I will begin with the case for conceptual confusion. In his opinion in *Swift*, Story made a statement about the content of the general common law prevailing in New York that was contrary to—or at least insensitive to—decisions by New York state courts.<sup>23</sup> Furthermore, the law Story was articulating was not characterized by him as *federal* law.<sup>24</sup> That makes this law sound nonpositivist. Story apparently said that there were norms legally binding in New York that did not depend upon social facts about officials, whether state or federal—the same thing that Field said about the law of personal jurisdiction in *Pennoyer*.

To be sure, these general common law rules—unlike the law of personal jurisdiction as Field understood it—could be displaced by state legislation. But if not displaced, they were apparently binding in a state, whatever the state's officials had to say about the matter. They were, as Justice Holmes later put it, “a brooding omnipresence,”<sup>25</sup> “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”<sup>26</sup>

It also appears that the same nonpositivist conception of the general common law was employed horizontally. If an event arising in a sister state was covered by the general common law, many state courts would come to their own conclusion about the content of this law, without deference to the sister state's courts.<sup>27</sup> State courts

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23. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842) (“[T]he true interpretation and effect [of commercial instruments] are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.”).

24. *See id.*

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

26. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

27. *See, e.g.*, *Patillo v. Alexander*, 30 S.E. 644, 644 (Ga. 1898); *Franklin v. Twogood*, 25 Iowa 520, 531 (1868); *Roads v. Webb*, 40 A. 128, 130 (Me. 1898); *Fellows v. Harris*, 12 Miss. (12 S. & M.) 462, 466-67 (1849); *St. Nicholas Bank v. State Nat'l Bank*, 27 N.E. 849, 851 (N.Y. 1891); *Faulkner v. Hart*, 82 N.Y. 413, 417-18 (1880); *Third Nat'l Bank v. Nat'l Bank of Commerce*, 139 S.W. 665, 667-68 (Tex. Civ. App. 1911). For a discussion, see Michael Steven Green, *Erie's Suppressed Premise*, 95 MINN. L. REV. 1111, 1123-24 (2011).



appeared to treat the general common law as a brooding omnipresence too.

But the argument above misdescribes how federal and state courts conceived of the general common law. It was not attributed to a state whatever the state's officials might say about the matter. Courts would assume that the general common law applied in a state—and so would come to their own conclusion about what this law was—*only if the state had a legal system that was based upon the common law*.<sup>28</sup> And the question of whether a state's legal system was based upon the common law was answered, positivistically, by reference to social facts about the state's officials or inhabitants.

The positivist basis of the general common law is evident in the presumptions that courts would use when adjudicating events occurring in other jurisdictions. During the *Swift* regime, courts encountered serious practical difficulties getting information about the content of another jurisdiction's law.<sup>29</sup> As a result, they were often faced with the problem of what to do if another jurisdiction's law applied, but the parties offered no evidence of the content of that law. In some cases, the plaintiff's action was dismissed on the grounds that he had failed to plead the necessary grounds for recovery.<sup>30</sup> But in other cases, courts would rely upon presumptions that would allow the plaintiff's case to proceed.<sup>31</sup>

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28. See Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505-06 (2006).

29. See Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 822-23 (1989).

30. See, e.g., *Cuba R.R. Co. v. Crosby*, 222 U.S. 473, 477, 479-80 (1912); *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541, 543-46 (2d Cir. 1956); *Rositzky v. Rositzky*, 46 S.W.2d 591, 595 (Mo. 1931); *Riley v. Pierce Oil Corp.*, 156 N.E. 647, 648 (N.Y. 1927); *Whitford v. Panama R.R. Co.*, 23 N.Y. 465, 467-68, 475 (1861); *Christie v. Cerro De Pasco Copper Corp.*, 211 N.Y.S. 143, 143 (App. Div. 1925); *Langdon v. Young*, 33 Vt. 136, 138-39 (1860). For a discussion, see Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1267 & nn.137-38 (2011); Arthur Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 633-34 (1967); Arthur Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1035-36 (1941). Under this approach, a defendant was also not permitted to introduce an affirmative defense without evidence that it was available under the foreign jurisdiction's law. See, e.g., *W. Union Tel. Co. v. Way*, 4 So. 844, 852 (Ala. 1887); see also Nussbaum, *supra*, at 1035 & n.103.

31. Green, *supra* note 30, at 1266-71.

For example, sometimes courts would presume that the law of the other jurisdiction was the same as their own.<sup>32</sup> Because this presumption allowed the forum to apply even its unusual statutory law to the dispute, it cannot be understood as an attempt to hazard a guess at the probable content of the law of the other jurisdiction. The justification for the presumption was instead that the parties, by failing to offer evidence of the law of the other jurisdiction, had consented to the application of forum law.<sup>33</sup>

But other presumptions involved guesses at the likely content of the foreign law. For example, with respect to very rudimentary legal principles that probably exist in any civilized legal system—such as the enforceability of contracts or liability for negligence—the court would often presume that the principles existed in the foreign jurisdiction unless the defendant could show otherwise.<sup>34</sup> Notice, however, that this presumption extended only to rudimentary legal principles, not to any common law rule.<sup>35</sup>

What is important for our purposes is the presumption that common law principles were binding in another jurisdiction in the absence of evidence by the parties that such principles had been displaced by statute.<sup>36</sup> This was not a presumption that forum law applied, for when the common law had been abrogated in the forum by statute, the common law and not the statute would be presumed to prevail in the other jurisdiction.<sup>37</sup>

If the general common law was truly thought of as a brooding omnipresence applicable in all jurisdictions unless displaced by

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32. *Id.* at 1269-70.

33. *Id.* at 1269; Robert von Moschzisker, *Presumptions as to Foreign Law*, 11 MINN. L. REV. 1, 10-11 (1926); Nussbaum, *supra* note 30, at 1036-37; *e.g.*, *Watford v. Ala. & Fla. Lumber Co.*, 44 So. 567, 568 (Ala. 1907); *Peet v. Hatcher*, 21 So. 711, 713 (Ala. 1896). For a criticism of the use of such a presumption in an interstate context, see Green, *supra* note 30, at 1269-71.

34. Green, *supra* note 30, at 1268; *e.g.*, *Compagnie Generale Transatlantique v. Rivers*, 211 F. 294, 298 (2d Cir. 1914); *Parrot v. Mexican Cent. Ry. Co.*, 93 N.E. 590, 593 (Mass. 1911); *Mackey v. Mexican Cent. Ry. Co.*, 78 N.Y.S. 966, 966-67 (City Ct. 1902).

35. Nussbaum, *supra* note 30, at 1038.

36. The idea, which made some sense when statutory abrogation of the common law was relatively rare, was that the common law rule probably still applied in a common law legal system. Green, *supra* note 30, at 1268.

37. *See, e.g.*, *Riedman v. Macht*, 183 N.E. 807, 809 (Ind. App. 1932); *see also* Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 980 (1958); von Moschzisker, *supra* note 33, at 3; Nussbaum, *supra* note 30, at 1038 n.120.

statute, courts would have presumed that general common law rules applied in *all jurisdictions*—just as Field considered the law of personal jurisdiction to apply in all jurisdictions. But they did not. The presumption was used only in connection with a jurisdiction whose legal system was based upon the common law.<sup>38</sup> Furthermore, when determining whether a legal system was based upon the common law, courts would rely upon social facts about the officials or inhabitants of the jurisdiction.<sup>39</sup>

Just which U.S. states were thought to have legal systems sufficiently based upon the common law for the presumption to apply was a matter of some disagreement. For example, some state courts would extend the presumption only to a sister state that was one of the original thirteen colonies or, like Illinois or Tennessee, composed of territory that belonged to these colonies.<sup>40</sup> Concerning other states these courts would not use the presumption, which meant that they dismissed the case or employed the presumption of similarity to forum law, including its statutory law.<sup>41</sup> Some courts, however, would extend the presumption to states carved out of territory acquired after American independence, provided that the state's first legal system was a common law system formed by emigrants from the original states.<sup>42</sup> But they did not extend the presumption to states that had preexisting civil law legal systems, such as Florida, Texas, and California, even though these states later passed reception statutes adopting the common law.<sup>43</sup> And, of course, the presumption was not extended to Louisiana,<sup>44</sup> which

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38. See, e.g., *Dempster v. Stephen*, 63 Ill. App. 126, 128 (1896); *Stewart's Adm'x. v. Bacon*, 70 S.W.2d 522, 523 (Ky. 1934); *Waln v. Waln*, 22 A. 203, 204-05 (N.J. 1891).

39. In general, courts took judicial notice of whether a jurisdiction's legal system was based on the common law. See, e.g., *Cuba R.R. Co. v. Crosby*, 222 U.S. 473, 479 (1912); *Castleman v. Jeffries*, 60 Ala. 380, 387 (1877); *Aslanian v. Dostumian*, 54 N.E. 845, 846 (Mass. 1899); *In re Hall*, 61 A.D. 266, 272-73 (N.Y. App. Div. 1901).

40. E.g., Albert Martin Kales, *Presumption of the Foreign Law*, 19 HARV. L. REV. 401, 402-03 (1906).

41. See, e.g., *Flato v. Mulhall*, 72 Mo. 522, 524-25 (1880).

42. See, e.g., *Crouch v. Hall*, 15 Ill. 264, 266-67 (1853); *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427, 432-33 (1902); Kales, *supra* note 40, at 402-04.

43. E.g., *Krouse v. Krouse*, 95 N.E. 262, 263-64 (Ind. App. 1911); *E. B. Hayes Mach. Co. v. Eastham*, 84 So. 898, 899 (La. 1920). See generally Kales, *supra* note 40, at 406-09.

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

retained a civil law system, or to other civil law jurisdictions, such as Mexico<sup>45</sup> or Germany.<sup>46</sup>

One might argue, however, that the refusal to extend the principles of the common law to a civil law state like Louisiana was compatible with the view that the common law was a brooding omnipresence. The common law was *originally* binding in Louisiana, but with the adoption of a civil law system it had been displaced by a comprehensive statutory regime. However, courts that refused to extend the common law to a civil law jurisdiction made it clear that this was because the jurisdiction's officials or inhabitants chose not to adopt the common law, not because they chose to displace the common law by statute.<sup>47</sup> Furthermore, such a reading cannot explain courts' refusal to extend common law rules to jurisdictions that were not based on the common law *and* lacked a comprehensive

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adopted the civil law, such as Louisiana.”).

45. *E.g.*, *Banco de Sonora v. Bankers' Mut. Cas. Co.*, 100 N.W. 532, 536 (Iowa 1904).

46. *In re De Garmendia's Estate*, 125 A. 897, 899 (Md. 1924).

47. *See, e.g.*, *Barrielle v. Bettman*, 199 F. 838, 840 (S.D. Ohio 1912) (“[I]t will not be presumed that the English common law is in force in any state or country not settled by English colonists.”); *Savage v. O'Neil*, 44 N.Y. 298, 301 (1871) (“Such a presumption is indulged by our courts only in reference to England and the States which have taken the common law from England.”).

statutory regime—such as Native American tribes<sup>48</sup>—or concerning which the existence of such a statutory regime was in doubt.<sup>49</sup>

Thus, the question of whether the common law was applicable in a jurisdiction was ultimately a question of social facts about that jurisdiction. A court adjudicating an event in another jurisdiction would not come to its own conclusion about a general common law rule prevailing there unless it had made a threshold determination—usually unarticulated—that officials in the jurisdiction, or its inhabitants more generally, had decided to adopt a common law system. Had the events in *Swift* occurred in Louisiana or among members of the Creek Nation, Story would not have thought that the Supreme Court was empowered to come to its own view about the prevailing legal rule. The Supreme Court had this power in *Swift* only because New Yorkers, by adopting a common law system

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48. See, e.g., *Davison v. Gibson*, 56 F. 443, 444-45 (8th Cir. 1893); *Johnson v. State*, 30 S.W. 31, 31 (Ark. 1895); *Garner v. Wright*, 12 S.W. 785, 785 (Ark. 1890); *Ark. City Bank v. Cassidy*, 71 Mo. App. 186, 188 (1896). To be sure, the Arkansas cases might be explained away on the grounds that Arkansas did not adopt a *Swiftian* view of the general common law, although the Arkansas Supreme Court took this stand only after the cases were decided. See *J.R. Watkins Med. Co. v. Johnson*, 196 S.W. 465, 466 (Ark. 1917). The same might be said of the Missouri case because Missouri later rejected *Swift*. See *Musser v. Musser*, 221 S.W. 46, 48-49 (Mo. 1920); *Root v. Kan. City S. Ry. Co.*, 92 S.W. 621, 628 (Mo. 1906). But federal courts accepted *Swift*, and nevertheless in *Davison* a federal court did not presume that the common law applied to events governed by the law of the Creek Nation. *Davison*, 56 F. at 444. To be sure, one might argue that *Davison* concerned a local usage, not the general common law, because it was about the common law right of a husband to his deceased wife's property. See *id.* at 444; see also *Magill v. Brown*, 16 F. Cas. 408, 413 (C.C.E.D. Pa. 1833) (No. 8952) (holding that the disposition of personal property in a will is "of a local rather than a general nature"). But the court in *Davison* relied on the fact that the common law could not be presumed to apply to an Indian tribe, not that the issue concerned a local usage. See *Davison*, 56 F. at 444.

Treatment of white settlers in Indian Territory was different. Sometimes courts held that common law principles should apply to them, even when the transaction being litigated occurred prior to the Act of May 2, 1890, ch. 182, § 31, 26 Stat. 81, 94-95, which extended the common law to Indian Territory. *Huntley v. Kingman*, 152 U.S. 527, 531-32 (1894); *Eddy v. Lafayette*, 49 F. 798, 799-800 (8th Cir. 1892). Here the applicability of the common law probably rested upon the settlers' choice to adopt it as the standard governing their affairs, although it might be understood as based on the presumption that the law of the forum should be used in the absence of evidence of applicable law. See, e.g., *Pyeatt v. Powell*, 51 F. 551, 555 (8th Cir. 1892) (arguing that in federal court the common law should be presumed to prevail among white settlers in Indian Territory because "the *lex fori*, or, in other words, the laws of the country to whose courts the party appeals for redress, furnish in all cases, *prima facie*, the rule of decision").

49. See, e.g., *Aslanian v. Dostumian*, 54 N.E. 845, 846 (Mass. 1899) (Turkey); *Savage*, 44 N.Y. at 300 (Russia).

for the state, gave the Court that power.<sup>50</sup> That means that the law applied in *Swift* was New York law.

But how could Story think he was applying New York law when he spoke of the “general commercial law” as unrelated to any particular jurisdiction?<sup>51</sup> The reason is that he was not using the word “law” to refer to the law. He was instead talking about a common *standard* identified by a number of jurisdictions’ laws.<sup>52</sup>

Assume two states—say, Alabama and Mississippi—each chose to adopt the Bible as binding law within their borders. A positivist would deny that Alabama and Mississippi have the same law, because that wrongly suggests that their sovereignty had somehow merged. For example, under Hart’s theory,<sup>53</sup> Alabama and Mississippi could have the same law only if they shared official practices of norm enforcement. And that is not true: The Bible is binding in Alabama due to Alabama practices and is binding in Mississippi due to Mississippi practices. Although the Bible *as a standard* exists independently of any particular jurisdiction, that does not mean that the Bible *as law* does.<sup>54</sup>

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50. See Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 927-28, 979-84 (2013). In arguing that *Swift* depended upon the view that state officials had licensed federal courts to come to their own conclusion about the state’s common law, my reading is contrary to Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998). Although Goldsmith and Walt also see *Swift* as compatible with positivism, under their reading of *Swift*, federal courts’ power to come to their own conclusion about the general common law in a state had its source in *federal* law, particularly diversity jurisdiction. See *id.* at 695. Either diversity jurisdiction authorized federal courts to make an independent judgment about the content of state law, or it gave federal courts the power to enforce a national common law. See *id.*; see also Steven Walt, *Before the Jurisprudential Turn: Corbin and the Mid-Century Opposition to Erie*, 2 WASH. U. JURISPRUDENCE REV. 75, 126 (2010). Under both of these readings, a federal court would have the power to come to its own conclusion about the law in a state whatever the state’s officials said about the matter. Under my reading, state officials had control over whether federal courts could come to their own conclusion about the law in the state. By adopting a civil law system or developing a customary law system not based upon the common law, New York could have made *Swift* inapplicable to it. The authority the Supreme Court exercised in *Swift* ultimately rested in New York law, not federal law.

51. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842), *overruled by Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

52. See *id.* at 18-19.

53. See *supra* notes 8-10 and accompanying text.

54. Even a nonpositivist like Field would agree. Although he would likely claim that Alabama and Mississippi have the same law of personal jurisdiction, see *supra* notes 16-22, he would not say the same thing about the Bible.

The “general commercial law” that Story described was like the Bible in our example. Although as a standard it existed independently of a jurisdiction’s officials, Story recognized that it was the law in a jurisdiction only because the jurisdiction’s officials or inhabitants said so.<sup>55</sup> His opinion sounds nonpositivist only because he chose to apply the word “law” to a standard shared by common law jurisdictions.

Once the general common law is understood as a shared standard for common law jurisdictions, rather than some sort of transjurisdictional law, a different objection to the *Swift* regime emerges: the general common law may not provide meaningful guidance to private individuals and courts. Someone might object to Alabama’s and Mississippi’s approach on the same grounds—that is, because no coherent standard of conduct can be derived from the Bible.

This criticism would obviously fail if the “general commercial law” at issue in *Swift* were commercial custom, because that can provide a coherent standard of conduct.<sup>56</sup> And unless one entertains a form of ethical antirealism—and perhaps not even then<sup>57</sup>—the criticism would also fail if the general common law included moral norms, because they too can provide courts with meaningful guidance.<sup>58</sup>

But the criticism gains more traction if we understand the general common law as a standard that does not merely *guide* the decisions of common law courts but also *depends* upon those decisions in a way that permits the standard to evolve over time.<sup>59</sup> To be sure, the standard would be able to provide meaningful guidance if it were understood as the majority position among common law

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55. Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1790 (1997).

56. *See id.*

57. *See* Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in NATURAL LAW THEORY 158 (Robert P. George ed., 1992).

58. I describe these incorporated moral norms as the inclusive legal positivist would, that is, as legal norms. For a description of the exclusive legal positivist approach, see SCOTT J. SHAPIRO, LEGALITY 267-74 (2011).

59. For this criticism of the general common law, see Lessig, *supra* note 55, at 1792; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 428 (1995). Lessig wrongly identifies this criticism as positivist in motivation. Lessig, *supra* note 55, at 1793. As we have seen, nothing in positivism keeps one from believing that such a general common law standard exists. The positivist would simply insist that whether the standard is legally binding in a particular jurisdiction is dependent upon social facts about that jurisdiction. *See supra* note 6 and accompanying text.

jurisdictions. Such a standard could evolve if the majority position changed—although it could do so only due to decisions that, diverging from the majority, were actually erroneous at the time they were made. The problem is that courts that were committed to the general common law apparently did not think they were in error simply because they were in the minority.<sup>60</sup> The general common law was an odd hybrid—beholden, by and large, to past decisions of all common law jurisdictions, but also containing normative standards allowing for *proper* divergence from such decisions.<sup>61</sup>

In what follows, I will not take a stand on whether the general common law can be defended as a meaningful standard. The reason, as we shall see, is that the question is not essential to the conflict between *Swift* and *Erie*. An *Erie* approach can be appropriate for a state that accepts the general common law, even when one assumes that the general common law is a meaningful standard. Conversely, a *Swift* approach can still be appropriate for a jurisdiction that rejects the general common law.

## II. DARK MATTER IN *SWIFT* AND *ERIE*

To see why this is so, let us begin by assuming that the general common law is a meaningful standard of conduct and adjudication. New York officials, in choosing to become a common law jurisdiction, decided that this standard should be binding in New York. The standard is *objective* in the sense that it is not reducible to the decisions of New York courts. They can be wrong about what the general common law is. Given that New York officials think the general common law is objective, does it follow that they licensed federal and sister state courts to come to their own conclusion about the general common law when adjudicating events in New York?

Justice Story apparently thought so. The issue in *Swift*, as he put it, was “whether it is obligatory upon this Court [to follow a New

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60. See Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 281-84 (1992). This aspect of common law adjudication is an abiding theme in the work of Ronald Dworkin. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 176-275 (1986); cf. Nelson, *supra* note 28, at 510 n.35 (“[T]he fact that most states have rejected a particular legal rule will not necessarily keep the relevant Restatement from embracing it.”).

61. Similar problems can occur when federal positive law refers to general legal rules that are distilled from the legal practices of many jurisdictions. See Nelson, *supra* note 28, at 519-25.



York decision], if it differs from the principles established in the general commercial law.”<sup>62</sup> The following was his response: “It is observable that the Courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage[;] but they deduce the doctrine from the general principles of commercial law.”<sup>63</sup> Story’s point appears to be this: given that New York courts think that the general commercial law transcends the interpretations provided by New York courts, why would they want their interpretations to bind federal and sister state courts? Surely they want these other courts to look to the general commercial law too. To claim that New York courts’ interpretations bind federal and sister state courts would change the nature of the common law in New York. It would become *whatever New York courts say it is*. And New York courts themselves do not think that is true. Having chosen a standard that transcends the decisions of New York courts, it follows that New York courts, as well as other New York officials, would want federal and sister state courts to look to the transjurisdictional standard rather than New York decisions when adjudicating events arising in New York.

But Story’s argument fails. To see why, consider a different problem: whether federal and sister state courts should respect a concrete *judgment*—say, that Tyson is not liable to Swift—made by a New York state court in a general common law case. Because the general common law is objective, New York officials would accept the possibility that the court issuing the judgment misinterpreted the general common law. Did it follow that federal and sister courts were free to ignore the judgment?

The answer is clearly no. The purpose of judgments, after all, is to *settle* concrete disputes. New York state courts had to respect a New York judgment, unless it was overturned on appeal, even when the court that issued the judgment misinterpreted the general common law. It is entirely possible that New York officials wanted federal and sister state courts to have the same duty to respect erroneous New York judgments that New York state courts had.<sup>64</sup>

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62. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

63. *Id.*

64. The question addressed here is whether New York officials wanted federal and sister state courts to respect the New York state court judgment. I set aside the question of whether

Like concrete judgments, interpretations of the general common law by the New York Court of Appeals were also intended to settle disagreements.<sup>65</sup> Their effect was greater, however, for they were binding on lower New York state courts in any case where the interpretive issue arose.<sup>66</sup> They had this binding effect even though New York officials thought the general common law standard transcended the decisions of the New York Court of Appeals. Its decisions were binding even when they were in error.

Given that official commitment to the objectivity of the general common law did not keep these decisions from binding lower New York courts, it is possible that they were meant to bind federal and sister state courts as well. Justice Story's mistake in *Swift* was assuming that he could draw conclusions about the extrajurisdictional effect of New York decisions from the fact that New York officials accepted a legal standard that transcended those decisions.

But critics of *Swift*, such as Justice Holmes, made the opposite error, for they assumed that they could draw conclusions about the extrajurisdictional effect of decisions by the New York Court of Appeals from the fact that the decisions were binding on lower New York state courts:

If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain. But when the constitution of a

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federal and sister state courts are constitutionally obligated to respect New York officials' views. Under the Full Faith and Credit Clause, sister state courts would, with a small number of exceptions, have such a constitutional obligation. *E.g.*, *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908). The obligations of federal courts, however, are statutory only. 28 U.S.C. § 1738 (2006).

65. In fact, at the time that *Swift* was decided, the highest court of appeal in New York was the Court for the Trial of Impeachments and the Correction of Error, "a hybrid composed of the state Senators sitting with the justices of the Supreme Court of Judicature ('N.Y. Supreme Court') (when hearing writs of appeal in equity) or the Chancellor (when hearing writs of error at law)." R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth Century United States*, 38 AM. J. LEGAL HIST. 482, 511 (1994). It was replaced by the current Court of Appeals by the New York Constitution of 1846. *Id.* For ease of exposition, I ignore these historical details here.

66. *E.g.*, *Hanford v. Artcher*, 4 Hill 271, 322-25 (N.Y. 1842); *Costello v. Syracuse, Binghamton & N.Y. R.R. Co.*, 65 Barb. 92, 100 (N.Y. Gen. Term 1873).

State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words, so far as it is not interfered with by the superior power of the United States. The Supreme Court of a State does something more than make a scientific inquiry into a fact outside of and independent of it. It says, with an authority that no one denies ... that thus the law is and shall be.<sup>67</sup>

Holmes is correct that interpretations of the general common law by the New York Court of Appeals are not simply a form of scientific inquiry. They are meant to settle disagreements for lower New York state courts. But it does not follow that when federal and sister state courts adjudicate events in New York, they are also bound by its decisions. Whether they are bound is a contingent question of New York law.

Of course, Holmes's argument would work if the legal standard of conduct prevailing in New York simply *was* what the Court of Appeals said it was. Holmes suggests this, for he speaks of decisions of the highest court of appeals as *establishing* the law, not settling disagreements about the law. But that is not what New York officials thought at the time. Holmes's argument is influenced by the fallacy—common among legal realists—that the legal standard of conduct in a jurisdiction must be equivalent to binding interpretations of that standard. The New York Court of Appeals, he assumes, cannot be wrong about New York law.

But that cannot be true, for if it were, one would have to conclude that because judgments by New York courts are binding, they cannot be wrong about New York law either. To be sure, many legal realists bit the bullet and said just that:

For any particular lay person, the law, with respect to any particular set of facts, is a decision of a court with respect to those facts so far as that decision affects that particular person. Until a court has passed on those facts no law on that subject is yet in existence. Prior to such a decision, the only law available is the opinion of lawyers as to the law relating to that person

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67. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 534-35 (1928) (Holmes, J., dissenting).

and to those facts. Such opinion is not actually law but only a guess as to what a court will decide.<sup>68</sup>

But few New York officials would accept this notion even today, much less at the time *Swift* was decided. They would think that a judgment can be binding *despite* being in error. The judgment does not change the prevailing legal rule, even in the case to which the judgment applies.

There is no a priori reason, therefore, why New York officials did not think that an interpretation of the general common law by the New York Court of Appeals could be in error, despite the fact that it was binding on lower New York state courts. And given that they considered the legal standard to be independent of the New York Court of Appeals' interpretation of the standard, they might have chosen to release federal and sister state courts from any duty to respect the interpretation.<sup>69</sup>

Indeed, because the extrajurisdictional effect of state court decisions is a contingent matter of state law, nothing about a *Swiftian* approach requires the general common law. Although New York officials are no longer committed to the general common law, they still might adopt *Swift* by licensing federal and sister state courts to come to their own conclusion about the common law in the state.

For example, in *Basso v. Miller* the New York Court of Appeals held that the common law duty of care to trespassers is a negligence standard.<sup>70</sup> Although it did not look to the general common law when justifying its decision, it did take into account moral, eco-

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68. JEROME FRANK, *LAW AND THE MODERN MIND* 50 (Anchor Books 1963) (1930); *see also id.* at 137, 297. For a discussion, see Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1926-36 (2005).

69. But what if the general common law standard was simply unable to provide anyone with meaningful guidance? Would it not follow *then* that federal and sister state courts must defer to the decisions of the New York Court of Appeals? Because the question is one of state law, we must ask what the state's officials would say about the matter. Consider, for example, what Alabama officials would think federal and sister state courts should do if the Bible fails to provide a meaningful standard of conduct. *Maybe* they would think those courts should follow the decisions of the Alabama Supreme Court. But because those decisions were based on the idea that the Bible was a meaningful standard, Alabama officials might instead conclude that federal and sister state courts should simply come to their own view about what Alabama law should be. Here too, no a priori conclusions about extrajurisdictional effect are possible.

70. 352 N.E.2d 868, 871-72 (N.Y. 1976).

conomic, and social considerations.<sup>71</sup> Its decision is binding on lower New York state courts even if it got these considerations wrong. It remains conceivable, however, that New York officials think that the objective considerations mentioned in *Basso* determine the legally applicable standard of conduct in New York—that is, that *Basso*, despite being binding on lower New York courts, could be wrong about New York law. If that is so, they might also want federal and sister state courts to ignore *Basso* and look to the legally applicable standard when adjudicating events in New York. Whether they have this view is a contingent question of New York law.

To sum up, *Swift* and *Erie* are best understood as different accounts of state law. According to *Swift*, a state's officials do not intend the state supreme court's decisions about the general common law to be binding beyond the state court system. According to *Erie*, state officials think the state supreme court's decisions bind federal and sister state courts when adjudicating events within the state. Either account could be correct. The question cannot be answered on the basis of a priori reasoning from the fact that state officials are committed to an objective legal standard or from the fact that state supreme court decisions are binding on lower state courts.

Although a priori reasoning cannot justify *Erie*, one might argue that it was the more plausible interpretation of state law, even when states were committed to the general common law, because *Swift* made it difficult for someone within a state to be sure what interpretation of the general common law might be applied to his conduct. But the general common law governed only transactions that tended to cross state borders.<sup>72</sup> It did not apply to issues that were “immovable and intraterritorial in their nature and character.”<sup>73</sup> For this reason, expectations were arguably weaker in general common law cases. New York officials might have thought that federal and sister state courts' freedom to collaborate in developing the general common law standard was more important than respecting any expectations the parties might have.

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71. *Id.*

72. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842), *overruled by Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

73. *Id.*

Can we get any evidence in favor of *Swift* or *Erie* from state court decisions themselves? The problem is finding a situation in which a New York state court would have a concrete reason to opine about whether federal and sister state courts have a duty to look to New York decisions when deciding a general common law case that arose in New York. Such a situation would not arise when New York courts were considering whether they should enforce a federal or sister state judgment concerning an event in New York. Full faith and credit would require New York state courts to respect the judgment even if the rendering court misapplied the law.<sup>74</sup> To be sure, New York state courts might say they *disagreed* with the rendering court's decision.<sup>75</sup> But they would have no reason to speak about whether the rendering court was violating its obligations under New York law.

We face the problem of dark matter. Notice that the situation is different with respect to federal law. Imagine that state courts take their obligations under the Supremacy Clause seriously but think that the United States Supreme Court does not intend its interpretations of federal law to bind them. If they ignore its interpretations, the Supreme Court can take the matter on appeal and make the extrajudicial effect of its interpretations clear.<sup>76</sup> But in general common law cases, there was no avenue of appeal from a federal or sister state court to the supreme court of the state where the cause of action arose.

The absence of decisions about extrajudicial effect from the state courts themselves led both *Swift* and *Erie* to devolve into *general* approaches—applicable to all common law jurisdictions. Although extrajudicial effect was a question of state law that

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74. See, e.g., *McElmoyle ex rel. Bailey v. Cohen*, 38 U.S. (13 Pet.) 312, 324-28 (1839); *Hampton v. McConnel*, 16 U.S. (3 Wheat.) 234, 235 (1818); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484-85 (1813); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 609 (photo. reprint 1979) (1834). For a discussion of state court treatment of federal judgments, see Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 763 (1986); Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 744 & n.17 (1976); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 989 (1998).

75. Cf. *Stalker v. McDonald*, 6 Hill 93 (N.Y. 1843) (disagreeing with the Supreme Court's interpretation in *Swift*).

76. Cf. *Cooper v. Aaron*, 358 U.S. 1, 18-20 (1958) (holding that agents of the state of Arkansas were bound by the Court's prior decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), requiring racial desegregation in public schools).

ideally should have been answered on a state-by-state basis, there was no information to give the forum a reason to deviate from the presumptive interpretation.

One might argue that the approach that a state supreme court took toward general common law cases arising in *sister states* was evidence of how it wanted its own decisions to be treated.<sup>77</sup> If it ignored sister state decisions, that indicated that it did not think its own decisions were binding on federal or sister state courts.<sup>78</sup> An example is Georgia, whose supreme court affirmed a *Swiftian* approach in *Slaton v. Hall*, only nine years before *Erie* was decided:

The common law is presumed to be the same in all the American states where it prevails. Though courts in the different states may place a different construction upon a principle of common law, that does not change the law. There is still only one right construction. If all the American states were to construe the same principle of common law incorrectly, the common law would be unchanged.<sup>79</sup>

Although *Slaton* concerned whether a Georgia state court could ignore Alabama decisions when determining the content of the common law in Alabama, the Georgia Supreme Court's reasoning suggests that it thought its own common law decisions should not bind federal or sister state courts when adjudicating events arising in Georgia.<sup>80</sup>

Conversely, even before *Erie* was decided, some states rejected *Swift*. As the Pennsylvania Supreme Court put it in *Forepaugh v. Delaware, Lackawanna & Western Railroad Co.*:

It is not probable that the doctrine [of the general common law] would ever have got a foothold in jurisprudence, and it would certainly have been long ago abandoned, had it not been for the unfortunate misstep that was made in the opinion in [*Swift*]. Since then the courts of the United States have persisted in the recognition of a mythical commercial law, and have

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77. Green, *supra* note 27, at 1123-27.

78. For a discussion, see *id.* at 1121-24.

79. 148 S.E. 741, 743 (Ga. 1929). Indeed, apparently Georgia *still* has this approach. Green, *supra* note 27, at 1126-27 & n.89.

80. See *Slaton*, 148 S.E. at 743-44.

professed to decide so-called commercial questions by it, in entire disregard of the law of the state where the question arose.<sup>81</sup>

Although *Forepaugh* concerned whether a Pennsylvania state court should follow New York decisions when determining the content of the common law in New York, the Pennsylvania Supreme Court's reasoning suggests that it thought its own common law decisions should bind federal and sister state courts when adjudicating events arising in Pennsylvania.<sup>82</sup>

Strictly speaking, however, *Slaton* and *Forepaugh* solely addressed the binding effect of sister state decisions, not the extrajurisdictional effect of the court's own decisions.<sup>83</sup> Absent certification, state supreme courts would have no reason to settle the matter. Thus, although I am reasonably confident that *Slaton* and *Forepaugh* indicate the views of each state supreme court about its own decisions, the absence of *authoritative* pronouncements on the matter makes it understandable that *Swift* and *Erie* ended up as general, rather than state-by-state, methods.

What is more, if courts were to adopt a state-by-state method, in which they looked to a state supreme court's general approach to sister states' common law decisions to determine the extrajurisdictional effect of the state supreme court's own decisions, the exercise would be self-defeating. Once state supreme courts themselves adopted such a method, they would no longer have general approaches, and the evidence of their views about their own decisions would evaporate.

One might argue that since the 1960s, the choice between *Swift* and *Erie* has been answered through certification, and the response has been *Erie*.<sup>84</sup> Federal and sister state courts have certified questions to state supreme courts concerning the state's common law, including issues that would have been designated as general at the time of *Swift*.<sup>85</sup> If the state supreme courts thought their

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81. 18 A. 503, 505 (Pa. 1889).

82. *See id.* at 506.

83. *See* Lea Brilmayer, *A Reply*, in *THE ROLE OF ETHICS IN INTERNATIONAL LAW* 136, 140-41 (Donald Earl Childress III ed., 2012).

84. *See* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1545-49 (1997).

85. *See id.* at 1544.



decisions were not binding extrajurisdictionally, surely they would have rejected the certification.<sup>86</sup>

Granted, the questions certified probably concerned how the state supreme court would rule, not whether its ruling would bind the court requesting certification—although that question could, of course, be certified as well. The courts requesting certification might have legitimate reasons to want to know what the state supreme court would say, despite the fact that they were not bound by its decision.<sup>87</sup> But even if certification *has* shown *Erie* to be correct, at the time *Erie* was decided the question was still open. And thus *Erie* was as much a guess about the extrajurisdictional effect of state supreme court decisions as *Swift* was.<sup>88</sup>

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86. Even the Georgia Supreme Court has taken certified questions about Georgia common law, e.g., *Doyle v. Volkswagenwerk Aktiengesellschaft*, 481 S.E.2d 518 (Ga. 1997), which suggests that it has in fact abandoned its *Swiftian* view of the common law, despite failing to overrule *Slaton*. Green, *supra* note 27, at 1126-27.

87. For example, if the question is one of forum state law, a federal court might have a reason to decide as the forum state's supreme court would, simply to serve the twin aims of *Erie*, that is, to avoid forum shopping and the inequitable administration of the laws. See *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). For the argument that the twin aims are motivated by federal interests rather than respect for state lawmaking authority, see Michael Steven Green, *In Defense of the Twin Aims of Erie*, 88 NOTRE DAME L. REV. (forthcoming 2013).

88. In my argument above, I have assumed that the extrajurisdictional effect of state supreme court decisions is up to the state's officials and thus that the appropriateness of adopting *Swift* or *Erie* can be answered only by reference to state law. I have argued elsewhere, however, that *Erie* might be justified on the basis of a constitutionally mandated antidiscrimination principle that prohibits a state from releasing federal and sister state courts from the duty to defer to the state supreme court's decisions, unless it is willing to release lower state courts from the same duty. Green, *supra* note 27. Georgia might be constitutionally prohibited from freeing federal and sister state courts from the duty to respect the Georgia Supreme Court's decisions, as it apparently tried to do in *Slaton*, unless it was willing to free lower Georgia state courts from the same duty. *Id.* at 1145-47.

I will not discuss in this Article the extent to which such a strategy can succeed. A complicating factor is that even if such a duty of nondiscrimination exists, a state is certainly permitted to free federal and sister state courts of any duty to use its *procedure* when entertaining its causes of action. *Id.* at 1150-54. The fact that Georgia state courts must use the state's service rules when entertaining Georgia actions does not mean that federal and sister state courts must do so as well. For a constitutional argument against *Swift* to succeed, therefore, we need to show that a state may not legitimately treat the interpretations of the common law by its supreme court as procedural rules. See *id.* at 1151.

## III. DARK MATTER AND THE LAW OF CHOICE OF LAW

Because problems of dark matter have not gone away, neither has the conflict between *Swift* and *Erie*. But the focus has shifted from whether a state supreme court's interpretations of the common law are binding extrajurisdictionally to the extrajurisdictional effect of other state rules—or, as it is sometimes put, whether these rules are *substantive* or *procedural*. Although these questions are occasionally certified to the relevant state supreme court,<sup>89</sup> the forum generally must approach the matter in the absence of any state court decisions on point.

A recent example is *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*<sup>90</sup> The issue in *Shady Grove* was whether section 901(b) of the New York Civil Practice Law, which prohibits claims for statutory damages from being brought as class actions, should be used by a federal court in New York sitting in diversity when considering the certification of a class in which the plaintiffs' actions were for statutory damages under New York law.<sup>91</sup> The disagreement between Justice Stevens and Justice Ginsburg was driven largely by a question of dark matter—that is, whether New York officials intended section 901(b) to be substantive, in the sense of following New York statutory damages actions into other court systems.<sup>92</sup> Because the legislative history was compatible with either a procedural or a substantive reading,<sup>93</sup> Ginsburg, who argued that the rule was substantive, was forced to look for evidence in New York cases.<sup>94</sup> The results were predictable: no New York state court had ever addressed the question.

A good deal of Justice Ginsburg's opinion focused on whether New York state courts had applied section 901(b) to causes of action

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89. *E.g.*, *Baxter v. Sturm Ruger & Co.*, 644 A.2d 1297, 1298 (Conn. 1994).

90. 130 S. Ct. 1431 (2010).

91. *Id.* at 1436-37.

92. *See id.* at 1456 (Stevens, J., concurring). Justice Scalia, in contrast, argued that Federal Rule of Civil Procedure 23 governed the matter, even if section 901(b) was substantive. *Id.* at 1442-43 (majority opinion).

93. *Compare id.* at 1440-42 (majority opinion), *and id.* at 1457-59 (Stevens, J., concurring), *with id.* at 1464-65, 1469-72 (Ginsburg, J., dissenting).

94. *Id.* at 1464-65 (Ginsburg, J., dissenting).

under federal or sister state law.<sup>95</sup> Although she argued that they had not done so,<sup>96</sup> she ignored cases in which New York state courts had treated section 901(b) as *prima facie* applicable to federal causes of action, including actions under federal securities and civil rights law and the Truth in Lending Act.<sup>97</sup> To apply to federal causes of action, section 901(b) must be procedural. It could not apply beyond New York courts because New York cannot tell federal or sister state courts when federal statutory damages actions can be brought as class actions.<sup>98</sup>

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95. *Id.* at 1470-73.

96. *See id.* at 1470-71. A particular problem was that New York state courts had applied section 901(b) to federal actions under the Federal Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227 (2006). *See Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, 799 N.Y.S.2d 795 (App. Div. 2005), *cited in Shady Grove*, 130 S. Ct. at 1470 (Ginsburg, J., dissenting). In response, Ginsburg noted that the TCPA has an unusual provision authorizing TCPA actions in state court “if otherwise permitted by the laws or rules of the court of [the] State.” *Shady Grove*, 130 S. Ct. at 1470 (Ginsburg, J., dissenting) (quoting 47 U.S.C. § 227(b)(3)). This provision did not just refer to state procedure but also to the relevant state *substantive* law. *See Gottlieb v. Carnival Corp.*, 436 F.3d 335, 342 (2d Cir. 2006). Thus, she argued, New York state courts applied section 901(b) to TCPA actions not because they considered section 901(b) procedural but because they thought it was substantive New York law that had been incorporated into the TCPA. *Shady Grove*, 130 S. Ct. at 1470-71 (Ginsburg, J., dissenting). In fact, Ginsburg ignored that New York courts had apparently not understood the TCPA as incorporating state substantive law. They applied section 901(b) to TCPA actions because they considered section 901(b) procedural. *E.g.*, *Rudgayzer*, 799 N.Y.S.2d at 799 (appealing to “the importance of state control of state judicial procedure”). As one New York court baldly put it, “[T]he New York Civil Practice Law and Rules are procedural in nature, and therefore the CPLR § 901 governing class actions is controlling as to whether plaintiff has a valid class action in this [TCPA] case.” *Giovanniello v. Hispanic Media Grp. USA*, 780 N.Y.S.2d 720, 722 (Sup. Ct. 2004).

97. In these cases the courts ultimately concluded that section 901(b) did not apply. But the reason was not that it was substantive and therefore applicable only to actions under New York law. It was because the damages at issue were not penalties, *Pruitt v. Rockefeller Ctr. Props.*, 574 N.Y.S.2d 672, 679-80 (App. Div. 1991) (federal securities law not a penalty); *Felder v. Foster*, 421 N.Y.S.2d 469, 471 (App. Div. 1979) (federal civil rights damages not a penalty), or because federal law had preempted New York state procedure on the availability of class actions, *Vickers v. Home Fed. Sav. & Loan Ass’n*, 390 N.Y.S.2d 747, 748 (App. Div. 1977) (permitting class action under Truth in Lending Act because federal statute “‘expressly contemplate[d]’ class actions”).

98. In fact, the matter is somewhat more complicated than this. New York cannot tell sister state and federal courts whether federal statutory damages actions can be brought as class actions by appealing to a power to *define the cause of action*. But it might extend section 901(b) to them by virtue of some other connection with the case, for example, because the defendant was a New York domiciliary. However, such a reading of section 901(b) is very implausible.

But these cases are far from fatal. It always remains possible that section 901(b) created two rules—one procedural and the other substantive. Section 901(b) might apply in New York state courts to all actions for statutory damages, including actions under the law of other sovereigns, *and* follow New York statutory damages actions into other court systems. A substantive reading of section 901(b) cannot be excluded because New York state courts have never had occasion to decide the matter. Without certification, the question is completely speculative. In the end, Ginsburg was reduced to pointing to a *Connecticut* state court decision that applied section 901(b) to causes of action that arose in New York as evidence that section 901(b) was substantive.<sup>99</sup> What else could she do? At least the Connecticut court had a reason to talk about the issue.

In the remainder of this Article, I would like to focus on another problem of dark matter that has inspired a *Swiftian* approach and an *Erie* response—the extrajurisdictional effect of a state's choice-of-law rules. To set up the problem, I will begin with recent arguments in favor of an *Erie* approach offered by Kermit Roosevelt.

Assume that a Vermont state court is entertaining a negligence action brought by a New York wife against her New York husband concerning an accident in Pennsylvania. Pennsylvania law forbids interspousal suits, but New York law allows them. Which law should the Vermont court use?

Roosevelt argues that this question needs to be broken down into two steps.<sup>100</sup> The first is determining “which of the potentially relevant laws grant rights to the parties.”<sup>101</sup> Here the question is whether New York and Pennsylvania law actually extend to the facts of the case. To answer this question, the court must look to what Roosevelt calls “rules of scope.”<sup>102</sup> If these rules say that only one state's law applies, then the court faces what Brainerd Currie called a “false conflict,”<sup>103</sup> and that state's law should be used. If two

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99. *Weber v. U.S. Sterling Sec.*, 924 A.2d 816, 826-27 (Conn. 2007), cited in *Shady Grove*, 130 S. Ct. at 1471 (Ginsburg, J., dissenting).

100. Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1871 (2005).

101. *Id.*

102. *Id.*

103. BRAINERD CURRIE, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 77, 107, 109 (1963) (initially using the phrase “false problem”); Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U.

or more states' laws apply, the court faces a "true conflict" and must use a "rule of priority" to decide between them.<sup>104</sup>

Following arguments originally offered by Lea Brilmayer and Larry Kramer, Roosevelt argues that the relevant rules of scope are provided by the choice-of-law rules of the state whose law is at issue.<sup>105</sup> Thus, the Vermont court should look to *Pennsylvania's* choice-of-law rules to find the rules of scope that determine whether Pennsylvania law extends to the facts. It cannot use Pennsylvania law unless the Pennsylvania Supreme Court, applying Pennsylvania's choice-of-law rules, would say that Pennsylvania law applies.<sup>106</sup> In short, Roosevelt argues that some of Pennsylvania's choice-of-law rules have extrajurisdictional effect. They follow Pennsylvania causes of action into other court systems.

But Roosevelt argues that the Vermont court is not bound by those Pennsylvania choice-of-law rules that are rules of *priority*.<sup>107</sup> Assume that the Pennsylvania Supreme Court has determined, through its own rules of scope, that Pennsylvania law applies to the facts and, through New York's rules of scope, that New York law also applies. That the Pennsylvania Supreme Court would favor a Pennsylvania right over a New York right—or a New York right

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CHI. L. REV. 1301, 1302 (1989).

104. Roosevelt, *supra* note 100, at 1871.

105. *Id.* at 1872-74. Lea Brilmayer is probably the first modern conflicts scholar to make the argument. See Lea Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555, 560-61 (1984). For Larry Kramer's version, see Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 303-04 (1990) [hereinafter Kramer, *Rethinking*]; Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979 (1991) [hereinafter Kramer, *Renvoi*].

106. See Roosevelt, *supra* note 100, at 1874. The approach recommended by Brilmayer, Kramer, and Roosevelt should be distinguished from the doctrine of "renvoi" in choice of law. Under *renvoi*, if the forum's choice-of-law rules recommend sister state law, "sister state law" is taken to mean the law that the sister state's courts would choose, using the sister state's choice-of-law rules. Kramer, *Renvoi*, *supra* note 105, at 980 n.3. Thus, if Vermont had a choice-of-law rule recommending Pennsylvania law, the fact that the Pennsylvania Supreme Court would use New York law means that the Vermont court should use New York law. Under the doctrine we are speaking of here, the fact that the Pennsylvania Supreme Court would use New York law means only that the Vermont court cannot use Pennsylvania law. If a French term must be used, the most appropriate would not be *renvoi*, but *désistement*. *E.g.*, *In re Tallmadge*, 181 N.Y.S. 336, 344-48 (Sur. Ct. 1919). For a further discussion of the doctrine of *désistement*, which was apparently also held by the German conflict scholar Carl Ludwig von Bar, see Ernest G. Lorenzen, *The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country,"* 27 YALE L.J. 509, 512-18 (1918).

107. See Roosevelt, *supra* note 100, at 1874.

over a Pennsylvania right—does not mean that the Vermont court must do the same. Pennsylvania's rules of priority do not have extrajurisdictional effect.

If adopted, Roosevelt's *Erie* approach to choice of law would be revolutionary, for states' current approach is *Swiftian*. Consider the traditional choice-of-law approach, as exemplified in the First Restatement, which a number of states still use.<sup>108</sup> Under this approach, the forum can apply the law of a sister state even when the courts of the sister state would not.<sup>109</sup> For example, in *Rhee v. Combined Enterprises*, a Maryland court, using the First Restatement, applied New Jersey law, which allowed interspousal suits, to a Maryland couple who got into an accident in New Jersey.<sup>110</sup> It did so even though the New Jersey Supreme Court, using a modern interest-analysis approach, had held in *Veazey v. Doremus* that New Jersey law on interspousal suits should not be applied to nondomiciliaries who get into accidents in New Jersey.<sup>111</sup>

Of course, Roosevelt would not object to the Maryland court's decision in *Rhee* if the New Jersey Supreme Court's decision in *Veazey* rested on a rule of priority rather than a rule of scope. But the New Jersey Supreme Court refused to apply New Jersey law in *Veazey* because it thought New Jersey lacked an *interest* in legally regulating interspousal suits by nondomiciliaries.<sup>112</sup> And Roosevelt argues that this amounts to a claim that New Jersey law does not apply to the facts. According to Roosevelt, therefore, the Maryland court in *Rhee* acted improperly because it made a claim about the territorial scope of New Jersey law in defiance of binding decisions of the New Jersey Supreme Court.

Modern approaches to choice of law are equally *Swiftian*. Although they can take a variety of forms—from the classical

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108. As of 2008, states still using the traditional *lex loci delicti* rule for torts are Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming. Symeon C. Symeonides, *Choice of Law in American Courts in 2008: Twenty-Second Annual Survey*, 57 AM. J. COMP. L. 269, 279-80 tbl.1 (2009).

109. The forum ignores the choice-of-law rules of foreign jurisdictions, except in cases of title to land and the validity of a decree of divorce. PETER HAY ET AL., CONFLICT OF LAWS 163 n.2, 167 n.4 (2010). In these two situations, the doctrine of *renvoi* is used. *Id.*

110. 536 A.2d 1197, 1197, 1203 (Md. Ct. Spec. App. 1988).

111. 510 A.2d 1187, 1191 (N.J. 1986).

112. *Id.* at 1190.

interest analysis approach of Brainerd Currie,<sup>113</sup> to the Second Restatement,<sup>114</sup> to Leflar's choice-influencing considerations,<sup>115</sup> to Baxter's comparative impairment<sup>116</sup>—all modern approaches take seriously the idea of looking to the purposes standing behind a state's law when determining whether it applies to an event that crosses state borders. But, like the First Restatement, modern approaches can conclude that sister state law applies even when the sister state's supreme court would say that it does not.<sup>117</sup> For example, in *Osborn v. Kinnington* the Texas Court of Appeals, using the Second Restatement, applied Alabama tort law to an accident between two Alabama co-employees who got into a truck accident in Texas.<sup>118</sup> The defendant pointed to *Powell v. Sappington*, in which the Alabama Supreme Court, using the traditional approach, had refused to apply Alabama tort law to Alabamans who got into an accident in another state.<sup>119</sup> The case was considered irrelevant.<sup>120</sup>

Once again, Roosevelt would object to *Osborn* only if the Alabama Supreme Court's refusal to use Alabama law in *Powell* was based on

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113. CURRIE, *supra* note 103; Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171. No state explicitly adopts all of Currie's approach, although all modern approaches are heavily influenced by it.

114. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). This is the most prevalent approach, used by twenty-four states for torts as of 2008. Symeonides, *supra* note 108, at 279-80 tbl.1.

115. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966). This approach, also known as the "better law" approach, is used by Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin for torts. Symeonides, *supra* note 108, at 279-80 tbl.1.

116. William A. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963). Baxter's approach is arguably used in California. See *Bernhard v. Harrah's Club*, 546 P.2d 719, 723 (Cal. 1976); Symeonides, *supra* note 108, at 279.

117. Roosevelt, *supra* note 100, at 1881; see also Kramer, *Renvoi*, *supra* note 105, at 1003-12. Occasionally modern courts do take the choice-of-law decisions of sister state courts into account when deciding whether sister state law should be used, but this is generally done in a haphazard fashion without any appreciation that choice-of-law rules might be substantive. See, e.g., *Am. Motorists Ins. Co. v. ARTRA Grp., Inc.*, 659 A.2d 1295, 1298-99 (Md. 1995); *Lommen v. City of E. Grand Forks*, 522 N.W.2d 148, 151 (Minn. Ct. App. 1994); *Griggs v. Riley*, 489 S.W.2d 469, 474 (Mo. Ct. App. 1972). Currie, for example, recommended that sister state choice-of-law rules be considered only by a disinterested forum state to resolve cases in which multiple sister states are deemed to be interested. Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 781-82 (1963).

118. 787 S.W.2d 417, 418-19 (Tex. Ct. App. 1990).

119. 495 So. 2d 569, 570 (Ala. 1986), cited in *Osborn*, 787 S.W.2d at 419.

120. See *Osborn*, 787 S.W.2d at 419-20.

a rule of scope rather than a rule of priority. But he reads the First Restatement as concerning scope.<sup>121</sup> According to Roosevelt, the Texas court in *Osborn* acted improperly because it made a claim about the scope of Alabama law in defiance of binding decisions of the Alabama Supreme Court.<sup>122</sup>

In recommending that the current *Swiftian* approach to choice of law be replaced by *Erie*, Roosevelt adopts a particular view about the extrajurisdictional effect of state supreme courts' choice-of-law decisions, according to which some—the ones he calls “rules of scope”—are intended to bind sister state and federal courts.<sup>123</sup> But what reason do we have to believe that this interpretation is correct?

Curiously, Roosevelt treats the matter as beyond the control of the state supreme court itself:

[I]f the courts of a foreign state would find that no rights exist under foreign law, the forum cannot disregard that fact. State courts, after all, are authoritative with respect to their own law, and the scope of foreign law is not a question of forum law. No state, for instance, has the power to disregard an explicit restriction on the scope of another state's statute (as, for instance, a provision allowing recovery only for wrongful death “caused in this state”), and it has no more power to disregard restrictions imposed by that state's court of last resort.<sup>124</sup>

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121. Roosevelt, *supra* note 100, at 1878-79. Kramer claims they are rules of priority. See Kramer, *Renvoi*, *supra* note 105, at 1042-43. The fact that they cannot agree is not surprising, because the issue concerns dark matter.

122. See Roosevelt, *supra* note 100, at 1882. Indeed, modern state courts ignore sister state choice-of-law decisions when determining the territorial scope of sister state law, even when the sister state has a *modern* choice-of-law approach. The modern approach tends to treat state interests as *objective*—in the sense that they should be determined on the basis of a rational reading of a state's laws, independent of the decisions of the state's courts. Herma Hill Kay, *Comments on Reich v. Purcell*, 15 UCLA L. REV. 551, 589 n.31 (1968) (“The mere fact that Ohio might mistakenly fail to recognize her own legitimate interests need not prevent California from recognizing her interests on her behalf, at least when to do so will not defeat any opposing interest of [another state with contacts].”); see Bruce Posnak, *Choice of Law: Interest Analysis and Its “New Critics,”* 36 AM. J. COMP. L. 681, 686-87 (1988). For a discussion, see Kramer, *Renvoi*, *supra* note 105, at 1003-05.

123. See Roosevelt, *supra* note 100, at 1871.

124. *Id.* at 1872-73 (footnote omitted).



Notice that Roosevelt does not say that the forum can disregard a state's rule of scope *only if this is permitted under the state's law*. He claims that the forum cannot disregard the state's rule *period*—apparently even if the state *wants* to release the forum of this duty. If the New Jersey Supreme Court, using a modern approach, says that it is not interested, a Maryland court *may not* use New Jersey law, even if New Jersey officials want to give the Maryland court that freedom.

Of course, the New Jersey Supreme Court can easily circumvent the limitation that Roosevelt puts on it. If it thinks that New Jersey is not interested but wants to allow federal and sister state courts to use New Jersey law anyway, all it has to do is say that New Jersey is “interested” and that its disinclination to use New Jersey law is due to a “rule of priority” rather than a “rule of scope.” But why force it to invoke such talismanic formulas? Why not simply say that, interest or no interest, the New Jersey Supreme Court—and other appropriate New Jersey officials—are the ultimate authorities on the extrajurisdictional effect of the New Jersey Supreme Court's choice-of-law decisions, even when the decisions concern the territorial scope of New Jersey law?

I think that the reason Roosevelt does not adopt this approach is the following: Channeling Holmes, he thinks that the scope of New Jersey law simply *cannot* outstrip binding interpretations of that law by the New Jersey Supreme Court.<sup>125</sup> As he puts it, “[U]nless they run afoul of constitutional restrictions, states *cannot* be ‘mistaken’ about the scope of their law.”<sup>126</sup> The scope of New Jersey law, he suggests, simply *is* what the New Jersey Supreme Court says it is. Having settled the question of territorial scope for lower New Jersey courts, the New Jersey Supreme Court has established its territorial scope for all courts, and so it cannot coherently license federal and sister state courts to come to a different conclusion about the matter.

As we have seen, however, this is a fallacy. The territorial scope of New Jersey law is what the New Jersey Supreme Court says it is *only if the New Jersey Supreme Court or other appropriate New Jersey officials say so*. One cannot draw a priori conclusions about

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125. See *supra* text accompanying note 67.

126. Roosevelt, *supra* note 100, at 1856.

the extrajurisdictional effect of state supreme court interpretations of the state's law from the fact that they are binding on lower state courts. The extrajurisdictional effect of state supreme court decisions must be answered, not by a priori reasoning, but by reference to the views of officials within the state.<sup>127</sup>

The same point is true of rules of priority. Roosevelt argues that a state *cannot* extend its rules of priority to other court systems: “[W]hile one state’s determination as to the scope of its law must—as a question of that state’s law—be respected in foreign courts, its resolution of conflicts between its law and the laws of other states commands no such deference.”<sup>128</sup> Assume, for example, that the New Jersey Supreme Court in *Veazey* had admitted that New Jersey has an interest in applying its law, but ultimately concluded that the sister state’s interest should be preferred. According to Roosevelt, this would permit federal and sister state courts to apply New Jersey law to such cases, whatever the New Jersey Supreme Court or other New Jersey officials say about the matter.

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127. I have concentrated on Roosevelt’s argument for an *Erie* approach to choice of law because the parallels with Holmes’s argument are strongest. But Kramer sometimes appears to offer similar a priori arguments that a state supreme court’s decisions about the scope of its law must bind federal and sister state courts because they bind lower state courts. Kramer, *Renvoi*, *supra* note 105, at 1030 (“Because this is a question of Illinois positive law, and because Illinois courts are the authoritative expositors of that law, the Michigan court is bound to follow Illinois decisions.”); *id.* at 1011 (“A state’s approach to choice of law by definition establishes the state’s rules of interpretation for questions of extraterritorial scope.”); *id.* at 1028-29. The following is another example:

A state’s approach to choice of law establishes the state’s rules of interpretation for questions of extraterritorial scope. But interpretation *makes* law: once interpreted, it is as if a law expressly said what the court has construed it to say. There is, however, no general common law of interpretation. Each state is free to adopt whatever rules of interpretation it deems appropriate, and these rules are themselves part of the state’s positive law. Consequently, a court in one state cannot ignore another state’s rules of interpretation in interpreting the other state’s laws.

Kramer, *Rethinking*, *supra* note 105, at 303.

But these passages probably do not reflect Kramer’s considered view. When arguing that a state’s rules of priority do not bind sister state and federal courts, he does not rely on a priori reasoning about the nature of law, but instead attempts to discern the likely intent of the state’s officials. See *infra* text accompanying notes 145-50. This suggests that he thinks the extrajurisdictional effect of a state’s rules of scope is likewise a contingent question of state law.

128. Roosevelt, *supra* note 100, at 1874; see also Kramer, *Renvoi*, *supra* note 105, at 1029 (“No state’s rule has a privileged status from this multilateral perspective.”).

Once again, this restriction is easy enough for the New Jersey Supreme Court to circumvent. If it thinks New Jersey has an interest but wants that interest to be subordinated to sister states' interests, even by federal and sister state courts, all it has to do is say the magic words: "New Jersey has no interest." But why make it do that? Why not simply say that, interest or no interest, the extrajurisdictional effect of its choice-of-law decisions is a contingent question of New Jersey law?

Of course, if New Jersey were to have a rule of priority that *preferred* New Jersey's interests over sister states' interests, it could not impose this rule on other courts. New Jersey can say when federal and sister state courts cannot use its law, not when they *must*.<sup>129</sup> But that is true of rules of scope, too. The most that a state can do through its rules of scope is keep federal and sister state courts from using its law.<sup>130</sup> It cannot force them to do so. I see no reason, therefore, why an a priori distinction concerning the extrajurisdictional effects of rules of priority and rules of scope should be drawn.

To say that Roosevelt's argument in favor of an *Erie* approach to rules of scope fails does not mean, however, that his approach is wrong. A state's officials may in fact intend their rules of scope to have extrajurisdictional effect. The problem is finding evidence, given that the question is about dark matter.

Notice, once again, that the problem of dark matter does not arise concerning federal law. On occasion, federal courts have decided the territorial scope of federal law—that is, whether federal law applies to transactions that cross international boundaries, such as events abroad involving Americans or events in the United States involving aliens.<sup>131</sup> Here too, one can worry whether *Erie* or *Swift* is correct. On the one hand, federal choice-of-law rules might be substantive and therefore binding on state courts when entertaining these federal actions. On the other hand, they might be procedural, in which case state courts would be free to use their own choice-of-law

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129. The situation would be different if only New Jersey had sufficient contacts to have lawmaking power under *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13 (1981). In such a case, sister states would be prohibited from applying their own law. *See id.* But the restriction would be constitutional, rather than having its source in New Jersey law.

130. *See* Roosevelt, *supra* note 100, at 1874.

131. *See, e.g., EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

rules for federal actions, just as they use their own rules when determining whether sister state law should be used in an international context.<sup>132</sup> But the question is not about dark matter, for the United States Supreme Court can answer it through direct review. Although the Supreme Court has not, to my knowledge, ever held that its choice-of-law rules are substantive, state courts must have concluded that it would, for they have followed the Supreme Court's rules, not their own.<sup>133</sup>

But in an interstate context there will, absent certification, be no authoritative state court pronouncements on the matter. Can one draw conclusions about how states think their own choice-of-law decisions should be treated from the way they treat the decisions of sister state courts? Consider, once again, the *Swiftian* approach to the common law expressed in *Slaton v. Hall*.<sup>134</sup> In *Slaton*, the Georgia Supreme Court ignored Alabama decisions when determining the content of common law in Alabama.<sup>135</sup> From this one might conclude that it thought its own decisions concerning Georgia common law could be ignored by federal and sister state courts when adjudicating events in Georgia. As far as choice of law is concerned, every state is Georgia. Whether it uses the First Restatement or a modern approach, every state supreme court thinks it can ignore sister state decisions when determining the territorial scope of sister state law. This suggests that every state supreme court thinks its own decisions can be ignored by federal and sister state courts.<sup>136</sup>

But because the question is about dark matter, no state supreme court has had an occasion to make an *authoritative* statement about

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132. See, e.g., *King v. Car Rentals, Inc.*, 813 N.Y.S.2d 448, 450-51 (App. Div. 2006) (using New York choice-of-law rules to determine applicability of New Jersey law in Quebec).

133. See, e.g., *Am. Radio Ass'n v. Mobile S.S. Ass'n*, 279 So. 2d 467, 470-72 (Ala. 1973) (looking to federal cases, rather than Alabama choice-of-law rules, to determine territorial scope of the Labor Management Relations Act (LMRA)); *Banco Do Brasil, S.A. v. Calhoon*, 270 N.Y.S.2d 691, 694-95 (Sup. Ct. 1966) (looking to federal cases, rather than New York choice-of-law rules, to determine territorial scope of the LMRA); *Grennan v. Crowley Marine Servs., Inc.*, 116 P.3d 1024, 1025, 1027-29 (Wash. Ct. App. 2005) (looking to federal cases, rather than Washington choice-of-law rules, to decide territorial scope of the Longshoreman and Harbor Worker's Compensation Act).

134. 148 S.E. 741, 743 (Ga. 1929).

135. See *supra* text accompanying notes 79-80.

136. Cf. Lorenzen, *supra* note 106, at 517-18 (arguing that nations do not consider their choice-of-law rules to be binding on foreign courts).

the extrajurisdictional effect of its choice-of-law decisions. The forum's choice-of-law decisions may indicate only how it thinks *sister state* choice-of-law decisions should be treated, not how it thinks its own should be treated.<sup>137</sup>

Can one argue for an *Erie* approach on the basis of the expectations of the parties? One argument against *Swift*, it will be remembered, was that it left people unsure about the interpretation of the general common law that a court might apply to their activities.<sup>138</sup> The counterargument was that expectations were weak in a general common law context because the general common law governed only transactions that tended to cross state borders.<sup>139</sup> Allowing federal and sister state courts to collaborate in articulating a uniform general common law standard was arguably more important than party expectations.

Concerning choice of law, the argument for *Erie* is even less persuasive. There is a choice-of-law issue to be faced only if, as a constitutional matter, more than one state's law can be applied to the parties.<sup>140</sup> But courts have such constitutional discretion only if party expectations about the applicable law are weak.<sup>141</sup>

Another consideration suggests that a state's officials might not want their choice-of-law rules to have extrajurisdictional effect. Consider once again *Rhee v. Combined Enterprises*, in which a Maryland court applied New Jersey law to a Maryland couple who got into an accident in New Jersey<sup>142</sup>—even though the New Jersey Supreme Court had held in *Veazey v. Doremus* that New Jersey law

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137. See Brilmayer, *supra* note 83, at 140-41. The only time that there is a reasonably clear answer to the question of whether a state wants its rule of territorial scope to bind federal and sister state courts—a situation that itself evokes *Swift v. Tyson*—is when the scope of a state's statute is specified in the statute itself. An example would be a Pennsylvania interspousal immunity statute that limits its application to "Pennsylvania domiciliaries." Fora respect such limitations, even when their own choice-of-law rules would have come to a different conclusion about the statute's territorial scope. See Roosevelt, *supra* note 100, at 1858. Of course, even here, skepticism about whether the limitation is meant to have extrajurisdictional effect is possible.

138. See *supra* text accompanying notes 72-73.

139. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

140. See *supra* note 129.

141. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

142. 536 A.2d 1197, 1198, 1203 (Md. Ct. Spec. App. 1988).

should not be used in such a case.<sup>143</sup> As we have seen, Roosevelt offers two possible descriptions of the New Jersey Supreme Court's decision. It might be articulating a rule of scope—that is, holding that New Jersey law does not apply to the facts. Or it might be using a rule of priority, under which applicable New Jersey law should yield to the law of a sister state.<sup>144</sup>

Although Roosevelt tends to offer a priori arguments that rules of scope have extrajurisdictional effect and rules of priority do not—as if the matter were not up to the state's officials themselves—there is a reason to think that New Jersey officials would not, in fact, want their rules of priority to be binding extrajurisdictionally. Larry Kramer has argued that we can understand a state's rules of priority as an overture in a process of negotiation with sister states.<sup>145</sup> When the New Jersey Supreme Court refrains from applying its law due to a rule of priority, it is, in effect, presenting a compromise to sister states, under which New Jersey interests yield to the sister state's in the case, provided that sister state courts will return the favor when their positions are reversed. But New Jersey would probably want to give sister state courts the freedom to offer *alternative* compromises.<sup>146</sup> To offer their alternatives, sister state courts must be free to use New Jersey law even when the New Jersey Supreme Court would not. To give them this freedom, New Jersey's rules of priority cannot have extrajurisdictional effect.<sup>147</sup>

Notice that Kramer's argument does not depend upon a priori reasoning. New Jersey officials *could* make their rules of priority binding extrajurisdictionally if they wanted.<sup>148</sup> But they would not want to tie sister state courts' hands. Kramer thinks the situation is different, however, if—as was actually the case in *Veazey*—the New Jersey Supreme Court refused to use New Jersey law because

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143. 510 A.2d 1187, 1189 (N.J. 1986).

144. See *supra* text accompanying notes 100-07.

145. Kramer, *Rethinking*, *supra* note 105, at 315-16.

146. See *id.* at 318-38.

147. See Kramer, *Rethinking*, *supra* note 105, at 316-18; Kramer, *Renvoi*, *supra* note 105, at 1029-34.

148. For example, they may not want to give sister state courts the freedom to present alternative compromises. Or they may think that the proper choice-of-law approach is a matter of "conflicts justice," which should not be subject to negotiation at all. See Kramer, *Renvoi*, *supra* note 105, at 1018, 1038.

New Jersey lacked an interest.<sup>149</sup> Here Kramer suggests that New Jersey would have no reason to give sister state courts freedom to apply New Jersey law.<sup>150</sup> After all, if New Jersey officials think their state has no interest, what purpose is there in permitting sister states to offer an alternative choice-of-law rule in which New Jersey law is used?

This argument fails, however. For New Jersey officials to give their choice-of-law rule extrajurisdictional effect means forbidding the Maryland court in *Rhee* from using New Jersey law. Because the only other state's law that can constitutionally be applied is Maryland's,<sup>151</sup> that means insisting that Maryland law decide the matter. But what if Maryland officials think that Maryland law does not apply either? What happens?

One might argue that the absence of any governing law simply means that the plaintiff fails to state a claim and that her action against her husband should be dismissed. As an analogy, assume that a New Yorker is upset because he was not invited to another New Yorker's birthday party in New York. If he sues her in New York state court, asking for compensation for the emotional distress this caused, his complaint should be dismissed for failure to state a claim. Under New York law, intentional infliction of emotional distress requires that the defendant's conduct be beyond the standards of civilized decency.<sup>152</sup> Because the failure to invite someone to a birthday party is, to put it mildly, not beyond the standards of civilized decency, the plaintiff has *no law* entitling him to relief. Our case looks comparable. Because neither New Jersey nor Maryland law applies, the plaintiff has no law to sue under, and her action should be dismissed for failure to state a claim too.<sup>153</sup>

But the cases are not comparable. Our New York plaintiff did not fail to state a claim for intentional infliction of emotional distress through the absence of New York law. He failed to state a claim

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149. *Id.* at 1028-29.

150. At times Kramer, like Roosevelt, suggests that it simply follows a priori that a state supreme court's interpretations of the territorial scope of the state's law are binding extrajurisdictionally. *See supra* note 127. But the argument I offer here is a reasonable extrapolation from what Kramer says about rules of priority.

151. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

152. *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 90 (N.Y. 1983); *Fischer v. Maloney*, 373 N.E.2d 1215, 1217 (N.Y. 1978).

153. *See Roosevelt, supra* note 100, at 1884-86.

through the *presence* of New York law. The defendant was permitted by New York law not to invite the plaintiff to her birthday party. If there really were an absence of governing law—a legal void—then there would be no answer to the question of whether the defendant was legally permitted to act as she did. But claiming that this question has no answer is plainly incompatible with dismissing the plaintiff's action for failure to state a claim, because that takes a stand on the permissibility of the defendant's actions. It would appear, therefore, that if there really is a legal void,<sup>154</sup> no court could legitimately take *jurisdiction* of the action, because that would mean applying law that does not exist.<sup>155</sup>

In short, a decision by New Jersey officials to give their choice-of-law rule extrajurisdictional effect means that they are so committed to New Jersey law not being used that they would prefer a legal void in which no court could take jurisdiction. Although it is *conceivable* that they would adopt such an uncompromising position, it is not very likely. Faced with the prospect of an accident within New Jersey falling into a legal void, they would surely relent and allow New Jersey law to fill the gap. Thus, I see no reason why a state would ever treat its choice-of-law rules—including its rules of scope—as having extrajurisdictional effect.

But all of this is speculation. The only way to get an answer to the question is to certify it to the New Jersey Supreme Court. It is odd that no advocate of the *Erie* approach to choice of law has ever mentioned certification. Why not just *ask* the New Jersey Supreme Court whether, and when, it wants federal and sister state courts to follow its choice-of-law decisions?

I believe that certification has been ignored because—as is often the case with dark matter—the systematic absence of authoritative cases on point has made the issue look jurisprudential and so answerable by a priori reasoning. But this is a mistake. The conflict between *Erie* and *Swift* in choice of law—like the original conflict

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154. Hans Kelsen is an example of a philosopher of law who rejects the very possibility of legal voids. See HANS KELSEN, PURE THEORY OF LAW 126 (Max Knight trans., 1967) (translating HANS KELSEN, REINE RECHTSLEHRE (2d ed. 1960)); see also RONALD MOORE, LEGAL NORMS AND LEGAL SCIENCE: A CRITICAL STUDY OF KELSEN'S PURE THEORY OF LAW 160 (1978); Green, *Logic of Legal Systems*, *supra* note 14, at 376 n.40.

155. Alternatively, one might argue that, as a constitutional matter, there *must* be law governing the issue and thus either Maryland or New Jersey is compelled to extend its law to the facts.



between *Erie* and *Swift* concerning the general common law—is a perfectly parochial state law issue about the extrajurisdictional effect of state court decisions. It has taken on a misty and jurisprudential aura only because it is about dark matter. The certification of some well-drafted questions to state supreme courts would solve the problem. I think advocates of an *Erie* approach would be disappointed by the answer they got.<sup>156</sup>

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156. There remains, however, the possibility of a constitutional argument in favor of an *Erie* approach—that is, one that depends upon the antidiscrimination principle I describe in Green, *supra* note 27, at 1136-54, 1162-67; *see also supra* note 88. If this argument succeeds, a state supreme court is not permitted to free federal and sister state courts from their duty to respect the state's rules of scope, unless it is willing to free its own lower courts from the same duty.