

SIGNALING DEFERENCE TO ANOTHER SOVEREIGN'S LAW

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ABSTRACT

Multiple lessons emerge from a survey of foreign law application in the four settings of a federalist legal system: (1) choice of law between independent sovereigns, (2) state law in federal court, (3) federal law in state court, and (4) federal law in different federal courts. First of three lessons is that there will presumptively be no deference, even if the other court from a different but equal judicial hierarchy would face the identical legal question. Preclusion doctrines aside, each court can take its own shot. Second, the lawmaker for the deciding court can make rules that call for deference, if signaled clearly. Such a rule of deference, whether in the form of adoption or application of foreign law, is the exception to the first lesson. Third, expanding upon the second lesson, a court will deferentially determine the contents of any directly applicable foreign law. The court should thus apply the foreign law in conformity with what it thinks the other sovereign's highest court would declare.

Consideration of these three lessons can resolve some perplexing problems. For example, consider the question of ferreting out federal law in an intercircuit setting after the transfer of a case where the two circuits have different views on the contents of the federal law. The default rule is that there should be no deference. No explicit congressional or judicial exception to that rule exists. Therefore, the transferee need not defer to the transferor, but instead can and must apply its own view of what the federal law provides. Not only does this analysis resolve a longstanding dispute, but also it illuminates our federalist system. Federal law is a uniform whole that applies equally in transferee and transferor courts.

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INTRODUCTION

The simplest technique for handling foreign law is the time-honored one: ignore it. But integration and pluralism have led most sovereigns to be more open to foreign law, as attested by the emergence and growth of the field of conflict of laws over the centuries. The sovereign either can adopt the foreign law as domestic law or can treat the foreign law as if it applied directly. This distinction suggests a spectrum of deference. But in fact, the distinction results in largely binary consequences, so that this dividing line operates as an on/off switch. As previously written,¹ the principal binary consequence is the ability or inability of the domestic court to modify the foreign law, which comes along with additional adoption or application consequences such as the existence of original and appellate jurisdiction in the domestic courts.

Each sovereign's law has a broad domain of authority.² Yet, sometimes the sovereign will look beyond its domain to consider a competing sovereign's law. In doing so, the sovereign may be motivated by external directive, reciprocal self-interest, or some sense of justice.³ However, this Article's central concern is not when a sovereign may or should look abroad.⁴ Instead the concern is the degree to which the domestic sovereign, once it has decided to look abroad, is bound by the other sovereign's view "of its own law."⁵ Here lies this Article's central concern: how a domestic sovereign heightens its degree of deference from ignoring or adopting⁶ to the significant deference of application—how the sovereign signals a choice to *apply* foreign law and how courts should react to any such signal.

We can start with an everyday problem. Let us imagine that a deciding court under its own choice-of-law rule must apply another sovereign's law, for

1. Kevin M. Clermont, *Degrees of Deference: Applying vs. Adopting Another Sovereign's Law*, 103 CORNELL L. REV. 243, 261, 275, 289 (2018).

2. See generally Paul B. Stephan, *Competing Sovereignty and Laws' Domains*, 45 PEPP. L. REV. 239, 244–45 (2018) (discussing the concept of domain, and noting that "domain . . . describes both the potential reach of a sovereign's authority and the actual scope of the laws it adopts").

3. See *id.* at 244 (proposing "a rational-choice explanation that can explain consistent patterns of deference . . . to the rules and policies of other sovereigns in situations where the deferring sovereign has the capacity to impose its own law").

4. The critical choice-of-law question of when a sovereign should adopt or apply another's law remains mostly outside the scope of this Article. That question is the focus of conflict of laws treatises.

5. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973).

6. See Stephan, *supra* note 2, at 272 & n.85 (treating adoption as "provisional deference").

example, the law of the place of the wrong.⁷ But, the foreign sovereign's law is not perfectly clear in the context of the case before the domestic court. How should the deciding court determine what the law is? As will be developed, the answer lies in the policy that the foreign sovereign's law should have the same content wherever it applies, even if the content has never been enunciated.⁸ Accordingly, the content is whatever the foreign sovereign's highest court would currently hold in the current case's context. It is then for the deciding court to predict what the foreign high court would declare. Importantly, the deciding court owes no further deference to any other court on this question, unless of course the deciding court's sovereign has validly adopted some rule of deference like *stare decisis*.⁹

Next, consider when two U.S. federal courts are involved, F1 and F2. Say both courts would apply federal law, but they have different views on its content. Imagine that F1 was the place of the wrong, but the plaintiff chooses to sue in F2 where the defendant lives. Would F2 defer to F1's different view of federal law? No, because this is not actually a matter of choice of law. By definition, choice of law selects among competing bodies of law, but here F2 is choosing between different views on the same question of law arising under a single body of law. A single federal law would apply in F1 and F2. Outside the preclusion doctrine,¹⁰ no doctrine calls on a court to defer to a coordinate or inferior court's view on a question of their common body of law. So F2 on its own would have to do its best to discern the federal law.

Perhaps the preclusion doctrine presents a more difficult example. Consider where federal court F2 is deciding the effect of federal court F1's judgment in a federal question case, and F1's view of the federal law on *res judicata* differs from that of F2. More specifically, the issue is whether alternative findings would each have effect under the issue preclusion branch of *res judicata*. Today, on this so-called *Halpern* problem,¹¹ the circuits are hopelessly split, so that a judgment

7. Or *lex loci delicti*. Under the application of the doctrine of *lex loci delicti*, the law of the jurisdiction where the activities generating the lawsuit occurred governs. See 23 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, *PERSONAL INJURY ACTIONS, DEFENSES, AND DAMAGES* § 110.25(2)(a) (Matthew Bender, rev. ed. 2023).

8. See *infra* Section I.A.1.

9. See generally Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012) (making the case for *stare decisis*).

10. See generally ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE* 212–29 (2001) (laying out the law of preclusion).

11. See *Halpern v. Schwartz*, 426 F.2d 102, 106 (2d Cir. 1970).

from different rendering circuits would mean different things.¹² The usual choice-of-law rule is that a judgment-recognizing court should apply the res judicata law of the judgment-rendering court.¹³ Should F2 follow that rule and thus defer to F1's view on *Halpern*? Or should F2 apply its own view of the proper federal res judicata law? The better answer is that F2 as the forum court should apply its own view.¹⁴

We can take the problem up a level in discomfort. Picture a federal case involving federal substantive law that is transferred from F1 to F2 via 28 U.S.C. § 1404(a)¹⁵ or § 1407(a).¹⁶ Such transfers are generally characterized as being,

12. Compare RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmts. i, o (Am. L. Inst. 1982) (following the principle of *Halpern* and saying that no alternative finding is binding), with RESTATEMENT OF JUDGMENTS § 68 cmt. n (Am. L. Inst. 1942) (saying that each alternative finding is binding). See generally RICHARD H. FIELD, BENJAMIN KAPLAN, KEVIN M. CLERMONT & ZACHARY D. CLOPTON, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 830–32 (14th ed. 2023) (treating the evolving law on alternative findings).

The federal circuits appear to be split 7–6 in favor of the Second Restatement. The U.S. Supreme Court last denied certiorari on this question in *Cisco Systems, Inc. v. TecSec, Inc.*, 572 U.S. 1158 (2014). The Petition for Writ of Certiorari at 18–21, *Cisco*, 572 U.S. 1158 (No. 13-1165), listed the Fourth, Fifth, Seventh, Tenth, and Federal Circuits in favor of the Second Restatement, while the Second, Third, Sixth, Ninth, Eleventh, and D.C. Circuits favored preclusion. This author would now add the First and Eighth Circuits to the former list. See *Foss v. E. States Exposition*, 67 F.4th 462, 469–71 (1st Cir. 2023); *Walker v. Maschner*, No. 4–98–cv–10159, 2005 WL 8141553, at *6 (S.D. Iowa July 8, 2005). However, while the majority did not reach the question in *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019), the dissent by Justice Samuel Alito, joined by Chief Justice John Roberts and Justices Clarence Thomas and Justice Brett Kavanaugh, said: “The First Restatement has the more compelling position.” *Herrera*, 139 S. Ct. at 1710 (Alito, J., dissenting).

13. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 94–95 (Am. L. Inst. 1971) (amended 1988) (saying that the law of the rendering court governs the basic res judicata effects of a prior judgment); CASAD & CLERMONT, *supra* note 10, at 212–29.

14. See *infra* text accompanying note 166 (developing that answer).

15. This is the statute for transferring a federal case from a proper court to another proper court. It says: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.” 28 U.S.C. § 1404(a).

16. This is the statute creating the Judicial Panel on Multidistrict Litigation (MDL Panel) and allowing it to transfer dispersed federal cases to one district for efficient multidistrict litigation. The statute starts: “When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407(a).

“with respect to [applicable] law, but a change of courtrooms.”¹⁷ So, can plaintiffs bring F1’s favorable view of federal law with them to F2? As this Article recounts,¹⁸ the answer is increasingly that the plaintiff cannot carry the first court’s favorable view of federal law to the next venue. Federal law ideally should have the same content wherever it applies, even when the content has never been hitherto enunciated. F1 and F2 would be facing the exact same question arising under a single body of law, and only one of the two courts is right. F2 thinks that F1’s answer is wrong, so why should F2 be forced to apply it?

Part I of this Article will develop the ideas that (1) while one sovereign need not defer to any other sovereign, (2) a sovereign can choose to apply a foreign sovereign’s law.¹⁹ If it does, (3) the foreign law’s content should be fixed as what the foreign sovereign’s highest court would declare. Those three lessons will emerge from a consideration of foreign law application in the four settings of a federalist legal system: (1) choice of law between independent sovereigns, (2) state law in federal court, (3) federal law in state court, and (4) federal law in different federal courts. As Part I discusses, the lessons reveal themselves in a different light in each of the four settings.

Part II will then use those three ideas to resolve the governing law after a transfer of venue. Part II’s analysis reveals the ultimate uniformity of federal law.

I. ASCERTAINING A SOVEREIGN’S LAW

The background here is that, in certain circumstances, a domestic legal actor concedes that another sovereign’s law applies. This Article’s analysis centers on *applying* the foreign law upon recognition that it should govern of its own force, as opposed to *adopting* the foreign law as part of the local law in voluntary pursuit of local policies. Thus, application fundamentally differs from the adoption of foreign law in formulating domestic law, in that application requires recognition that the foreign law has a claim to govern. Obviously, adoption provides the domestic legal actor much more free play in formulating what the amalgam of domestic and foreign law provides.

17. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964). The Court was there speaking of state law applicable in federal court, so the text is posing the question of whether the principle of *Van Dusen* extends the transferee’s deference to the transferor’s view of federal law.

18. *See infra* text accompanying note 203.

19. *See* H.L.A. HART, *THE CONCEPT OF LAW* 50 (2d ed. 1994) (“[I]n every human society, where there is law, there is ultimately to be found latent beneath the variety of political forms . . . [a] simple relationship between subjects rendering habitual obedience and a sovereign who renders habitual obedience to no one.”).

A. Horizontal Choice of Sovereign Law

This Section considers international or interstate choice of law.²⁰ This problem is almost as old as law itself, but the law long handled it by ignoring it altogether. Glimmers of concern eventually appeared.²¹ For example, some ancient Greek city-states signed treaties that gave jurisdiction only to the court of the defendant's domicile, and then provided that it would apply the law of the forum.²² Jurisdiction was thus used to handle the problem, doing so by effectively sweeping it under the rug. Rome took a different approach, employing a substantive solution to avoid the conflicts problem.²³ Its law gave cases with foreign elements to a special judge, the *praetor peregrinus* or magistrate of the foreigner, who then crafted a special law, called *jus gentium* or law of nations, that was an amalgam of Roman and foreign laws.²⁴ This is one of the earliest examples of the adoption of foreign law as part of the local law.

Upon the rediscovery of *Justinian's Digest* in the twelfth century, and given the growing trade in Northern Italy's city-states where local variations on the Roman law had emerged, a more modern attention to true choice-of-law problems developed.²⁵ Out of an unsystematized welter of personal and territorial approaches, Italian and French theorists, called statutists, formulated complex schemes to decide *when* a court should look to foreign law.²⁶ They asked which of the conflicting laws' intended scope encompassed the instant case.²⁷ "However," as the major conflicts treatise observes, "the major shortcoming of statutist theory was its failure to explain *why* a territorial unit

20. On the rather similar treatment of modern international law itself, see Clermont, *supra* note 1, at 293–307; Paul B. Stephan, *Marry the Domestic and the International*, 63 VA. J. INT'L L. 535, 545 (2023) (book review) ("What matters is whether direct application of a treaty (or, for that matter, any rule or norm derived from international law) conforms to the basic assumptions, customs, and structures of the relevant domestic legal system."). On tribal courts, see FIELD ET AL., *supra* note 12, at 914.

21. See PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTECK, *CONFLICT OF LAWS* § 2.2, at 9 (6th ed. 2018) (conveying the following survey of early history).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* § 2.4, at 13; see FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 11–19 (1993); ERNEST G. LORENZEN, *CASES AND MATERIALS ON THE CONFLICT OF LAWS* 2–5 (5th ed. 1946).

26. See HAY ET AL., *supra* note 21, § 2.4, at 13; JUENGER, *supra* note 25, at 11–19; LORENZEN, *supra* note 25, at 2–5.

27. See HAY ET AL., *supra* note 21, § 2.4, at 13; JUENGER, *supra* note 25, at 11–19; LORENZEN, *supra* note 25, at 2–5.

should accept another's extraterritorial legislation, that is, why one should import the other's law."²⁸

One answer started to emerge with the rise of the nation-state and the consequent stress on territoriality. The answer was the concept of comity, the deference to another sovereign's law and acts not as a matter of obligation but out of mutual respect.²⁹ Its origin lay in the writings of Ulrich Huber, a Dutch theorist who posited in 1689 that "[t]he laws of each state have force within its territory but not beyond" and "[o]ut of comity, foreign laws may be applied so that rights acquired under them can retain their force, provided that they do not prejudice the state's powers or rights."³⁰ Comity derived from enlightened self-interest, in that following foreign law could serve local policy interests and also encourage reciprocal foreign respect for the forum's law in other cases.³¹ But the foreign law had no force of its own and thus could be overridden by conflicting local interests.³²

Even though no one was expressly saying that the forum court was making the foreign law part of its domestic law, this comity was more adoption than application. The essential distinction between adoption and application lies in whose law truly governs the case: forum law or foreign law? By comity, the forum court was consciously applying its own law while it voluntarily looked to the foreign rule of decision in the attempt to get to the right result in the particular case before it. The forum court was not recognizing the foreign law's claim to govern of its own force, as it would do with application.

A later answer to why one sovereign should import another's law came in 1849 from Savigny,³³ the famed German theorist who would have a much greater influence in Europe than Huber. He saw the forum court's task as mandatory. In

28. HAY ET AL., *supra* note 21, § 2.4, at 13.

29. Michael Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 MELB. UNIV. L. REV. 416, 424 (1999).

30. HAY ET AL., *supra* note 21, § 2.5, at 13–14; *see also* Ernest G. Lorenzen, *Huber's De Conflictu Legum*, in *SELECTED ARTICLES ON THE CONFLICT OF LAWS* 136, 136–37 (1947). However, Huber's idea of comity may have been more of a mandatory command. Compare S. Nathan Park, *Equity Extraterritoriality*, 28 DUKE J. COMP. & INT'L L. 99, 168–70 (2017) (stressing the need to balance proper respect for territoriality with the "mandatory obligation" of comity in developing a modern "Equity Extraterritoriality" doctrine), with William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2085–86 (2015) (discussing Huber's view of comity as a necessary means to solve the problems created by territoriality).

31. *See* Whincop, *supra* note 29, at 416 (analyzing comity as an iterative prisoner's dilemma game).

32. *Id.* at 424; *see* RESTATEMENT OF CONFLICT OF LAWS § 1 (AM. L. INST. 1934).

33. FRIEDRICH CARL VON SAVIGNY, *A TREATISE ON THE CONFLICT OF LAWS, AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME* (William Guthrie trans., Edinburgh, T. & T. Clark 1869); *see* JUENGER, *supra* note 25, at 34–40.

other words, to each legal relationship the court must apply the law of the place where the relationship has its “seat,” the geographic location most closely connected to the relationship.³⁴ “Unlike his Dutch predecessors, Savigny was an internationalist in the sense that he regarded the rules of the conflict of laws as imposed upon each country by some higher [international] law.”³⁵ The foreign law thus finally enjoyed parity with the forum law. Ideally, decisions regarding any relationship would then be uniform across all courts.

Conflict of laws evolved later in the Anglo-American world, and then followed a similar path. Early England avoided choice of law at home by its uniquely unified legal system, while it could ignore choice of law internationally by its jurisdiction rules.³⁶ For a long time England’s regular courts, with their requirement of a local jury, did not entertain claims arising outside the country. Later, when the jury came to decide based on the evidence rather than personal knowledge, those courts allowed the plaintiff to allege fictionally that a foreign case had arisen in England, forbade the defendant from denying the allegation, and then applied English law.³⁷ By the seventeenth century, England was coming to accept jurisdiction over foreign cases more forthrightly. By 1760, the reformist judge Lord Mansfield was discussing conflict of laws with bows to Huber.³⁸ England has since followed the continental tradition, and lately American developments, as England moved toward the actual application of foreign law.³⁹

The early U.S. views were, of course, the contemporary English views, stunted though they were. Next, the influential Justice Joseph Story openly injected Huber’s ideas into American law while somewhat reshaping them. He enshrined comity as the way to justify adopting foreign law:

34. See HAY ET AL., *supra* note 21, § 2.6B, at 16–17.

35. LORENZEN, *supra* note 25, at 7.

36. See J.J. FAWCETT & J.M. CARRUTHERS, CHESHIRE, NORTH & FAWCETT PRIVATE INTERNATIONAL LAW 19–23 (Sir. Peter North ed., 14th ed. 2008); Alexander N. Sack, *Conflict of Laws in the History of English Law*, in 3 LAW: A CENTURY OF PROGRESS 1835–1935, at 342 (1937), reprinted in SELECTED READINGS ON CONFLICT OF LAWS 1 (Maurice S. Culp ed., 1956); cf. SYMEON C. SYMEONIDES, CHOICE OF LAW 52–53 (2016) (stressing, as a consequence, the lack of significant English influence on American private international law). The English merchant courts applied the international law merchant, which the common law eventually adopted into itself. See R.H. GRAVESON, CONFLICT OF LAWS 33–34 (7th ed. 1974).

37. FAWCETT & CARRUTHERS, *supra* note 36, at 19–23.

38. Robinson v. Bland (1760) 97 Eng. Rep. 717, 718, 719 (KB) (dictum); see A.E. Anton, *The Introduction into English Practice of Continental Theories on the Conflict of Laws*, 5 INT’L & COMPAR. L.Q. 534, 534 (1956).

39. See Richard Fentiman, *English Private International Law at the End of the 20th Century: Progress or Regress?*, in PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS? 165, 169 (Symeon C. Symeonides ed., 1999).

[T]he phrase ‘comity of nations’ . . . is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and is inadmissible when it is contrary to its known policy or prejudicial to its interests.⁴⁰

The U.S. views came to rest on territoriality in its restrictive sense and on comity in its now usual sense of nonobligatory discretion.⁴¹

This Article does not mean to suggest that all courts and all theorists henceforth spoke with one voice. For one, Professor Joseph Beale reintroduced the quite different idea of vested rights: “A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere.”⁴² Beale thereby provided a more tangible sense than did comity for *when* the forum court should look to foreign law, namely, when a right vested elsewhere.⁴³ But he still saw the judicial function as the local adoption of foreign-accrued rights that should travel with the person or thing. Beale endorsed the enforcement of foreign-created rights under the forum’s law, rather than call for applying foreign law.⁴⁴ Even more clearly than his predecessors, he called for applying the forum law. Notably, Beale began the first *Restatement of the Conflict of Laws* on this note:

No state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own law, but by the law of each state rights or other interests in that state may, in certain cases, depend upon the law in force in some other state or states.⁴⁵

40. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC § 38, at 35 (Boston, Little & Brown 8th ed. 1883) (footnote omitted) (appearing in 1834 as the first comprehensive conflicts treatise in English); *see id.* § 23, at 25 (“A state may prohibit the operation of all foreign laws, and the rights growing out of them, within its own territories.”). Story thus made Huber’s comity more explicitly a matter of discretion. *See* ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS 8–9, 27–44 (1992).

41. *See* HAY ET AL., *supra* note 21, § 2.7A, at 20–22.

43. 3 JOSEPH HENRY BEALE, JR., A SELECTION OF CASES ON THE CONFLICT OF LAWS § 47, at 517 (1902) (citation omitted).

43. *See id.*

44. *See id.* § 48, at 517–18 (“[T]he general principle is, that when a right has once been created by the proper law it will be enforced everywhere, even where it would not originally have been created upon the same facts.” (citation omitted)).

45. RESTATEMENT OF CONFLICT OF LAWS § 1 (AM. L. INST. 1934).

Additionally, Dean Herbert Goodrich's standard treatise of the early twentieth century railed against the use of the word "comity," but it did so in a way that reinforced the idea of voluntariness:

Such a conception of the matter [comity] supposes one sovereign state stepping back, and, as a matter of courtesy, allowing the law of another to operate within the territory of the first. Each recognition of the foreign law or rights acquired under it would then involve a temporary abrogation of sovereign power on the part of the state affording the recognition.

If this were true, extension of Conflict of Laws doctrines would be something to regard with distrust. We should not look with favor upon the proposition that a state should hand over its power to declare its law to another, however competent.⁴⁶

Even as such cracks started to develop in the traditional American system, theorists still adhered to the view that the local law alone controlled.⁴⁷ Professor Walter Wheeler Cook vigorously attacked the traditionalists. But as a legal realist, he saw the domestic sovereign as the sole source of law. Nonetheless, Cook argued that, when justice required, the local law should generate a remedy that approximated what the foreign law would do.⁴⁸ Thus he, more clearly than his predecessors, expressly argued for adoption of foreign law:

The view outlined may be stated as follows: the forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected The rule thus 'incorporated' into the law of the forum . . . thus enforces not a foreign right but a right created by its own law.⁴⁹

46. HERBERT F. GOODRICH, HANDBOOK ON THE CONFLICT OF LAWS § 5, at 7 (1927).

47. See ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW §§ 2, 4, 15 (6th ed. 2011) (discussing local law theory).

48. See WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 20–21 (1942).

49. *Id.*; see *id.* at 21 n.41a ("The use of the word 'incorporated' here has led at least one critic to ascribe to the present writer the theory that the foreign 'law' is in some mysterious way actually 'incorporated' as 'law' into the legal system of the forum. Clearly all that is meant is that the forum models its own applicable rule of law upon the foreign rule of law."); HAY ET AL., *supra* note 21, § 2.8A, at 25–27 (discussing Cook's contributions).

In short, the various early U.S. approaches to choice of law, in the past and where they still prevail, could be seen as variations on the common theme of the adoption of foreign law. But then America's Conflicts Revolution of the 1960s introduced a good number of new choice-of-law methodologies.⁵⁰ The most prominent example is arguably interest analysis in its broad sense.⁵¹ This Article does not include the details of these methodologies. Rather, its concern is a jurisprudential question: how, by adoption or by application, does the forum effect the recognition of foreign law when recognition is appropriate?

The Conflicts Revolution is often phrased in terms of a departure from wooden *lex loci* rules,⁵² which were based on territorial factors without consideration of the laws' contents.⁵³ Of course, the motivation of the revolutionaries was their growing despair with the older approaches' reasoning overall and the results in actual cases.⁵⁴ In terms of doctrine, it entailed a shift from wooden rules to functional analysis of competing laws. Nevertheless, it might be equally cogent to conceive of the Revolution in terms of a switch from adoption to application of foreign law, from importing foreign views into domestic law as a matter of comity to recognizing the foreign law's claim to govern. One could say that, spurred by despair over the doctrine, the revolutionaries came to recognize that achieving the just result sometimes necessitated applying foreign law. The pertinent wooden rule might call for following forum law, while attention to the interests at stake could demand application of a foreign law and its more just result. Shaping local law by rule-bound adoption of certain foreign law placed the courts in handcuffs, but more freely deciding which body of law had a claim to apply freed up the courts' decision-making. There is at least a correlation; in the United States, a switch from adoption to application came at the time of the Conflicts Revolution.

50. See Linda Silberman, *(American) Conflict of Laws Revolution*, in *ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW* 66 (Jürgen Basedow et al. eds., 2017).

51. See Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1282 (1999) ("[M]any states now seek to identify the interests that the several jurisdictions would have in seeing their rule of law applied to the dispute, and analyze and then sometimes weigh these interests in opting for the appropriate legal standard."); Anthony J. Colangelo, *Absolute Conflicts of Law*, 91 IND. L.J. 719, 769–70 (2016) (stressing fairness to parties); cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (AM. L. INST. 1971) (selecting the tort law of the state that "has the most significant relationship to the occurrence and the parties").

52. See *supra* note 7 and accompanying text.

53. See, e.g., RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 3.1, at 55 (6th ed. 2010) (discussing how some pervasive problems in conflicts of laws are difficult to address with territoriality-oriented choice-of-law rules).

54. See KERMIT ROOSEVELT, III, CONFLICT OF LAWS 35–36 (3d ed. 2022).

In sum, U.S. courts increasingly came to treat the chosen foreign law as if it is applicable of its own force. Although it was still the local law (or some constitutional or other external superior law) that called for applying foreign law, rather than the foreign law applying *ex proprio vigore*,⁵⁵ the forum began choosing to treat the foreign law as if it were directly applicable. The Conflicts Revolution was a recognition of the foreign law's status as being almost coequal.

Supreme courts, and subsequently some legislatures, performed the switch of U.S. conflicts law from adoption to direct application. Afterwards, the judicial job became one of choosing which law applies in an integrated pluralist world, divining by construction and interpretation which law should be seen as meant to apply in spatial terms.⁵⁶ The legal question faced by a court today is no longer, What is the law? It has become, What is the governing body of law? For example, rather than thinking that the local law should wisely adopt the law of the place of the wrong to decide a case in the local court, the court now worries about which body of law should regulate the behavior at issue.

1. Conformity

The shift to direct application should also affect how a court in F1 determines and clarifies the content of F2's foreign law. In the old days of adoption, a court could employ presumptions and develop idiosyncratic rules about what sources to consult.⁵⁷ In the new days of application, a court should take conformity more seriously.

The bounds and details of deference are a matter for the local law of the forum F1, subject to any constitutional or other external constraint.⁵⁸ Nonetheless, basic conformity with the foreign law is an essential feature of

55. See Ernest A. Young, *Sosa and the Retail Incorporation of International Law*, 120 HARV. L. REV. F. 28, 35 (2007) ("[Foreign] law does not apply 'of its own force' in such cases; rather, application of foreign law is permitted to the extent that the relevant state or federal choice of law rules permit it.").

56. See HAY ET AL., *supra* note 21, § 2.12A, at 48. On the coexisting dimension of time, see generally Jeffrey L. Rensberger, *Choice of Law and Time*, 89 TENN. L. REV. 419 (2022).

57. See HAY ET AL., *supra* note 21, § 12.19, at 558–59, 561. For example, in the pre-*Erie* days New York followed an approach that would look to sister-state statutes, but not to sister-state common law. See Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in CIVIL PROCEDURE STORIES 21, 68 n.145 (Kevin M. Clermont ed., 2d ed. 2008). Georgia still follows that approach. See *Coon v. Med. Ctr., Inc.*, 797 S.E.2d 828, 829, 832–34, 836 (Ga. 2017).

58. See MICHAEL H. HOFFHEIMER, CONFLICT OF LAWS 3 (4th ed. 2019) (explaining how federal statutes determine the breadth of applicability).

today's horizontal choice of law.⁵⁹ Hence, once the forum court decides to apply foreign law, the court must predict what that law is.

Presumably, but not necessarily,⁶⁰ the foreign law is what foreign F2's highest court would decide it is. Unless F1's law provides otherwise, the F1 court should put itself into the shoes of the highest foreign court. Conflicts theorists argue therefore that state court F1 should investigate how F2's highest court would interpret its state statutes.⁶¹ The forum court thus loses its license to engage in conventional legal reasoning, because it has no authority to create foreign law. Concomitantly, the forum court is not bound by any lower foreign court's view. The forum court would never think to choose on its own among varieties of the foreign law offered by a foreign sovereign's lower courts' views. The forum court only applies the foreign law that it thinks the foreign highest court would apply.

2. Renvoi

The issue of renvoi arises when a foreign law's conflicts provision would send the forum court to another body of law.⁶² Imagine that F1 has decided to apply F2's law, but F2 would apply F3's law. It is for F1 to decide whether to accept this *transmission* to a third body of law.⁶³ Most sovereigns in fact do not

59. See LOUISE WEINBERG, *FEDERAL COURTS* 444 (1994); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 20 n.75 (1994).

60. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136(2) (Am. L. Inst. 1971); Allan Erbsen, *Erie's Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579, 654–55 (2013); *infra* text accompanying notes 121, 130 (explaining that horizontal choice of law is less demanding than *Erie* with regard to conformity).

61. See Aaron-Andrew P. Bruhl, *Improving (and Avoiding) Interstate Interpretive Encounters*, 2022 WIS. L. REV. 1139, 1144; Zachary B. Pohlman, *State Statutory Interpretation and Horizontal Choice of Law*, 70 KAN. L. REV. 505, 525 (2022). *But see* Nina Varsava, *Stare Decisis and Intersystemic Adjudication*, 97 NOTRE DAME L. REV. 1207, 1249–50 (2022) (showing hesitancy about applying the other state's law of stare decisis); Nina Varsava, *Derivative Recognition and Intersystemic Interpretation* 5–6 (May 8, 2023) (unpublished manuscript) (on file with author) (broadening her position toward ignoring the other state's interpretive methodology).

62. See HAY ET AL., *supra* note 21, §§ 3.13–.14 (treating renvoi).

63. See Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 25 (2012) (“The Supreme Court has never said that states’ rules about the scope of their law are binding—not when they take the form of choice-of-law rules—and state courts regularly ignore sister-state choice-of-law rules.” (footnote omitted)).

accept a renvoi.⁶⁴ But if F1 does, should it apply its own view of F3's law or defer to F2's view of what F3 has to say? There is in fact no authority for following F2's view here. Courts instead follow the usual rule of not deferring to another judicial system's views on matters outside of that other's inside knowledge of its own internal law.⁶⁵ Resultantly, F1 would predict what F3's highest court would declare.

The propriety of this practice becomes clearer in the case of renvoi's *remission* back to the forum's law. Imagine that F1 looks to apply F2's law, but F2 would look to F1's law. Imagine further that F1 decides to accept the remission. Without discussion, F1 will apply its view of its own law as usually discerned, not what F2 thinks is F1's law.⁶⁶

In sum, the ancient rule of no deference to F2 remains in force in the renvoi situation. No lawmaker has promulgated an exception that commanded deference. If F1 and F2 encounter the same legal question as equals—what is the content of the applicable body of law, if other than F2's law?—F1 can and will exercise its judgment independently of F2.

3. Lessons, So Far

Lesson #1: No deference as norm. The rule of no deference between court hierarchies is the norm, or the default rule that would exist in the state of nature—until the domestic lawmaker alters it. This rule follows from what must be the first principle of judging: judges, try to decide as correctly as you can. In any event, do not pass the buck by letting some other court system make controlling decisions.

Even in applying one's own law, when one needs to unearth its content, do not defer—except as one's own lawmaker has dictated deference in legal method or by stare decisis within the judicial hierarchy.

Lesson #2: Deference as exception. The deciding court's lawmaker can make exceptions to Lesson #1. History shows that, in the face of growing integration and pluralism, such exceptions of deference will come. Choice-of-law doctrine is the prime example of an exception that gives deference to foreign law. The modern doctrine has been switching from adoption of foreign law to direct application.⁶⁷ Adoption allows more free play in formulating the adoptee's

64. See HAY ET AL., *supra* note 21, § 3.13, at 143. *But cf.* Gary J. Simson, *Plotting the Next "Revolution" in Choice of Law: A Proposed Approach*, 24 CORNELL INT'L L.J. 279, 287–88 (1991) (favoring renvoi).

65. See HAY ET AL., *supra* note 21, § 3.14, at 149 & n.112 (disparaging uniformity of result as a goal of choice of law).

66. See, e.g., *In re Estate of Wright*, 637 A.2d 106, 107, 109 (Me. 1994).

67. See *supra* Section I.A.

contents, meaning a lower level of deference. Application, based on a recognition that the foreign law has a claim to govern, means high deference and hence close conformity.

Application of foreign law is serious business. It involves the sovereign's abdication of its function as law giver. It also involves the court's losing its job as law interpreter. Stepping up to application therefore requires a clear signal from on high. Thus, Lesson #2 intrudes in the form of application only when the lawmaker for the deciding court has clearly dictated application.

Normally, because application stands as a stark exception to the first principle of judging, the exception needs to be authorized or endorsed by a high-level lawmaker: a constitution, a treaty, the legislature, or the highest court. A lower court should thus not create for itself an exception of deference that relieves it of the duty to decide. These exceptions should be created by a careful and orderly, if not stingy, process.

Alternatively, the exception might be well-established by ancient practice. Within a judicial hierarchy, stare decisis is the prime example. An appellate court is bound by its own decisions, and any court is bound by decisions rendered in the direct line above it in the judicial pyramid. Stare decisis is rather flexible in command.⁶⁸ However, it is not a violation of the first principle of judging. The purpose of stare decisis is to foster correct decision-making by the hierarchy over time.⁶⁹

Where did the unarticulated rule of clear signal come from? Like stare decisis, it comes from longstanding judicial practice. Out of respect for the norm of independent judgment, innovative decisions by lower courts to defer would have generally been ignored as precedent. Only when a high-level lawmaker has authorized or endorsed deferential application do subsequent courts fall into line. This prudent approach has become part of the judicially created legal method binding on the legal system.

Vertical choice of law must be discussed next. The doctrinal details of ascertaining another sovereign's law have been most carefully elaborated within the context of vertical choice of law.

B. Erie

For any legal actor in a federalist system, who exists under dual sovereigns, every question of law is preceded by the vertical choice-of-law question of

68. See Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 800–04 (2012) (explaining that federal district courts are not bound by earlier decisions within the same district).

69. See ARTHUR J. GOLDBERG, *EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT* 74–79 (1971).

whether the legal question is a matter for state or federal law.⁷⁰ Consider first the situation where a federal court applies state law. Such a situation is guided by the landmark case *Erie Railroad Co. v. Tompkins*.⁷¹

The lessons of horizontal conflicts should carry over to this *Erie* (and reverse-*Erie*) context. After all, federalism really is a choice-of-law problem.⁷² Admittedly, the United States' federalism scheme was partly settled by a treaty-like, but especially binding, agreement called the Constitution. This joint-venture contract among thirteen independent state sovereigns created a federal government of limited and separated powers, and thus it gave special prominence to its choice-of-law and choice-of-forum provisions.⁷³ The choice-of-law portion of the constitutional contract was in fact so prominent that it proves useful to view the Constitution as centrally a choice-of-law agreement, with the states giving certain legal matters to the federal government but retaining this and that for state law, and so on through the document.⁷⁴ Such provisions work like ordinary, albeit always binding, agreements on applicable law. Thus, the constitutional flavor of federalism's fairly ordinary choice of law does not prevent the carryover of horizontal conflicts' lessons to the *Erie* setting.

Concededly, the federal-state relation differs from the relation between states or between countries. The U.S. Supreme Court has explained that the United States' being a unified nation, subject to the Supremacy Clause,⁷⁵ makes the federal-state relation unique.⁷⁶ That is, states do not bear the same relation to the central government's laws that they bear to the laws of sister states or other countries. Nonetheless, one can see similar methods of application of foreign law at work in all these settings. Therefore, the lessons can easily travel between the above-discussed conflicts of law and the federal and state settings.

70. See Bauer, *supra* note 51, at 1236. That article explains that "horizontal" choice of law refers to a choice on "which state's or country's law to apply to an issue, with respect to a transaction touching on two or more jurisdictions," while "vertical" choice of law refers to a choice between federal and state law in the context of a federalist legal system. *Id.*

71. 304 U.S. 64 (1938).

72. See Bauer, *supra* note 51, at 1238; Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 3 n.7 (2006).

73. See U.S. CONST. art. I, § 1 (vesting legislative power in Congress); U.S. CONST. art. II, § 1 (vesting executive power in the President); U.S. CONST. art. III, § 1 (vesting judicial power in the Supreme Court and any lower courts created by Congress); THE FEDERALIST No. 47 (James Madison) (explaining the intention for a separation of power).

74. Accord Stephan, *supra* note 2, at 266 (calling the Constitution "an express domain-assignment compact").

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

76. See *Testa v. Katt*, 330 U.S. 386, 388 (1947) (rejecting Rhode Island's view that the federal government "is 'foreign' to the State in the 'private international' . . . sense").

Going beyond the Constitution, the First Judiciary Act of 1789⁷⁷ included a section that came to be called the Rules of Decision Act. That section required the federal courts to apply “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide.”⁷⁸ The early federal courts acknowledged an equivalent duty to apply state common law.⁷⁹ Thus, from the beginning, the federal courts operated in the evolutionary stage of direct application of foreign (i.e., state) law that fell within the states’ lawmaking realm.⁸⁰

However, in 1842, *Swift v. Tyson*⁸¹ held that when the state law was neither statutory in origin nor a local usage, then it was not within the Rules of Decision Act’s command. Except for those statutes and customs, the state was seen to be applying the general law, a source of universal law that was seen at the time to be the background against which the federal and state sovereigns were making their own law.⁸² According to *Swift*, the federal court was therefore positioned to make an independent determination of the general law.⁸³ If both the federal court and the state court were to face the same question as to the content of the general law, the deciding court could exercise its independent judgment because the federal and state judicial systems were equal in their relation to that law. The two

77. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (establishing the federal courts).

78. *Id.* § 34 (codified as amended at 28 U.S.C. § 1652).

79. See *Jackson v. Chew*, 25 U.S. (12 Wheat.) 153, 167 (1827); *Brown v. Van Bamm*, 3 U.S. (3 Dall.) 344, 356 (1797); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 578–80 (7th ed. 2015).

80. The states’ realm was fixed by the federal courts in accordance with the federal view of the general law on conflicts of law. See *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 737 (1838) (“The submission [of the case] gives power to decide according to the appropriate law of the case; which depends on the subject matter, the source and nature of the claims of the parties, and the law which governs them.” (citation omitted)); Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1255–69 (2017). This practice was the forerunner of today’s *Erie* formula imposed as federal common law.

81. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842) (Story, J.), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71 (1938) (Brandeis, J.) (saying *Swift* “held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the state is—or should be . . .”).

82. See FALLON ET AL., *supra* note 79, at 580–82 & n.10; Sachs, *supra* note 80, at 1263–65, 1267–68, 1284; *cf. id.* at 1264 (“[General law] was available for use by federal courts without really being ‘federal law.’”).

83. See Sachs, *supra* note 80, at 1267–68 (“But a federal court could take its own view, both of the conflicts questions and of the substance, considering each of these issues as among ‘those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions.’” (quoting *Huntington v. Attrill*, 146 U.S. 657, 683 (1892))).

sovereigns were sitting in the same posture, as coequal judicial systems having to apply the same lawmaker's uniform law (here the general law existing outside federal and state sovereignty). In that situation and at that time, *Swift* held that no statute or precedent commanded deference in this or any similar setting, nor did any policy call on the federal court to defer to the state's view of the general law.⁸⁴ By contrast, whenever state statutes and customs were in play, they applied of their own force, just as they always had. In short, all *Swift* did was reduce the size of the realm of state law that applied. Thus, from 1842 until *Erie* in 1938, a large juridical swath of no deference to states' decisional law prevailed in federal courts.

Today, of course, under the command of the *Erie* doctrine, all kinds of state law again apply in federal court if the state law is within the state's lawmaking realm.⁸⁵ Although state law applies of its "own" force⁸⁶ only because federal law says it must apply, that federal command exists as a result of the states' original consent to our constitutional structure.⁸⁷ If the Constitution, or Congress acting within constitutional limits, expressly or impliedly made the choice of law for federal or state law, that choice is binding on the federal courts. An example is the Seventh Amendment's guarantee of trial by jury, which directly governs all federal civil cases.⁸⁸ In the absence of such a constitutional or congressional directive, the federal courts (or any other federal law-applier) must apply the *Erie* methodology to decide whether state or federal law applies.⁸⁹

84. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842), *overruled by Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71 (1938).

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

86. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 886 & n.16 (1986) ("In areas in which federal courts lack power to create a federal rule of decision, state law is said to operate 'of its own force.'" (quoting *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973))).

87. *See* KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* 187–213 (6th ed. 2021) (explaining *Erie*'s place in the constitutional structure).

88. *See* U.S. CONST. amend. VII; FIELD ET AL., *supra* note 12, at 181, 1672 (stating the uncontroversial background that the Seventh Amendment is not incorporated or implicit in Fourteenth Amendment due process, hence does not apply to the states, and so does not constrain state civil trials; state jury practice is widely similar to the federal, but it need not be; and generally for state law claims, the states have not completely followed the U.S. Supreme Court's modern expansion of the jury right). For a congressional illustration, one can turn to the Federal Rules of Evidence, which were enacted as a statute. *Compare, e.g.*, FED. R. EVID. 302 (legislating that state law governs some presumptions in federal court), *with, e.g.*, FED. R. EVID. 407 (legislating that federal law governs admissibility in federal court of subsequent remedial measures).

89. *See* Field, *supra* note 86, at 883 ("When an issue of law is not governed by a federal enactment—constitutional or statutory—there is always a potential question whether state law will govern or whether federal common law will be developed to displace state law.").

When acting as the default decision-maker on applicable law, the federal courts are fixing the proper bound for applying state law, which often lies well beyond any constitutional or statutory command to apply state law.⁹⁰ Much difference of opinion persists on the details of where *Erie* draws the line between the realms of state and federal law.⁹¹ This Article accepts that the predominant methodology in the federal courts today, unless a Federal Rule covers the matter,⁹² calls for evaluating (1) the interests of the state that might provide applicable law, in light of all legitimate purposes or policies reflected by its content, in having its legal rule applied in federal court on this particular issue, in order to see if they equal or outweigh the net sum of (2) the federal interests in having federal law govern, which are called affirmative countervailing considerations, and (3) the negative federal interest in avoiding the forum-shopping and inequality effects of any outcome-determinative difference between state and federal law.⁹³

This Article does not seek to start or settle a debate on the above formula. Rather, the reader need only assume that one way or another, state law often applies in federal court. It governs matters ranging from the substantive to the procedural. For example, state law governs tort liability (in a diversity action like *Erie* itself),⁹⁴ statute of limitations in a breach of trust suit,⁹⁵ and burden of proof in a land title dispute.⁹⁶ In fact, the persisting dispute over judicial methodology

90. See ARTHUR TAYLOR VON MEHREN & DONALD THEODORE TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 1049–51 (1965) (“[T]he ultimate bounds of federal competence are established in the Constitution, but a wise exercise of federal power often leads Congress or the courts to contain federal power within more restrictive limits.”).

91. See, e.g., Bauer, *supra* note 51, at 1237–38 (enumerating various considerations that might come into courts’ *Erie* choice-of-law analysis and acknowledging that “in the vertical [choice-of-law] setting . . . there is disagreement at the margins as to the appropriate rules”).

92. See *Hanna v. Plumer*, 380 U.S. 460, 466–74 (1965) (distinguishing so-called unguided *Erie* decisions from situations involving a Federal Rule of Civil Procedure).

93. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 437–38 (1996) (using a balancing-of-interests approach for unguided *Erie* decisions, so that weighty federal interests called for applying the deferential federal standard of appellate review in the federal court of appeals); CLERMONT, *supra* note 87, at 213.

94. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–80 (1938) (applying state law to decide plaintiff’s status as trespasser or licensee for state-created claim).

95. See *Guar. Tr. Co. v. York*, 326 U.S. 99, 110 (1945) (applying state statute of limitations to state-created claim).

96. See *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208, 212 (1939) (holding that state law governs burden of proof on matter governed by state law); see also *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943) (“Rule 8(c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases must apply.” (internal citation omitted)).

does not leave the question of governing law terribly unclear. In the aforementioned situations, federal courts today will treat the choice of state law as routine. And on other issues, under any conceivable methodology, federal law very often applies in federal question cases, and even in diversity cases, as a consequence either of a constitutional choice, congressional choice, or previous judicial-choice-of-law decision.⁹⁷ A lack of clarity on vertical choice of law extends only to a relatively small group of hard cases with a close balance of state and federal interests. Therein lies the explanation of how our system can function without achieving perfect clarity.

In any event, the modern evolution of the *Erie* doctrine led to the development of federal common law to fill part of the space when the *Erie* balance tips toward federal law.⁹⁸ With the added impetus of modern jurisprudence, *Erie* killed off the general law at the federal level,⁹⁹ although special enclaves of federal common law in the federal lawmaking realm would absorb parts of the old general law.¹⁰⁰ Moreover, the new understanding of federalism's vertical choice-of-law prompted the growth of reverse-*Erie* alongside *Erie* itself.¹⁰¹

1. Conformity

Application of state law under *Erie* calls for the federal actor's fairly blind adherence to the state's view of the content of its law.¹⁰² Therefore, this duty

97. See, e.g., *Hanna*, 380 U.S. at 466–74 (applying a Federal Rule of Civil Procedure to state-created claim).

98. See, e.g., *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (Brandeis, J.) (creating federal common law of interstate waters, on the very day *Erie* was decided).

99. See *Erie*, 304 U.S. at 78 (“There is no federal general common law.”).

100. See CLERMONT, *supra* note 87, at 209.

101. See *infra* Section I.C.

102. When federal law governs but there is no extant federal law, the federal court may adopt state law as federal common law. See VON MEHREN & TRAUTMAN, *supra* note 90, at 1049–51, 1054–58 (using “supplementation” as the term for adoption of state law, as opposed to “delineation” for application of state law). The state law then does not in any sense apply of its own force, but instead the federal court merely integrates it into federal law. It no longer is state law, it becomes federal law. The status of adoption carries with it all sorts of practical implications. The most obvious implications are that the federal court can let federal interests guide which state's law to adopt for the particular case and how much of it to adopt.

Thus, for adoption of state law, the federal court need not unalterably bring into federal law how the state has fashioned its law. See CLERMONT, *supra* note 87, at 209–10; Paul J. Mishkin, *The Varioussness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 804–05 (1957). The federal

demands considerable effort by the federal actor to ascertain correctly the state law to be applied.

The bottom line here is that the federal court cannot take an independent view of the state law, because ultimately modern *Erie*, where it governs, forbids federal creation of state law. Consistently, *Erie* aims to avoid applying different versions of state law in the federal and forum state courts.¹⁰³

The outcome-determinative factor in the *Erie* analysis of when to look to state law reflects this policy concern. Notably, the U.S. Supreme Court in *Byrd v. Blue Ridge Rural Electric Cooperative*¹⁰⁴ and *Hanna v. Plumer*¹⁰⁵ abandoned the pure outcome-determinative test by holding that any effect on outcome was merely a factor in determining the applicability of state law and counted only if it induced forum-shopping or inequality effects. Upon the Court's framing of the outcome effect as one factor in the balance, it became clear that conformity to state law was not the sole aim in deciding whether to look to state law. Yet once state law is decided to be applicable in federal court, the task imposed by *Erie* is to conform to the content of the state's law. Even then, the federal court need not conform to the result the state would reach based on the law and facts of the instant case. Conformity to legal content is the command, not uniformity of result.

How does a federal court perform its duty when the content of state law is unclear on a particular matter to be governed under *Erie* by state law? The federal trial or appellate court must pretend that it is, "in effect, sitting as a state court."¹⁰⁶

court as lawmaker has some freedom of movement. It can pick and choose among the state's provisions. That is, federal interests can override a presumptive adoption of state law. Federal courts can reject state law if any federal interests call for a certain content in or a particular limit on the federal common law. A federal court may alter or ignore part or all of the relevant state law in the case at bar. *See, e.g.,* *Reconstruction Fin. Corp. v. Beaver Cty.*, 328 U.S. 204, 210 (1946) (holding that a federal statute adopted the state definition of "'real property,' so long as it is plain, as it is here, that the state rules do not effect a discrimination against the Government, or patently run counter to the terms of the Act"); *Holmberg v. Armbrrecht*, 327 U.S. 392, 396–97 (1946) (reading a federal tolling notion into an adopted state statute of limitations for a particular federal action on a federally created claim).

Significantly, the federal court could make an independent determination of unclear content of the adopted state's law. *See* 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4518, at 813–16 (3d ed. 2016).

103. *See, e.g.,* *Guar. Tr. Co. v. York*, 326 U.S. 99, 99–101 (1945).

104. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958).

105. *Hanna v. Plumer*, 380 U.S. 460, 466–69 (1965).

106. *See Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (noting that federal courts must ascertain the content of the applicable state law based on the decisions of "the highest court of the State," although lower court decisions can help reveal that state law).

This has come to mean that the federal court must predict what the unclear state law is in fact.¹⁰⁷

Which of the state's courts acts as the beacon in finding the content of state law? Despite some small disagreements in the past,¹⁰⁸ the current approach is to look to the state's highest court.¹⁰⁹ Looking to a state trial court might deliver the same results in federal and state lower courts, but not necessarily the same laws that are ultimately applicable. To achieve application of the same laws, the federal court must enunciate state law as the forum state's highest court would,¹¹⁰ taking into account all the latest¹¹¹ precedent and other data that the state's highest court would.¹¹²

This is not to say that our federalism immediately arrived at this approach of state law prediction. Justice Louis Brandeis in *Erie* was explicit in saying that the federal court should apply the state's common law "as declared by its highest court."¹¹³ This was not another instance of Justice Brandeis simply failing to foresee inevitable problems, as he arguably did with the problem of deciding

107. See 19 WRIGHT ET AL., *supra* note 102, § 4507, at 124–25 ("In divining and applying the forum state's law in diversity cases, each federal court—whether it be a district court or an appellate court—functions as a proxy for the entire state court system, and therefore must apply the substantive law that it conscientiously believes would be applied by that system in a comparable case, which includes the state appellate tribunals. In other words, the federal court must determine issues of state law as it believes the highest court of the state would presently determine them, not necessarily (although usually this will be the case) as they previously have been decided by other state courts." (footnote omitted)).

108. See Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 699, 713–15 (1995) (depicting arguments as a proponent of a freer flowing standard, awarding more weight toward a coherent state law); see also Erbsen, *supra* note 60, at 646–59 (arguing as a proponent of emulating state trial courts).

109. Geri J. Yonover, *Ascertaining State Law: The Continuing Erie Dilemma*, 38 DEPAUL L. REV. 1, 37 (1988).

110. See 19 WRIGHT ET AL., *supra* note 102, § 4507, at 124–26; Yonover, *supra* note 109, at 3 n.16, 42 (1988) (referencing *Hillery v. Rushen*, 720 F.2d 1132, 1138 n.5 (9th Cir. 1983)).

111. See *Vandenbark v. Owens-Ill. Glass Co.*, 311 U.S. 538, 543 (1941) (ruling that any federal court should use the latest available data in deciding what the state law is); cf. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231, 238–39 (1991) (ordering nondeferential review by the courts of appeals of the district court's *Erie* guess, because such review "best serves the dual goals of doctrinal coherence and economy of judicial administration," even in the *Erie* setting).

112. See *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272–74 (2d Cir. 1994); cf. *Webber v. Sobba*, 322 F.3d 1032, 1035–38 (8th Cir. 2003) (employing an arguably overactive interpretation of state law).

113. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 70–71, 78, 80 (1938).

which state's law governs.¹¹⁴ Rather, he was referring to the fairly standard practice in the *Swift* era when state statutes or customs applied in federal courts: the state law had to be well-defined by the highest court, and, if not, the federal court could formulate and apply its own law.¹¹⁵

The existence of problems of unclear state law became increasingly clear with the passing years. What if the highest court of the state has not passed upon the point but there is a decision of an intermediate state court? In an early case, the Supreme Court corrected lower federal courts' inclination to look only at the state's highest court, by saying of an intermediate state decision, "whether believed to be sound or unsound, it should have been followed."¹¹⁶ But almost simultaneously the Court turned the focus to what the state's highest court would do, saying that such an intermediate decision "is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."¹¹⁷

Many variations exist on this problem of a state's highest court not having been recently explicit. What if there is a recent decision of an intermediate state court that is inconsistent with an old decision of the state's highest court? What if the only state court decision is a very old one by the state's highest court that is wholly out of line with the modern trend of authority elsewhere? What if, instead of any such decisions, there are only state court dicta? What if there is no

114. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941) (resolving the problem three years after *Erie*).

115. See *Portneuf-Marsh Valley Canal Co. v. Brown*, 274 U.S. 630, 637 (1927) ("The construction of state statutes so enacted, and the status of liens created under them are local questions which, in the absence of controlling authority by the highest court of the state, we must determine for ourselves." (citation omitted)); PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 789 (3d ed. 1988) ("Before *Erie*, in situations in which the decisions of the highest court of a state were controlling, the Court frequently said that the absence of any such decision at the time of the transaction in question or at the time of trial left the federal court free to form an independent judgment." (omitted in later editions)); cf. *supra* text accompanying note 83 (discussing general law under *Swift*).

116. *Fid. Union Tr. Co. v. Field*, 311 U.S. 169, 180 (1940); see also *id.* at 177–78 ("An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question."). But see *King v. Order of United Com. Travelers of Am.*, 333 U.S. 153, 158–59, 162 (1948) (limiting *Fidelity Union* to its facts).

117. *West v. Am. Tel. & Tel.*, 311 U.S. 223, 237 (1940); see also *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 205 (1956) ("[T]here appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule.").

state law of any kind on the particular point in issue?¹¹⁸ In the face of all these difficulties, the optimal solution is this: when finding unclear state law, the federal trial or appellate court should enunciate, but never make, whatever state law it believed would emerge from the forum state's highest court, assuming the state's highest court sat at the current time while reviewing issues of law under a nondeferential standard of review.¹¹⁹

The decision by a federal court in predicting state law will have no real effect on the forum state courts' future behavior.¹²⁰ If the federal court must make an *Erie*-guess as to the content of state law, its decision might have persuasive effect but has no precedential effect in state court.¹²¹

2. *Klaxon*

Consistent with enunciating the content of the law applicable by vertical choice of law, federal adherence to state law also extends to the forum state's view on horizontal choice of law. The so-called *Klaxon* rule provides, in connection with matters governed by state law under *Erie*, that the forum state's law governs conflicts of law.¹²² *Klaxon* is a definitive rule without exception.¹²³

118. See 19 WRIGHT ET AL., *supra* note 102, § 4507, at 154–55, 178–79 (“If no decisions by state courts, high or low, or another federal court are available, the federal court, must look for other indicia of what state law would be if declared by an authoritative tribunal. . . . When trying to determine the relevant content of state law to decide the case before it, a federal district court may consider all of the available legal sources and, when necessary, employ its experience to make an enlightened prediction of how the state’s highest court would answer the open questions.”).

119. See *id.* at 190–91 (“As is true in other contexts in which the forum state’s law governs, however, the federal court must keep in mind that its function when divining the content of forum state law is not to choose the rule of law that it believes is ‘better’ in some sense or choose the rule of law that it would adopt for itself or to be unduly innovative or creative. In making an ‘Erie guess,’ the court must select the rule that it believes the state’s highest court, from all that is known about its methods of reaching decisions and the authorities it tends to rely on, is likely to adopt sometime in the not too distant future. In effect, it is attempting to act as that state court would.” (footnote omitted)).

120. Cf. Colin E. Wrabley, *Applying Federal Court of Appeals’ Precedent: Contrasting Approaches to Applying Court of Appeals’ Federal Law Holdings and Erie State Law Predictions*, 3 SETON HALL CIR. REV. 1, 4–16 (2006) (discussing the precedential effect in federal court of federal decisions as to state law).

121. See *id.*

122. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

123. See *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (per curiam) (holding that *Klaxon* applies without exceptions, no matter how appealing the facts—even when U.S. servicemen, maimed and killed in an unpopular war far from home, are left without recovery by Texas’s seemingly purposeless application of a very foreign and rather regressive

So, to find the applicable law for any state law issue in a case, federal law tells the federal court to look to the forum state's choice-of-law doctrine. That state doctrine will tell which state's or country's law governs.¹²⁴

Indeed, if the foreign law chosen by the forum state is unclear in content, the federal court should determine the content to be what the *forum state's* highest court would determine.¹²⁵ That is, if the forum state were to reference another body of law, the federal court must find what the forum state would deem to be the content of that other law. The effect is that, under *Klaxon*, the federal court is really applying only the forum state's law, and only indirectly the chosen foreign law. The reason is that modern *Erie* aims to eliminate different versions of state law applicable in the federal and the forum state courts.

Note that horizontal choice of law differs from *Klaxon's* approach. In renvoi, F1 and F2 both would be referencing F3's (or F1's) law.¹²⁶ It is up to the forum court's lawmaker to prescribe the bounds and details of deference, subject to any constitutional or other external constraint.¹²⁷ The lawmaker can prescribe more or less deference in different contexts. Accordingly, horizontal choice of law need not go so far as to extend *Klaxon*-like deference to F2's views. In fact, no one argues for following *Klaxon's* approach in horizontal choice of law. No lawmaker has promulgated an exception that commands such deference after renvoi. With a lesser urge to conform to the applicable law, F1 need not bow to F2's view of F3's law.¹²⁸ Therefore, F1's conflicts law demands less conformity than does *Erie*.

Cambodian law); *Griffin v. McCoach*, 313 U.S. 498, 503 (1941) (holding that *Klaxon* applies even when the forum state court could not have entertained the action, such as a statutory interpleader case). *But cf.* 17A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 124.30[2][d], [3] (3d ed. 2016) (treating very special situations of multidistrict and consolidated cases).

124. *See Klaxon*, 313 U.S. at 496–97.

125. *See Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960) (“Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought.”); *AIU Ins. Co. v. TIG Ins. Co.*, 934 F. Supp. 2d 594, 605–06 (S.D.N.Y. 2013), *aff'd*, 577 F. App'x 24 (2d Cir. 2014); 19 WRIGHT ET AL., *supra* note 102, § 4507, at 209. *But see* *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981) (bowing inexplicably to the local federal circuit court's view of the applicable state law).

126. *See supra* text accompanying note 62 (discussing renvoi).

127. *See supra* text accompanying note 49 (discussing the governing law on choice of law).

128. Renvoi thus works just like *Swift's* allowing the federal court to determine the general law without bowing to the state's view. *See supra* text accompanying note 83 (discussing independent determination of general law by federal courts); Sachs, *supra* note 80, at 1262 (“Standing outside any one judicial system, the tradition [of the general law] was

3. Conformity's Limits?

Under *Erie*, how servile should the federal court be in predicting what the state's highest court would decide is its law? Should the federal court apply state rules for statutory construction or instead apply the federal approach to construction? Of late, the view has shifted definitively toward applying the state's approach.¹²⁹ In predicting what the state's highest court would do, should the federal court ignore the individual justices' personal predilections, such as political views? The best article taking the affirmative on this question, written by Professor Michael Dorf, says to ignore such predilections.¹³⁰ Professor Dorf argues that lower courts in general should not decide by a "predictive model," disparaging the model's consideration of individual state justices' predilections as detrimental to rule-of-law and impersonality-of-law concerns.¹³¹ Professor Dorf acknowledges that *Erie* presents a situation unlike decision-making within a single legal system, but maintains that even in the *Erie* situation those neutrality concerns ever so slightly outweigh the desire for conformity of law in federal and state courts.¹³² Although he admits that *Erie* case law verbally calls for the predictive approach,¹³³ he observes that in practice federal courts do not often look to data bearing on individual state justices.¹³⁴

One could disagree with Professor Dorf's argument on which way the balance of policies tilts. Regardless, it would be tough to fix and maintain any such dividing line among considerations. What to do if the state's highest court is elected, and the majority came in on a conservative platform? What if the

available to multiple states at once; and two courts could disagree about the tradition without either being obliged to take the other's view.").

129. Compare Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1905–07 (2011) (arguing that a federal court should apply state rules for statutory construction), and Aaron-Andrew P. Bruhl, *Interpreting State Statutes in Federal Court*, 98 NOTRE DAME L. REV. 61 (2022) (similar), with J. Stephen Tagert, Note, *To Erie or Not to Erie: Do Federal Courts Follow State Statutory Interpretation Methodologies?*, 66 DUKE L.J. 211, 216–17 (2016) (arguing that in practice federal courts do not apply state rules for statutory construction).

130. Dorf, *supra* note 108, at 654–55 (arguing that a federal court should ignore individual state judges' personal predilections); see Note, *The Ascertainment of State Law in Diversity Cases*, 40 IND. L.J. 541, 554 (1965). By contrast, Caminker, *supra* note 59, favors predictive decision-making more generally, and forwards *Erie* as a realm where it is clearly and rightly accepted. See *id.* at 20 ("Federal courts also unabashedly embrace a predictive approach when discerning state law pursuant to the *Erie* doctrine.").

131. See Dorf, *supra* note 108, at 679–89.

132. See *id.* at 695–715.

133. See *id.* at 695 & n.151.

134. See *id.* at 701. But see, e.g., *State Farm Mut. Auto. Ins. Co. v. Armstrong*, 949 F.2d 99, 101 (3d Cir. 1991).

majority came in on a platform of deciding the open issue in a particular way? What if the majority came in on a platform of deciding the open issue in a particular way, and a lower state court had already reversed direction on the issue in anticipation of the highest court's change in direction?

For a final rebuttal that is determinative for this Article, the *Erie* doctrine itself calls for strict conformity to the state law it applies. First, adjudicating within a single legal system is different from applying another sovereign's law. When applying domestic law, a court has some freedom to modify its evolving law. But once the decision is made to apply another sovereign's law, the general obligation is to apply the bitter with the sweet. This is the basic difference between adopting and applying another sovereign's law. Second, the Constitution, federal statutes, and case law demand that federal courts respect the related and basically similar state sovereign. The essence of *Erie* is that the federal court has no authority to create law in the realm where state law applies. The federal court cannot invoke a public-policy exception to defeat a state's lawmaking within the realm reserved to the states.¹³⁵ Third, *Erie*'s twin aims to reduce federal-state forum-shopping and unequal treatment imply strict conformity of law.¹³⁶ Once the federal court has decided to apply state law, the court is to apply state law as the state sees it. *Erie* and its progeny make clear that this duty requires prediction of the view of the other sovereign's most authoritative enunciator of its law.¹³⁷

In sum, the questions about the limits of conformity remain difficult. But, once a federal court decides to apply the state's law, the remaining effort should aim to produce the same view of state law in the federal court as would prevail in the forum state's highest court. Then, is a federal judge who puts on predilection blinders failing to perform the judicial function? Can the federal judge justify viewing state law in a way contrary to what the judge would confidently predict the state's highest court would actually do? Admittedly, looking at personal predilections has long sounded a little ridiculous. But with each passing year, the view of law as impersonal looks more and more outdated.¹³⁸ All told, maybe it is best for the federal court to look holistically at

135. See *Guar. Tr. Co. v. York*, 326 U.S. 99, 112 (1945) (refusing to allow a supposedly better federal law to displace state law); HAY ET AL., *supra* note 21, §§ 3.15–.19, at 149–56 (discussing the public-policy exception in horizontal choice of law, which for example allows an American court to refuse to apply England's broad libel law); Clermont, *supra* note 1, at 289–92.

136. See 19 WRIGHT & MILLER, *supra* note 102, § 4504.

137. See Caminker, *supra* note 59, at 51 n.184.

138. See Eric Segall, *We Are All Legal Realists Now*, DORF ON LAW (Aug. 26, 2020), <https://www.dorfonlaw.org/2020/08/we-are-all-legal-realists-now.html>.

what the state's highest court would do and then, open to all factors, make a prediction. Most often, predilections will not play a prominent role.

Again, in horizontal choice of law, the forum court might have greater freedom to modify the applicable law under the public policy doctrine than a federal court has under *Erie*. Also, one sees a less servile devotion to predicting the other sovereign's law. With a lesser urge to conform to the applicable law's contents, the local conflicts doctrine of F1 does not seem to call for blind conformity to the leanings of F2's individual justices.¹³⁹ One does not encounter discussions of any duty to predict how F2's high court justices would individually decide. Indeed, one does not see any in-depth treatise discussions of how to determine F2's law if unclear.¹⁴⁰ Detailed discussions of where to locate the foreign law's unclear content do not appear in conflict of laws treatises,¹⁴¹ but only in *Erie* discussions such as Professor Dorf's.¹⁴² Although applying another sovereign's law ultimately requires faithful conformity, this Article bases this inference of possibly looser constraints in horizontal choice of law on the stronger policies undergirding *Erie* and on the absence of conflicts authority explicitly requiring strict conformity.

4. Lessons, Revised

Lesson #1 redux: No deference, as norm. A parallel lesson of normally no deference arises from the *Swift* general-law regime that *Erie* replaced. If two courts from different but equal judicial systems face the same legal question, each can take its own shot.

Lesson #2 redux: High deference for application, as exception. *Erie* works much as the horizontal choice-of-law process now does, with the local legal actor deciding when the foreign law applies. At first by the Rules of Decision Act and eventually by *Erie* and *Klaxon*, the federal lawmaker clearly

139. See *supra* Section I.A.1.

140. The most focused, albeit brief and indeterminate, discussion this author has found appears in GILLES CUNIBERTI, *CONFLICT OF LAWS: A COMPARATIVE APPROACH* 130–31 (2017) (“The last issue is whether the purpose of the establishment of foreign law should merely be to identify the main sources and rules in the foreign law (for instance, applicable statutes and/or leading precedents), or the precise outcome that the foreign court would reach. All legal systems require that the precise and actual outcome that the foreign court would reach be assessed. German scholars explain that courts must determine the ‘legal reality’ of foreign law.” Professor Cuniberti closes the section by quoting a new Italian statute: “Foreign law shall be applied pursuant to its own criteria of interpretation and application.”).

141. By contrast, the treatises do cover in detail the procedure for pleading and proving the foreign law. See HAY ET AL., *supra* note 21, §§ 12.1–.19, at 525–61; see also Clermont, *supra* note 1, at 287–89.

142. See *supra* Section I.B.3.

signaled the federal actor and now delineates the proper range for applying state law. When the choice goes for state law, the federal actor cannot apply federal law, nor can it create state law. The state law truly *applies*, and it governs as state law.

Lesson #3: Strict conformity. A distinctive lesson of *Erie* arises from how the federal court deferentially determines the contents of the law when a state supplies the applicable law. The federal court must apply the state law in conformity with what it thinks the state's highest court would do. If the forum state court would reference another body of law, the federal court must find what the forum state's highest court would deem to be the contents of that other law. Thus, in the special situation of federalism, where there is a strong desire for conformity of law between the federal court and the forum state court, there are significant extensions of Lesson #2's duty to defer.

Horizontal choice of law exhibits a less servile degree of conformity to the contents of the other sovereign's law. The bounds and details of deference are a matter for the local lawmaker of the forum F1, subject to any constitutional or other external constraint. Although adoption and application work as on/off switches, degrees of deference are possible on the details within the realms of ignoring, adopting, and applying another sovereign's law. The F1 lawmaker can prescribe more or less deference in different contexts. Although a step up to application requires a clear signal from the lawmaker,¹⁴³ specifying bounds and details is subject to ordinary lawmaking. In short, there is nothing theoretically troubling about the emergence of degrees of deference that differ between horizontal and federal-to-state choice of law.

Next, a brief look at the reverse situation—where state courts are compelled by the federal vertical-choice-of-law doctrine to apply federal law—will serve to generalize some of the lessons of *Erie*.¹⁴⁴

C. Reverse-Erie

Reverse-*Erie* comprises an externally imposed command to defer to applicable law.¹⁴⁵ From the beginning, the Supremacy Clause propelled the states onto the stage of direct application of foreign (i.e., federal) law.¹⁴⁶ Today, the

143. See *supra* text accompanying note 69.

144. See generally Clermont, *supra* note 72. Incidentally, by “reverse-*Erie*,” this Article refers to the whole problem of federal law's impact on state actors, just as it has used *Erie* to refer generally to state law's impact on federal actors. Thus, reverse-*Erie* subsumes preemption. Indeed, the “*Erie* doctrine,” properly conceived as the dividing line between federal and state law, encompasses both *Erie* and reverse-*Erie*.

145. See *id.*

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

reverse-*Erie* balance, imposed on the states by the U.S. Supreme Court, tells state courts when to apply federal law to displace state law.¹⁴⁷ Subject to the Constitution or Congress having already chosen the applicable law, federal law—be it constitutional, statutory, or common law—applies in state court whenever it preempts state law or whenever it prevails by an *Erie*-like judicial choice of law.¹⁴⁸

If the state court determines that federal law governs, then the state court applies it as is.¹⁴⁹ Here, it becomes ever clearer that applying another sovereign's law is a task very different from a court's deciding under its own sovereign's law. True to its *Erie* counterpart,¹⁵⁰ a state court's application of federal law under reverse-*Erie* calls for the state actor's relatively blind adherence to the federal government's view of the federal law's content. The state court is then merely an applier of federal law and can never act as a creator of federal law. Although the state court is competent to adjudicate cases involving questions of federal law, it must decide the federal questions in accordance with the U.S. Supreme Court's view of federal law.¹⁵¹ A state court would never think to take an independent view of federal law.

At the time of the state court's decision, the federal law might already be fully formulated or might still be simply incipient. The state court may have to begin by envisaging the federal courts' *Erie* analysis to determine the reach of federal law.¹⁵² Sometimes the state court must be the very first to enunciate the federal law.¹⁵³ A state court has authority to enunciate federal law, as long as it decides in accordance with the federal law; it must act by trying to discern what the U.S. Supreme Court would decide is the content of the federal law, and not by undertaking to formulate federal law as an independent federal law-giver acting in pursuit of the policies and principles that might guide it as a creator of state law.¹⁵⁴ That is, the state court should act in the same manner as federal courts do when applying state law under *Erie*. In both the reverse-*Erie* setting

147. See *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 298–99 (1949); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952); *Felder v. Casey*, 487 U.S. 131, 153 (1988); *Johnson v. Fankell*, 520 U.S. 911, 922–23 (1997).

148. See Clermont, *supra* note 72, at 20 (laying out the doctrine described below).

149. See *id.* at 28–32.

150. See *supra* Section I.B. (discussing the *Erie* doctrine).

151. See Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 839 n.64 (2005).

152. See *id.* at 839 & n.65.

153. See *id.* at 839 n.64.

154. See *id.* at 837 n.53.

and the *Erie* setting, the court's job is to apply the other sovereign's "existing" law, not to "make" law for the other.¹⁵⁵

More precisely, if the content of the governing federal law is extremely unclear, how should the state court determine what the federal law says? Are state courts bound by lower federal courts on the federal law's content? The better view—mainly trying to effectuate the constitutional status of state courts, while accepting some local disuniformity in the short term—is that the state courts should try to determine de novo what the U.S. Supreme Court would rule.¹⁵⁶ On the one hand, the state court should not consider itself actually bound, rather than merely informed, by the local federal courts' rulings.¹⁵⁷ On the other hand, the state court would tend to be bound under *stare decisis* by decisions within that state's hierarchy of courts as to the federal law's content. Note this view's profound implication, which constitutes the primary argument for the de novo approach:¹⁵⁸ this view implicitly makes the state courts into judicial systems that can independently enunciate federal law, parallel to the lower federal courts and the other states' courts, and subject only to rare U.S. Supreme Court review.¹⁵⁹

The state court's prediction of the U.S. Supreme Court's view on the federal law is binding on the state by virtue of the Supremacy Clause. However, the decision by a state court as to federal law will have no effect on the federal courts' future behavior.¹⁶⁰ A state court's decision as to the content of federal law might have persuasive effect in federal court but has no precedential effect there at all.

1. Reverse-*Klaxon*?

Klaxon has no role to play in reverse-*Erie*, because reverse-*Erie* says to apply federal law that applies throughout the nation, rather than apply diverse

155. See *id.* at 839 n.64, 889, 908 n.369.

156. See *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075–76 (7th Cir. 1970); *Hall v. Pa. Bd. of Prob. & Parole*, 851 A.2d 859, 865 (Pa. 2004). But see *Yniguez v. Arizona*, 939 F.2d 727, 736–37 (9th Cir. 1991); *State v. Dukes*, 745 S.E.2d 137, 141 (S.C. Ct. App. 2013).

157. See *Bellia*, *supra* note 151, at 839.

158. See Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1144–45 (1999) (arguing that state courts should decide questions of federal law the way they think the U.S. Supreme Court would decide them, while admitting that the case law on this question is in disarray).

159. See Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1473–74 (2005).

160. See *supra* text accompanying note 121.

state laws under *Erie*.¹⁶¹ The state is on its own in predicting what the U.S. Supreme Court would declare to be the federal law. Even if a situation were to arise where reverse-*Erie* tells the state court to apply a federal choice-of-law rule, the state court would still be predicting only what the U.S. Supreme Court would decide for the particular case.¹⁶²

2. Lessons, Generalized

Reverse-*Erie*'s generalization of Lessons #2 (high deference) and #3 (strict conformity) is that when a trial or appellate court is under command to apply a co-sovereign's law that is unclear, the court should enunciate, but never make, whatever law it believed would emerge at the current time from the co-sovereign's highest court. That body of law is complete, as it covers every legal question that could arise, and is uniform, in the sense that every other court would be looking at the same body of law.

Having examined federal-to-state and state-to-federal choice of law, the next Section will discuss federal courts referencing the federal law declared by other federal courts.

D. Federal Law in Federal Court

This fourth setting is different because it does not deal with the law of another sovereign. Separate federal circuits are not separate judicial systems.¹⁶³ Choice between separate bodies of law is not in play. Therefore, the specific rules of deference that arose in horizontal choice of law have no role.¹⁶⁴

Stare decisis exists within the federal court system, but it does not dictate deference between federal circuits. A federal appellate court is bound by its own decisions, and any federal court is bound by decisions rendered in the direct line above it in the judicial pyramid.¹⁶⁵ In short, no federal lawmaker has established an exception to the background rule of no deference that would govern in the federal-federal setting.

161. See *infra* Section I.D. (establishing the uniformity of federal law).

162. See *infra* text accompanying notes 177, 245 (employing similar analysis).

163. See Thomas B. Bennett, *There Is No Such Thing as Circuit Law*, 107 MINN. L. REV. 1681, 1744 (2023) ("Because federal intermediate appellate courts are each part of the same sovereign legal system, they cannot develop their own bodies of law.").

164. See *supra* Section I.A. (discussing rules of deference pertaining to the horizontal choice-of-law context).

165. See *supra* text accompanying note 68.

Let us return to the hypothetical¹⁶⁶ where federal court F2 is deciding the effect of federal court F1's judgment rendered in a federal question case. F1's view of the federal law on res judicata differs from F2's.

Outside the federal-federal setting, the choice-of-law rule is generally that a judgment-recognizing court should apply the res judicata law of the judgment-rendering court.¹⁶⁷ There is good reason for this "retroverse" choice of law dictated by conflicts law. Res judicata is the law that defines what a judgment stands for, that is, what it decided and what it did not decide.¹⁶⁸ We want to know the rendering court's view of its own judgment. Thus, F2 should let F1 decide what it conclusively decided.¹⁶⁹ Moreover, retroversion is fairer, as the litigants can know in advance what is at risk in the F1 litigation, and the applicable res judicata can mold to F1's procedural system.¹⁷⁰

However, here the retroverse choice of law could result simply in the thought that federal law governs. The issue then would become what is the content of the federal law. F1's and F2's views differ. Does F2 extend the retroverse rule and so defer to F1's view on the federal law of res judicata? Or does F2 apply its own view of the federal res judicata law?

Some of the reasons for applying the rendering court's res judicata law carry over. They might counsel application of the rendering court's view on the content of that law, even though F1 and F2 are both looking to the same federal law.

Still, for circuit differences as to federal law outside the res judicata setting, the prevailing but largely unexamined practice, usually explained through silence, is that F2 as the forum court should apply its own view on any federal law question.¹⁷¹ Accordingly, one never sees reference to any conflict of laws provision for questions of federal law in ordinary cases involving events in

166. See *supra* text accompanying note 14.

167. See *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1177 (D.C. Cir. 1987) (D.H. Ginsburg, J., concurring) ("[T]here are some circumstances in which a federal court is bound to apply the decisions of another circuit, but they are the rare instances where a preclusion doctrine so requires."), *aff'd on other grounds sub nom.* *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

168. See *CASAD & CLERMONT*, *supra* note 10, at 3–5.

169. See *id.* at 212.

170. See *id.* at 215.

171. See, e.g., *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) ("But neither this court nor the district courts of this circuit give the decisions of other courts of appeals automatic deference; we recognize that, within reason, the parties to cases before us are entitled to our independent judgment.").

different places.¹⁷² The forum court just sets its mind directly to the question of, What is the federal law?

The *res judicata* setting probably should and would be resolved conformably.¹⁷³ This result follows from the background norm of no deference and then from the absence of any binding exception ordered by F2's lawmaker. Both F1 and F2 hold that the federal law of *res judicata* governs. Yet, F1's and F2's views differ on its content. Both F1 and F2 face the same task in coordinate and equal judicial hierarchies, and there is only one correct answer. F2 thinks that F1's answer is wrong, so why should F2 be forced to apply it? F2 should go with the best answer in its opinion.¹⁷⁴ Thus, F2 should follow its own view.

How does F2 arrive at its own view of the federal law's content? The content is linked to whatever the U.S. Supreme Court would currently hold in the instant case's context. But here a court arguably need not employ the predictive model of decision-making, certainly insofar as it involves looking to the current justices' individual leanings. Applying one's own law differs from applying another sovereign's law. This is a dividing line. Application of another sovereign's law requires careful prediction of the view of the other sovereign's most authoritative enunciator of its law. Otherwise, the deciding court would be making the other sovereign's law. Short of that dividing line, when F2 is stating its own governing law, prediction is not mandatory. F2 seeks the one true federal law. It does so by conventional legal reasoning,¹⁷⁵ although of course F2's view of federal law on decision-making could constrain the methodology employed.

172. See Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 732 (1995) ("In the state system, choice of law plays a significant role. There is, however, no analogous federal concept because federal law is theoretically uniform.").

173. See 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4466, at 4–5 (3d ed. 2019) ("It remains to be determined whether a court in one regional circuit will use its own circuit law to measure the preclusion effects of a judgment from a court in a circuit with different views of preclusion. Although in other settings preclusion is measured by the law of the judgment court, that rule may cede to the strong tendency to adhere to local circuit law as the correct view of what should be uniform federal law.").

174. See Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 702 n.154 (1984) ("But with issues of federal law in the federal system, . . . [Leflar's better-law principle points to F2]: The forum circuit's interpretation is always the better law because it is, in the eyes of the forum court, the correct one."). However, the better-law principle for choice of law can lead to strange results. See, e.g., *Gravina v. Brunswick Corp.*, 338 F. Supp. 1, 7 (D.R.I. 1972) (deciding that Rhode Island would apply Illinois's better law (privacy right) over Rhode Island's regressive law (no privacy right), even though Rhode Island would apply its no-privacy-right law in a domestic case).

175. See Dorf, *supra* note 108, at 664–66.

A legal system can establish rules of stare decisis or other legal reasoning as the best way ultimately to achieve an accurate view of what the U.S. Supreme Court would proclaim.¹⁷⁶

If federal law would look to state res judicata law,¹⁷⁷ F2 would conform. But again, F2 would still be deciding only what the U.S. Supreme Court would proclaim as the federal law for this case.

1. Federal Circuit's Exceptional Deference

Federal law on federal-federal application of law could dictate otherwise in special situations. For an example that proves the rule on exceptions, the Federal Circuit has chosen, on federal non-patent issues, to follow the view of the circuit whence the appeal came: it would decide "sitting as though it were a panel of" that regional circuit.¹⁷⁸

This is not to say that the Federal Circuit's exception is a wise one.¹⁷⁹ Admittedly, it seems odd for a specialized national court to override other

176. *See id.* at 661–71.

177. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (adopting state law as federal res judicata law for a diversity judgment, and observing: "This is, it seems to us, a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits."). Under *Semtek*, a federal court F2 is to apply federal res judicata law in assessing the effects of an F1 federal judgment. But adopted state law usually dictates the federal res judicata effects of a diversity judgment. *See supra* note 89. Which state's law? This being state law adopted into federal common law, the answer lies in what the U.S. Supreme Court would determine. F2 will strive to ascertain what the U.S. Supreme Court would choose as adopted state law for this case (and how the U.S. Supreme Court would interpret that law). That process would normally lead to the res judicata law of the state where F1 sat. *See supra* text accompanying note 162; *see also infra* text accompanying note 245 (employing similar analysis).

178. *Atari, Inc. v. JS & A Grp.*, 747 F.2d 1422, 1440 (Fed. Cir. 1984) (en banc), *overruled on other grounds*, *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068 (Fed. Cir. 1998); *see Ragazzo, supra* note 172, at 768 ("The Federal Circuit has held that it also has appellate jurisdiction over nonpatent issues in cases that are otherwise within its appellate jurisdiction. On federal nonpatent issues, however, the Federal Circuit applies the federal law of the regional circuit within which the district court sits." (footnotes omitted)). For deference running the other way, to the Federal Circuit in pursuit of national uniformity, *see In re Provider Meds, L.L.C.*, 907 F.3d 845, 853 (5th Cir. 2018).

179. *See Bennett, supra* note 163, at 1703–10 (criticizing the exception); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 37–46 (1989) (criticizing the exception); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 769, 788–91 (2004) (updating her criticism); Rochelle C. Dreyfuss, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience*, 66 S.M.U. L. REV. 505, 529 (2013) (same); Jennifer E. Sturiale, *A Balanced Consideration of the Federal Circuit's Choice-of-Law Rule*, 2020 UTAH L. REV. 475 (criticizing the exception).

circuits' views on issues outside its special subject area. Nevertheless, this particular conflict among federal circuits seems little different from any other circuit conflict on federal law, which the federal system leaves to the Supreme Court or to self-correction for straightening out. Moreover, the big objection is that this exception comes via a lower court's inferential dictate. Congress did not treat deference in setting up the Federal Circuit.¹⁸⁰ The origin of the exception is evident from the fact that the Federal Circuit has since created, on its own, an exception to the exception.¹⁸¹ In short, the original command to defer was not uttered clearly by a high-level lawmaker.¹⁸²

2. Lessons, Finalized

In the federal-federal setting, Lesson #1 (no deference) prevails in general. However, a minor exception prevails in the Federal Circuit, deriving from its wrongful invocation of Lesson #2 (exceptional deference). Consequently, the Federal Circuit has had to convert Lesson #3 (strict conformity) into obeisance to another intermediate-level court.

The related insight is profound: there are generally no variations in federal law, and so none will be perceived by F2.¹⁸³ "Circuit law" does not exist.¹⁸⁴ There are only current circuit differences over what is the true federal law. The true federal law is what the U.S. Supreme Court would proclaim. It is perfectly uniform. The illusion that one circuit could have different law than another can lead to confusion. Nevertheless, some commentators maintain that the uniformity of federal law is "a myth."¹⁸⁵ But they are bewitched by the fact that circuits can hold differing views. Even if the different circuits have different opinions and might come to different results, they are all trying to apply the same, uniform federal law. In the federal-federal setting, choice of "circuit law" is the myth.

180. See 28 U.S.C. § 1295.

181. See *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068 (Fed. Cir. 1998) (narrowing the exception to exclude antitrust immunity issues); see also Claudette Espanol, *The Federal Circuit: Jurisdictional Expansion into Antitrust Issues Relating to Patent Enforcement*, 2 SETON HALL CIRC. REV. 307, 319–20 (2005) (approving *Nobelpharma*).

182. See *supra* text accompanying note 65 (justifying this requirement).

183. See 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, *FEDERAL PRACTICE AND PROCEDURE* § 3846, at 116 (4th ed. 2013) ("[F]ederal law, at least ordinarily, is intended to be uniform—to provide a national body of substantive law. So in the normal situation, where Congress has intended a single national law, there are not two sets of law competing for application.").

184. See Bennett, *supra* note 163, at 1682.

185. E.g., Ragazzo, *supra* note 172, at 736. But cf. *id.* at 732 (acknowledging that there is no choice-of-federal-law doctrine).

However, it is not the proposition of a uniform federal law that leads to the conclusion that F2 should not defer to F1's view of federal law. Just because there is in theory one federal law does not lead to any conclusion on the appropriate deference between differing views of what the federal law says. The disuniformity of views on federal law will remain whether F2 applies F1's view or F2's view. Indeed, developing a choice-of-federal-law regime might arguably make it smoother to live with that disuniformity. At most, "the uniformity of federal law" is an aesthetic argument against recognizing that other federal courts hold different views.

The conclusion that F2 should not defer to F1 derives instead from the background norm of no deference. To cement that conclusion, this Article now turns to a more litigated problem in the federal-federal setting.

II. TRANSFER OF FEDERAL VENUE

Recall the hypothetical where a plaintiff, defendant, or court transfers a federal case from a proper court F1 to another proper, more convenient federal court F2 under 28 U.S.C. § 1404(a) or § 1407(a).¹⁸⁶ These transfers are generally characterized as being, "with respect to state law, but a change of courtrooms."¹⁸⁷ So can a party bring F1's favorable view of the federal law to F2? That is, does F1's or F2's view of federal law govern after transfer?

A. *Current Law*

The problem is a federal-federal difference, after transfer, on the content of federal law. The reason for investigating this problem separately comes from the U.S. Supreme Court's decision in the quite different, just-quoted case of *Van Dusen v. Barrack*.¹⁸⁸

Van Dusen involved the applicable state law in cases transferred under § 1404(a). The Supreme Court ruled that F2 must apply the same state law that F1 would have applied.¹⁸⁹ However, the reference is not to how federal court F1 would see the applicable state law. Instead, F2 must construe the content of state law as the transferor state would see it.¹⁹⁰ F2 looks directly to what the transferor

186. See *supra* text accompanying notes 15–16 (quoting these transfer statutes).

187. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964).

188. *Id.*

189. See *id.* ("We conclude, therefore, that in cases such as the present, where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue.").

190. See *id.*

state's highest court would do on the state law question, without any deference to federal court F1's view.¹⁹¹

Another distinction exists between *Van Dusen*'s federal-state setting and any federal-federal differences on the content of federal law. *Van Dusen* is a decision on which body of law to apply, while the federal-federal setting poses the question of what the federal law's content is. *Van Dusen* provides the federal choice-of-law rule on the former matter. By contrast, the question of the federal law's content would confront F1 and F2 as the same question expressed in the same terms within the same legal system. It is not a choice-of-body-of-law question.¹⁹²

As to the case law on this transfer question of whether to look to F1 or F2 for the content of the federal law, the pre-*Van Dusen* cases looked to F2, doing so without any analysis.¹⁹³ It seemed to be their implicit opinion that the transferee court was now entertaining the case, and no one saw a reason to apply the transferor's view of federal law. Post-*Van Dusen*, many lower courts reflexively switched to applying the transferor-court view on federal law questions too.¹⁹⁴ They seemed to see a superficial similarity for all questions after transfer, and neglected further analysis. Recently, however, the cases are trending back to the transferee-court view.¹⁹⁵ Recent cases recognize that their predecessors overread the signal of *Van Dusen* that some deference was in order, and some of the recent cases have even understood the content-of-law problem correctly.¹⁹⁶

191. See, e.g., *Yelton v. PHI, Inc.*, 669 F.3d 577, 580 (5th Cir. 2012) (looking directly to state law). F2 should make its own determination on whether state law would apply, which is an *Erie* question governed by federal law. See *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 154 n.17 (2d Cir. 2013) ("We note that federal courts in this Circuit, including the Court of Appeals, are bound by our interpretations of federal [*Erie*] law, even when a case is transferred from a district court in another circuit. See *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 90–91 (2d Cir. 2006).").

192. See *Ackert v. Bryan*, 299 F.2d 65, 69 (2d Cir. 1962) ("We are not dealing with a true conflict of laws problem.").

193. See *Marcus*, *supra* note 174, at 692 n.98, 705–07 (citing and discussing cases).

194. See *id.* at 692 n.100 (citing cases).

195. See 15 *WRIGHT ET AL.*, *supra* note 183, at 116 n.39 (citing cases); *Marcus*, *supra* note 174, at 693 n.102. But see *Grimes v. Navigant Consulting, Inc.*, 185 F. Supp. 2d 906, 912 n.6 (N.D. Ill. 2002) ("In a transferred case, I apply the law of the transferor forum (here the Third Circuit) if it differs from the laws of the transferee forum (the Seventh Circuit).").

196. See, e.g., *AER Advisors, Inc. v. Fid. Brokerage Servs., LLC*, 921 F.3d 282, 288–91 (1st Cir. 2019); *Murphy v. Fed. Deposit Ins. Corp.*, 208 F.3d 959, 964 (11th Cir. 2000) ("Although this circuit has not addressed the question of whether a transferee court should follow its own interpretation of federal law or that of the transferor court, several other circuits have addressed the question, and all have concluded that the transferee court should apply its own interpretation of federal law."), *cert. dismissed*, 531 U.S. 1107 (2001).

The case law for multidistrict litigation (MDL) under 28 U.S.C. § 1407(a) is less developed. To defer or not in this situation seems to be a more difficult question. On the one hand, the need to handle MDL cases transferred from all over the country might prompt courts to apply the F2 view of federal law to all the cases before them.¹⁹⁷ On the other hand, the opposite result could be reached by arguing that the policies behind § 1407(a) in dealing only with pretrial matters for many dispersed cases differed from those behind § 1404(a), which deals with transfer of a case for all purposes in pursuit of convenience. The theoretical duty to retransfer MDL cases back to their home forum for trial provides support for applying the F1 view,¹⁹⁸ even if that duty to retransfer is seldom acted upon¹⁹⁹ and even if the law-of-the-case doctrine would ease any reentry into the original forum.²⁰⁰ Furthermore, application of the F1 view closes the door that would be slightly open to bias by the MDL Panel when selecting F2 as the transferee forum.²⁰¹ The consequence of these offsetting arguments has been that the § 1407(a) cases, since the statute's enactment, have followed the § 1404(a) arc, without much analysis distinguishing the two statutes.²⁰²

Today the case law under the two statutes is "largely consistent" in favor of applying the transferee-court's view of federal law,²⁰³ even if some commentators still argue for a transferor-court approach under § 1407(a).²⁰⁴

197. See 15 WRIGHT ET AL., *supra* note 183, § 3867, at 615; Marcus, *supra* note 174, at 716–17.

198. See 15 WRIGHT ET AL., *supra* note 183, § 3867, at 615 ("[I]t seems likely that Congress intended that transfer for MDL [pretrial] proceedings should affect only the venue and not the outcome of the case."); see also Ragazzo, *supra* note 172, at 707 (arguing that the choice-of-law rule should be to apply the law of the circuit that in theory would review a final decision on the merits).

199. See Marcus, *supra* note 174, at 681.

200. See 15 WRIGHT ET AL., *supra* note 183, § 3867, at 624.

201. See Mark A. Hill, *Opening the Door for Bias: The Problem of Applying Transferee Law in Multidistrict Litigation*, 85 NOTRE DAME L. REV. 341, 360 (2009).

202. See *In re Korean Air Lines Disaster* of Sept. 1, 1983, 829 F.2d 1171, 1175–76 (D.C. Cir. 1987) (R.B. Ginsburg, J.), *aff'd on other grounds sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989); 15 WRIGHT ET AL., *supra* note 183, § 3867, at 619 n.32; Marcus, *supra* note 174, at 692 n.100 (citing § 1407(a) cases together with § 1404(a) cases). But see *In re Dow Co. "Sarabond" Prods. Liab. Litig.*, 666 F. Supp. 1466, 1470 (D. Colo. 1987) ("I conclude the law of the transferor jurisdictions should apply to resolution of the motion to dismiss the RICO claims.").

203. 15 WRIGHT ET AL., *supra* note 183, § 3867, at 615; see Hill, *supra* note 201, at 353–54.

204. See, e.g., Ross Daryl Cooper, *The D.C. Circuit Review, September 1987–August 1988, The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation*, 57 GEO. WASH. L. REV. 1145, 1166 (1989); Hill, *supra* note 201, at 361–62; Ragazzo, *supra* note 172,

B. Current Theory

As just observed, some commentators hold out for the transferor's view of federal law after a § 1407(a) transfer, and there has even been a little support still voiced for the transferor's view after a § 1404(a) transfer.²⁰⁵ But in fact, the academic dispute is fading away, at least as to § 1404(a) and even as to § 1407(a).

The modern consensus for the transferee's view owes its existence to a brilliant and vastly influential article by Professor Richard Marcus.²⁰⁶ Rising above the contemporaneous disarray in the case law, Professor Marcus argued that the federal court F2 was "competent" (and implicitly obliged) to make its own independent decision as to matters of federal law.²⁰⁷

Professor Marcus developed his competence principle by arguing that *Van Dusen*'s reasons did not carry over to the federal law setting.²⁰⁸ First, *Van Dusen* derived from *Erie*'s rationale of deference to state law.²⁰⁹ Second, he demonstrated that protecting the plaintiff's venue choice was at most a weak policy argument.²¹⁰ Affirmatively, he argued that applying F2's view of federal law would avoid obstacles to efficient handling of the transferred case.²¹¹ But he admitted that applying F2's view would fail to eliminate change of law as a party's motive or a judicial consideration with regard to transfer.²¹²

at 767; Jeffrey L. Rensberger, *The Metasplit: The Law Applied After Transfer in Federal Question Cases*, 2018 WIS. L. REV. 847. But see Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 662–706 (1987) (arguing that federal law-of-the-case doctrine should be independently determined by the transferee court after an MDL transfer).

205. See Tom M. Fini, Note, *The Scope of the Van Dusen Rule in Federal-Question Transfers*, 1992/1993 ANN. SURV. AM. L. 49, 51–52 ("Indeed, the Court, in justifying its holding in *Van Dusen*, explicitly articulated two policies which apply with equal force to transferred federal claims as they do to transferred state claims. These policies are the avoidance of creating opportunities for forum shopping and the insistence that decisions to transfer venue under section 1404(a) turn on considerations of convenience rather than on the possibility of prejudice resulting from a change in the applicable law." (footnotes omitted)).

206. See Marcus, *supra* note 174.

207. See *id.* at 687, 702–05.

208. See *id.* at 693–701.

209. See *id.* at 693–96.

210. See *id.* at 696–701, 721 ("There are no federal choice-of-law principles that favor application of the law of one state over the law of another." But federal reasons exist not to apply the transferor view of federal law. "Finally, there seems to be little reason to prefer the transferor interpretation simply to protect plaintiffs who forum shop for favorable interpretations . . ." (footnote omitted)).

211. See *id.* at 713–19.

212. See *id.* at 709, 711–12.

The competence principle seems a bit conclusory; it does not follow that because F2 has the basic power to decide, F2 should not defer on federal law.²¹³ Of course, Professor Marcus saw this point. By competence, he was referring to realms of decisional jurisdiction. He states, “For federal courts, the most significant choice-of-law difference between issues of state law and issues of federal law is that they lack competence to decide the former and are presumptively competent to decide the latter.”²¹⁴

Recall, however, that horizontal choice of law is a doctrine that self-imposes limits on the forum’s competence to decide.²¹⁵ If competence to decide were to mean no deference, then almost all horizontal choice of law would be wiped out: the forum court has power to decide most of law, and so almost never should it defer to foreign law. If we are to retain horizontal choice of law, the competence principle must be somehow restricted to the federal-federal setting. Professor Marcus accomplished this by linking the competence principle to the law-of-the-circuit concept, which arose from the Evarts Act.²¹⁶ That statute set up the federal courts of appeals as separate hierarchies, albeit inarticulately:²¹⁷

[T]he federal courts have not only the power but the duty to decide [issues of federal law] correctly. There is no room in the federal system of review for rote acceptance of the decision of a court outside the chain of direct review. If a federal court simply accepts the interpretation of another circuit without addressing the merits, it is not doing its job.²¹⁸

Nonetheless, the competence principle left a couple of questions in doubt. First, does the transferor view govern with regard to a federal law that includes geographically nonuniform law, that is, federal law that explicitly adopts state law such as a statute of limitations?²¹⁹ Second, should the rule for § 1407(a) differ from that for § 1404(a)?²²⁰

213. See Ragazzo, *supra* note 172, at 729 (“[The] choice of circuit law at the district court level is more a matter of hierarchy within the federal system than of competence.”).

214. Marcus, *supra* note 174, at 702.

215. See *supra* text accompanying note 2.

216. Circuit Courts of Appeals Act of 1891, ch. 517, 26 Stat. 826.

217. See Marcus, *supra* note 174, at 686–87.

218. *Id.* at 702.

219. See *id.* at 708–09 (choosing transferor law on the limitations period because federal courts are not competent to create those periods, but sticking with transferee law for selecting the “analogous” state cause of action).

220. See *id.* at 710–11, 716–19 (admitting that there is some thin legislative history supporting the transferor-court view for MDL cases, and stressing the need for consolidation of cases).

The influence of Professor Marcus's 1984 article was immeasurably enhanced by then Judge Ruth Bader Ginsburg, who implemented it to decide the 1987 *In re Korean Air Lines*²²¹ case in the D.C. Circuit. However, she did more than rely on the article. She added the idea that the federal courts constitute a single system in which they apply a unitary federal law.²²²

A sterling article by Professor Thomas Bennett picked up this idea in 2023.²²³ In fact, he substituted the idea of unitary federal law for the competence principle.²²⁴ "Because federal intermediate appellate courts are each part of the same sovereign legal system, they cannot develop their own bodies of law."²²⁵ While his analysis remained restricted to the federal-federal setting,²²⁶ he fearlessly extended his conclusion to cover § 1407(a),²²⁷ but formulated an exception for geographically nonuniform federal law.²²⁸ He concluded with an accurate statement of today's law:

The law today is, therefore, that district and circuit courts adjudicating transferred federal claims should treat them just like any other case before them: by applying binding in-circuit precedent, considering persuasive non-binding authority, and making their best determination of the meaning of federal law. . . . [E]ach federal court is . . . to determine the meaning of federal law for itself, at least when not

221. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (MDL case), *aff'd on other grounds sub nom.* *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

222. *See id.* at 1174–76 ("For the adjudication of federal claims, on the other hand, '[t]he federal courts comprise a single system [in which each tribunal endeavors to apply] a single body of law' [I]t is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law." (quoting *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962))).

223. *See* Bennett, *supra* note 163, at 1682 ("Federal circuit courts of appeals do not create or apply their own bodies of law. Those courts lack the power to create law in the choice-of-law sense . . .").

224. *See id.* at 1755–58. However, Professor Bennett fell back on the competence principle when he seemed to realize that a logical step was missing between "uniformity of federal law" and "no deference to the transferor court on federal law," as argued *supra* text accompanying note 185. *See id.* at 1723 ("[E]ach federal court is presumed competent—and indeed has an affirmative obligation—to determine the meaning of federal law for itself . . .").

225. Bennett, *supra* note 163, at 1744.

226. *See id.* at 1687–700.

227. *See id.* at 1721.

228. *See id.* at 1722–23 ("The only reason to depart from the logic of *In re Korean Air Lines*, then, is if Congress itself has compelled it by making the law geographically non-uniform.").

bound by principles of stare decisis. No such presumption, let alone obligation, applies when a federal court decides matters of state law.²²⁹

Professor Bennett commendably explodes the myth of “circuit law.”²³⁰ However, getting from the proposition of a uniform federal law to his conclusion that F2 should not defer to F1’s view of federal law requires a leap. He argues that “applying *Van Dusen* in the context of federal claims would undermine, rather than reinforce, the uniformity of federal law,” with one interpretation for transferred cases filed in one circuit and another interpretation for transferred cases filed in another circuit.²³¹ But rejecting *Van Dusen* would lead more pervasively to interpretations that differ between transferred and nontransferred cases. He further argues that deferring to F1 in an MDL proceeding would likely put F2 in an inherently illogical position of employing conflicting interpretations of a unitary federal law among the joined MDL cases.²³² But the illogic is little different from simultaneously applying conflicting state laws.

In sum, there inevitably are going to be different views of federal law in different circuits. Whether F2 defers or not to F1 has little bearing on the extent of those differences or on the ultimate uniformity of federal law. Distinguishing between “circuit law” and “circuit view” helps expose the uniformity of the unitary federal law, but it does not give an airtight argument leading to no deference after transfer. There must be a missing reason for not deferring.

C. Problem’s Resolution

This Article seeks a nonconclusory argument that is not reliant on the policies at play in the special setting of federal-federal differences upon transfer—although this Article stands aligned with the policy arguments of Professor Marcus, Judge R.B. Ginsburg, and Professor Bennett. No deference here seems, on close balance, a pretty good rule. But their context-specific policy arguments do not lead syllogistically to no deference. The alternative to their narrow arguments is to argue from a broad principle down to the specifics of transfer of venue. Indeed, such a principle was suggested by Judge Douglas Ginsburg’s concurrence in the *In re Korean Air Lines* case itself, where he entitled the principle as “the norm of independent judgment.”²³³

229. *Id.* at 1723.

230. *See supra* text accompanying note 184 (supporting his position).

231. *See* Bennett, *supra* note 163, at 1719.

232. *See id.* at 1719–20.

233. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1177 (D.C. Cir. 1987) (concurring opinion), *aff’d on other grounds sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989).

This Article's argument derives from a general norm, and proceeds to the specific conclusion that transferee F2 should make its independent decision as to federal law. In this federal-federal setting, a reassuringly familiar pattern reappears. The ultimate question here is, Should we defer to a coordinate court's view on what is our law? But this question is not fundamentally different from asking, Should we follow another sovereign's body of law? As this Article argues, a court should apply its own view of the law, unless its lawmaker has clearly commanded otherwise. In the transfer setting, the argument should run from the background rule of no deference, and then through the absence of any binding exception ordered by the transferee's lawmaker as to differences in views on federal law. In brief, the norm of independent judgment tells F2 how to proceed.

This Article also seeks an argument without any gaps that mask logical leaps. All this leads to this deduction:

- The first principle of judging tells a court to make maximal effort to decide correctly. That means that a judge should not abdicate the task by deferring to someone with whom the judge might disagree—
 - Unless the judge's lawmaker has commanded strict deference by clear signal. Applying someone else's law or view is a serious step to take.
- Clear signals have been pronounced in horizontal choice of law and in federal-state and state-federal settings—
 - But not in the federal-federal setting, in the situation where coordinate federal courts differ as to the content of the federal law that is unitary and uniform in principle.
- Ergo, because there is a general norm of independent judging, and no exception exists, transferee federal courts can take their own best shot at the content of federal law.

Now, one could ask why lawmakers have not adopted an exception to the general norm in the federal-federal setting. That gets us back into policy. Basically, the answer is that here no convincing reason exists to depart from the general norm.

In the pursuit of the content of the federal law, F2 has no duty to apply a wrong answer. F1 has no more expertise or claim to priority. If a purely procedural question comes up in F2, nobody would argue that F1's law applies. Or if an issue of fact comes up in F2, nobody would suggest looking to how F1 would resolve it. F2 should not abdicate its role as a court.

Indeed, few policy arguments can be formulated for the transferee court F2 to defer to the coequal court F1 on a question of federal law. F2 is free to ignore the plaintiff's claim of entitlement to its original choice of forum and governing law. In the federal-federal transfer setting the plaintiff is not claiming a right to a body of law, but instead is wishing to benefit from a particular view of what the same law says. There is very little reason to indulge that wish.

Admittedly, any change in federal law upon transfer does affect and complicate the decision on whether to transfer.²³⁴ However, this concern diminishes upon realizing that all that is at stake is a switch from asking F1 to decide what the federal law is to asking F2 to decide the very same question. Indeed, this realization explains why federal courts usually, and probably wisely, simply ignore this point when deciding whether to transfer.²³⁵ In any event, the transferee court's authorization to apply its own law delivers the benefits of efficient handling of the transferred cases.

Finally, the background rule of no deference handles Professor Marcus's two problem cases.

First, should the rule for § 1407(a) differ from that for § 1404(a)? No, it should not. The norm of independent judgment applies broadly. A court should decide questions of its own law, unless its lawmaker has clearly signaled otherwise. *Erie*, *Klaxon*, *Van Dusen*, and § 1407(a) do not utter any clear command that would separately alter the practice for MDL transfers.²³⁶

Second, does the transferor-court view apply to federal law that includes geographically nonuniform law, for example, federal law that explicitly adopts as federal law some state law such as a statute of limitations?

*Eckstein v. Balcors Film Investors*²³⁷ is the standard citation for such an issue.²³⁸ That federal case was a securities action.²³⁹ The case had been transferred from California to Wisconsin.²⁴⁰ A statute of limitations problem

234. See *supra* text accompanying note 212.

235. See *In re Equifax, Inc., Customer Data Sec. Breach Litig.*, 289 F. Supp. 3d 1322, 1325 (J.P.M.L. 2017) ("We are not persuaded by these arguments [about circuit splits]. Transferee courts consider a wide variety of legal issues that are subject to differing precedent in their transferor courts. Moreover, the Panel does not consider the possible implications with respect to standing or other potential rulings when it selects a transferee district.").

236. See *In re Korean Air Lines Disaster*, 829 F.2d at 1176–79 (D.H. Ginsburg, J., concurring) (providing an excellent refutation of any argument based on congressional intent to treat MDL differently from ordinary transfer in choice of law).

237. 8 F.3d 1121 (7th Cir. 1993).

238. *Id.* at 1126–28 (dictum).

239. *Id.* at 1123.

240. *Id.* at 1124.

arose. Congress had directed courts to look to the state's statute of limitations.²⁴¹ So, state law was the reference. But which state? The court said the transferor state's law. Consequently, *Eckstein* was a problem for the dominant approach pioneered by Professor Marcus.

To handle it, the authorities created a nonuniformity exception to the no-deference rule in the federal-federal setting.²⁴² Their result is right, but in fact no exception is needed to reach their result, if only one were to accept the properly formulated broad version of the no-deference rule.²⁴³ F2 should take an independent view of the U.S. Supreme Court's choice-of-law process. F2 would apply the federal law, which the lawmaker explicitly made nonuniform. It would decide which state's law the Supreme Court would adopt, as adoption of state law is discretionary as to which state's law to adopt and as to appropriate modifications of the state law to make.²⁴⁴ The transferee court would then be following its own view of the unitary federal law that includes adopted state law, not the law of the transferor circuit.²⁴⁵

In sum, the default rule would say no deference in this federal-federal setting. The policies at play cut both ways: fostering independent judgment by F2 versus protecting plaintiff's forum-shopping in F1, and fostering the efficiency of handling the case in the transferee forum versus simplifying the transfer decision in the transferor forum. A lower court might find this balance a tough call. So, the legal system instead awaits a clear signal from a high-level lawmaker. The balance of the policies explains why no such exception to the default rule has yet come down. No federal lawmaker has signaled federal-federal deference after transfer from proper court to proper court. The transfer statutes do not convey such a command and neither did *Van Dusen*, which dealt with choosing the governing state law and not with how to decide issues of

241. See 15 U.S.C. § 78aa-1(a) ("The limitation period for any private civil action implied under section 78j(b) of this title [on use of a deceptive device in a securities transaction] that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.").

242. See, e.g., *McMasters v. United States*, 260 F.3d 814, 819 (7th Cir. 2001) (dictum) ("Only where the law of the United States is specifically intended to be geographically non-uniform should the transferee court apply the circuit precedent of the transferor court."); 15 WRIGHT ET AL., *supra* note 183, § 3846, at 117, § 3867, at 621–23.

243. See *supra* text accompanying note 171 (stating the no-deference rule for this federal-federal context).

244. See Clermont, *supra* note 1, at 261–63.

245. See *supra* text accompanying notes 162 & 177 (employing similar analysis). Also, the practice for adopted state law after transfer of venue resembles the practice for applied state law pursuant to *Van Dusen*, as described *supra* text accompanying note 191.

federal law. The transferee federal court is free from the command of *Erie* and *Klaxon*. Thus, the default rule remains in place.

All of these various threads neatly came together in a recent negligence case brought by a young woman against the U.S. Tennis Association for, much earlier, exposing her to an abusive coach. The plaintiff first sued under diversity jurisdiction in the Western District of Missouri, which then transferred her case under 28 U.S.C. § 1404(a) to the District of Kansas.²⁴⁶ By *Van Dusen* and *Erie*, the Kansas federal court had to apply the Missouri statute of limitations, which resulted in dismissal.²⁴⁷

Instead of appealing, the plaintiff just started over in the Arizona federal court, drawn by Arizona's still-open statute of limitations.²⁴⁸ The defendant invoked res judicata.²⁴⁹ For choice of res judicata law, the Arizona federal court looked to the Kansas federal judgment, which would be governed by federal res judicata law.²⁵⁰ But by *Semtek*,²⁵¹ federal res judicata law would adopt state res judicata law. In this case, the U.S. Supreme Court would say to adopt Missouri res judicata law to the appropriate degree. So, the Arizona federal court should look to the effect Missouri would give to a statute-of-limitations dismissal. Missouri would say it was claim-preclusive.²⁵² Thus, the Arizona district court correctly dismissed on the ground of res judicata. However, its decision is now on appeal!

CONCLUSION

Three lessons emerge from a survey of foreign law application in the four settings of a federalist legal system: (1) choice of law between independent sovereigns, (2) a federal court's application of state law, (3) a state court's application of federal law, and (4) federal law in different federal courts.

First, the lesson of presumptively no deference between court systems constitutes the norm of independent judgment, or the default rule that would exist in the state of nature until the lawmaker altered it. This rule follows from the principle of independent judging, whereby judges try to decide as correctly as

246. *See Jensen v. U.S. Tennis Ass'n*, No. 20-2422-JWL, 2020 WL 6445117, at *1 (D. Kan. Oct 30, 2020).

247. *See Jensen v. U.S. Tennis Ass'n*, No. 20-2422-JWL, 2022 WL 1460011, at *2–3 (D. Kan. May 9, 2022).

248. *See Jensen v. U.S. Tennis Ass'n*, No. CV-22-01905-PHX-DJH, 2023 WL 3160989 at *1 (D. Ariz. Apr. 28, 2023).

249. *Id.*

250. *Id.* at *3.

251. *See supra* note 177.

252. *See Jensen*, 2023 WL 3160989, at *3–5.

they can. Normally, if two courts from different but equal judicial hierarchies face the same legal question, each can follow its own view. Likewise, a court should not defer when it applies its own law and needs to unearth the content of that law—except as the lawmaker has dictated by *stare decisis* or other legal method within the judicial hierarchy.

Second, a sovereign can decide when to defer to another sovereign. The sovereign can decide the bounds and details of any such deference. A lawmaker for the deciding court can make the call for some deference. It must signal a move up to adoption or application of another sovereign's law. Deference is the exception to the first lesson. Besides *stare decisis*, examples include the choice-of-law doctrine as well as the federal Rules of Decision Act, *Erie*, *Klaxon*, and *Van Dusen*. For direct application of another sovereign's law, the lawmaker can even call for high deference, if the call is signaled clearly (and usually only by a high-level lawmaker) or if it is well-established by ancient practice.

Third, an elaboration of the second lesson is that a court deferentially determines the contents of the law to apply when another sovereign supplies the applicable law. The deciding court should try to predict the foreign sovereign's highest court's view. The referenced body of law is both complete, as it covers every legal question that could arise, and uniform, in the sense that every other court would look to the same body of applicable law. The deciding court sometimes must work to unearth what the foreign law is. The court should apply the foreign law in conformity with what it thinks the other sovereign's highest court would do, if it were sitting at the current time while exercising review of issues of law under a nondeferential standard of review. The deciding court should take into account all the latest precedent and other data that the foreign court would. The court can thus enunciate, but never make, the foreign law.

Consideration of these three general lessons can resolve some perplexing specific problems. The prime example is deciding federal law in an intercircuit setting, where the two circuits have different views on the content of the federal law. This might arise in recognizing a federal judgment, or after a transfer of venue between proper courts. The two circuits are separate judicial hierarchies as far as *stare decisis* is concerned, even if they are parts of the same legal system. The background norm is that there be no deference. There is no explicit congressional exception, and no high court case like *Van Dusen* has come down for this setting. Thus, the second federal court need not defer to the first federal court, but instead should apply its own view of what the federal law provides. The principle of independent judgment as to the unitary federal law triumphs.