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Degrees of Deference: Applying vs. Adopting Another Sovereign's Law

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DEGREES OF DEFERENCE: APPLYING VS. ADOPTING ANOTHER SOVEREIGN'S LAW

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Familiar to all Federal Courts enthusiasts is the Erie *distinction between federal actors' obligatory application of state law and their voluntary adoption of state law as federal law. This Article's thesis is that this significant distinction holds in all other situations where a sovereign employs another's law: not only in the analogous reverse-*Erie *resolution of federal law's constraint on state actors, but also in the horizontal choice-of-law setting and even in connection with the status of international law.*

Application and adoption are different avenues by which to approach a pluralist world. Application involves the recognition of the other sovereign's law properly governing by its own force, while adoption follows from voluntary consultation of the other's law while formulating the local rule of decision in pursuit of fairness, convenience, or other local policies. The applying/adopting distinction can be difficult to draw, but draw it we must because many binary practical consequences turn on it. Those consequences range beyond the federalist implications for federal and state courts to the modifiability of the sovereign's law and the availability of original and appellate jurisdiction in the local courts.

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INTRODUCTION

Oklahoma may try to stop Shari'a from sweeping down the plain, but American legal systems cannot build a wall that will block all the waves of immigrating law.[1] Legal actors must handle a fair amount of law backed by a sovereign other than their own.

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[1] *See* Awad v. Ziriax, 670 F.3d 1111, 1118 (10th Cir. 2012) (enjoining Oklahoma's attempt to amend the state constitution thus: "The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law.") (emphasis omitted); *infra* note 209.

This Article's concern is the employment, by any sort of public or private legal actor involved in lawmaking or law applying, of another sovereign's law to provide the rule of decision.[2] Because the most familiar setting is a court's use of such law, examples drawn from the judicial setting are the easiest to comprehend. For courts, examples of this employment fall into at least four categories of setting: (1) a federal court frequently wields state law;[3] (2) a state court frequently defers to federal law;[4] (3) American courts may resort to foreign law by horizontal choice of law, where "foreign" in this particular context refers to the law of a U.S. state or another country;[5] and (4) American courts may look to international law.[6]

In the first of those four settings, federal courts have steadily distinguished between two methods of reference to state law.[7] First, a certain state's law can *apply* "of its own force" in federal court, under the command of the *Erie* doctrine.[8] Although admittedly the state law so applies "of its own force" only because federal law says it must apply, that federal command exists as a result of the states' original consent to our constitutional structure.[9] Second, when federal law governs but there is no extant federal law, the federal court may *adopt* state law as federal common law.[10] The state law then does not in any sense apply of its own force, but instead the federal court merely incorporates it by reference.[11] It no longer is state law, it becomes federal law. The status of adoption carries with

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2 For justification of the focus on rules of decision, in contrast to use of foreign law as an interpretive guide or as a datum in a case, see *infra* text accompanying note 174.

3 *See infra* notes 37–48 and accompanying text.

4 *See infra* notes 136–65 and accompanying text.

5 *See infra* Part III and accompanying text.

6 *See infra* Part IV and accompanying text.

7 *See generally* ARTHUR TAYLOR VON MEHREN & DONALD THEODORE TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 1049–51 (1965) (discussing the two methods, and using "supplementation" as the term for adoption of state law, as opposed to "delineation" for application of state law).

8 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77–78 (1938), *overruling* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842); 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)).

9 *See* VON MEHREN & TRAUTMAN, *supra* note 7, at 1049–51 ("[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.").

10 *See id.* at 1049–51, 1054–58.

11 *See id.* at 1050–51 ("In cases of optional supplementation by reference, a federal rule is supplemented by a relevant rule of state law, but although the

it all sorts of practical implications.[12] 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.

Applying versus adopting is thus a recognized and basic distinction in our *Erie* law, but I think that the distinction between methods is of more general significance. These two methods are theoretically available in the other three settings of judicial encounters with another sovereign's law.[13] A court might apply it *or* adopt it. Awareness of the differences between the two methods could provide all sorts of practical lessons, not only as to federalism but also as to conflict of laws and international law.

The initial step in generalizing the distinction is to flesh out the two methods. Typically, a sovereign's adoption would involve a low commitment to the other sovereign's law and hence a high retained degree of control of the governing law.[14] Application would by contrast involve a high degree of commitment and hence a low degree of retained control. But as one seeks the essential distinction, one will perceive that the true marker is which sovereign is supplying the rule of decision—is it the domestic sovereign or the foreign sovereign?

On the one hand, the domestic lawmaker might adopt the other sovereign's law as its own law.[15] Adoption usually represents only the consultation of the other's law while formulating the sovereign's own law. Adoption could be static, adopting the other's law as it now is, or dynamic, adopting the law as the other sovereign might change it in the future.[16] Indeed, the adopting sovereign could bind itself to follow slavishly the other sovereign's law. The adopter could thereby make its adoption look just like applied law.[17] But it would still be adoption because the domestic sovereign is formulating its own law and retains ultimately full control over its content.[18] Thus, the

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supplementary rules derive their content from state law, they are analytically though covertly federal rules.").

12 *See infra* notes 90–135 and accompanying text.

13 *See infra* Parts II–IV.

14 *See* VON MEHREN & TRAUTMAN, *supra* note 7, at 1050–51, 1054–58.

15 *See id.* at 1054–58.

16 As a matter of local validity, dynamic incorporation might raise some concerns of sovereignty and delegation. *See* Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 110–12 (2008) (using the term "incorporation" to refer to the concept of "adoption" of another sovereign's law).

17 *See infra* notes 75–86 and accompanying text.

18 *See* VON MEHREN & TRAUTMAN, *supra* note 7, at 1050–51 (noting that, when distinguishing between adoption and application, "[t]he ultimate test that deter-

static/dynamic difference or any other details of adoption are not a concern for present purposes. This Article's concern is with the general notion of adoption of nondomestic law as domestic law, rather than the particular manner of adoption.

On the other hand, in other circumstances a domestic legal actor might concede that another sovereign's law applies.[19] Application fundamentally differs from adoption, in that it requires recognition that the other's law has a claim actually to govern. That is, the subject of the verb changes, as does the direction of the action: the other sovereign's law might apply, or the domestic sovereign might adopt another's law. That usage follows from the two words' meanings. The word "apply" comes from the Latin *applicāre*, which meant to lay on or to impose; the word "adopt" comes from the Latin *adoptāre*, which meant to choose for oneself or to take by choice.[20]

Application would result from some dictate, external (another sovereign's constitutional, statutory, or judicial command that is binding on the domestic sovereign) or internal (a self-imposed choice-of-law rule deriving from domestic constitutional, statutory, or judicial decision).[21] An internal directive does not really result in the other sovereign's law applying *ex proprio vigore* but rather represents a choice by domestic law to treat the other's law as if it were directly applicable. It is thus essentially a recognition of the status of the other's law as being at least co-equal.

This realization—that application may rest on an internal decision—leads us sometimes to speak nontechnically of the domestic sovereign choosing to apply another sovereign's law. More significantly, this realization could induce the counterargument that application to adoption constitutes a spectrum, without any inherent difference between the poles.[22] Application might be just some strict form of adoption. But any such thought—that the difference between applying and adopting is one of degree—runs up against the fact that, as we shall see, big practical consequences turn on the binary distinction.[23] The law thus forces distinguishing application from adoption.

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mines which technique is being used is whether . . . supplementing rules could be federally articulated or must be found in the relevant state law").

19 *See infra* notes 37–48 and accompanying text.

20 *See* THE BARNHART CONCISE DICTIONARY OF ETYMOLOGY 11, 33 (Robert K. Barnhart ed., 1995).

21 *See infra* notes 228–36 and accompanying text.

22 *See infra* Part III, subpart C.

23 *See infra* notes 90–135, 178–207, 241–73 and accompanying text.

One could certainly investigate the obvious distinction between external and internal directives. But the different and less obvious distinction between application and adoption turns out to be much more instructive. To explore and develop the latter distinction, Part I will map out the solid ground for distinguishing between application and adoption of state law by federal actors such as the federal courts. Part II will analogize to application and adoption of federal law by state actors. Part III will explain how American horizontal choice of law has evolved from adoption to application of foreign law. Part IV will extend the distinction to the realm of international law, where Americans have instead evolved from application to adoption. Significantly, the last two subparts under international law tie everything in the Article into a theme of pluralism and then extend coverage to all nonsovereign law.

Outside the scope of this Article is the critical question of when a sovereign should defer to another. Each sovereign's law has a certain domain of authority.[24] Sometimes the sovereign will look beyond its domain and defer to a competing sovereign's law, motivated by external directive, reciprocal self-interest, or some sense of justice.[25] However, this Article's concern is not with when to defer but how a sovereign can defer, that is, by application or by adoption.[26]

To locate my subject jurisprudentially, I note that if H.L.A. Hart's rule of internal recognition constitutes a secondary rule of law that governs what a legal system recognizes as its law,[27] the rules of external recognition that this Article examines might be tertiary rules of law (or constitute a subdivision of the secondary rule).[28] These tertiary rules treat one aspect of the system's external relations with other legal orders, namely, a sovereign's employment of another sovereign's law.[29] Such

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24 *See generally* Paul B. Stephan, *Competing Sovereignty and Laws' Domains*, 45 PEPPERDINE L. REV. (forthcoming 2017–2018) (manuscript at 3–6), http://ssrn.com/abstract=2905720 [https://perma.cc/7XZK-S6D8] (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").

25 *See id.* at 3 (proposing, across my four settings, "a rational-choice model 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").

26 *See id.* at 28 & n.93 (treating adoption as "provisional deference").

27 *See* H.L.A. HART, THE CONCEPT OF LAW 94–95, 100–10 (2d ed. 1994).

28 *See* Ralf Michaels, *Law and Recognition—Towards a Relational Concept of Law*, *in* IN PURSUIT OF PLURALIST JURISPRUDENCE 90, 90 (Nicole Roughan & Andrew Halpin eds., 2016); Stephan, *supra* note 24, at 4 n.11.

29 *See* Michaels, *supra* note 28, at 108 ("[T]ertiary rules . . . establish [the] relation [of one legal order] with other legal orders . . . .").

rules will become increasingly important as we come to accept the pluralism of law,[30] and increasingly challenging if we were to move toward rejecting "the idea that 'law' must ultimately depend from a single validating source."[31] In any event, this Article's distinction between adopting and applying occupies the first level of tertiary rules for the recognition of another sovereign's law.

If one backs up jurisprudentially, the subject appears to fit into Joseph Raz's wider concern with authority.[32] His concern involves when a decision maker should decide for itself and when it should instead follow the dictates of another. The decider might prefer autonomy. But the other source might, for any of a number of reasons, be in a better position to decide. This tension permeates law and indeed life. For one of an infinitude of examples, a child will often, although perhaps not often enough, abide by a parent's view. Or in the law of lawyering, it is a familiar proposition that governmental tribunals exercising their inherent authority may look to the bar's rules of professional conduct, though they are not technically bound by them.[33] That is, tribunals dealing with legal ethics will usually follow the profession's view of lawyers' obligations, suggesting "that the bar's understanding of law controls the court's interpretation."[34] Is this application or adoption?[35]

I
STATE LAW FOR FEDERAL ACTORS

In a federal system, whether to *apply* state or federal law is the usual, indeed ubiquitous, question. To *adopt* state law, or to adopt federal law, is a less prominent phenomenon but still an understood terminology. In the conceptual framework for

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30 *See generally* John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 2 (1986) (defining legal pluralism as "that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs").

31 *Id.* at 8.

32 *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 57–62 (1988). *See generally* AUTHORITY IN TRANSNATIONAL LEGAL THEORY: THEORISING ACROSS DISCIPLINES (Roger Cotterrell & Maksymilian Del Mar eds., 2016) (examining how the concept of authority is challenged in the transnational context).

33 *See* Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1475 n.372 (1992).

34 *Id.* at 1475; *see id.* at 1461 ("In cases involving the law governing lawyers, the courts show a weak commitment to state law—to the maintenance of a state *nomos*—in two basic ways. First, they are reluctant to create legal meaning and as a consequence create little. Second, they show little inclination to back with violence the legal meaning they do create.").

35 *See infra* text accompanying note 334 (giving a tentative answer).

horizontal choice of law[36] or international law, application or adoption of law is not the usual way of thinking or talking. Thus, the possibility of fruitfully considering both application and adoption methods in connection with all situations involving another sovereign's law is often overlooked. Accordingly, I shall systematically work through the two methods in all four settings.

A. Application of State Law

For any legal actor in a federal system, every question of law is preceded by the vertical choice-of-law question of whether the legal question is a matter for state or federal law.[37] If the Constitution, or Congress acting within constitutional limits, expressly or impliedly made the choice of 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-court civil cases.[38] In the absence of such a constitutional or congressional directive, the federal courts, or any other federal actor, must decide whether state or federal law applies, doing so by a Court-prescribed methodology.[39] When acting as the default decision maker, the federal courts are fixing the proper bound for applying state law, which often involves going well beyond any constitutional or statutory command to apply state law.

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36 *See* Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1236 (1999). That article explains that "horizontal" choice of law refers to a choice between "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 federal legal system. *Id.*

37 *See id.*

38 *See* U.S. CONST. amend. VII; RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 180, 1683 (12th ed. 2017) (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 for state-law claims, the states, in fact, have generally not followed the 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).

39 *See* Field, *supra* note 8, 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."); *see also infra* note 76.

The key insight from this description is that the federal actors are delineating the proper bound for applying state law. What is the realm of governing state law and hence what is the remaining realm of federal law? When the choice goes for state law, the federal actor is definitely not applying federal law, nor is it ever creating state law. The state law really *applies*, and it governs *as* state law.[40]

Much difference of opinion exists on the details of how to choose between state and federal law.[41] Resolution of that debate is not necessary for this study of applying versus adopting state law. To provide expressive illustrations, however, I shall summarize my *Erie* view here. As I see it, the predominant methodology in the federal courts today, unless a Federal Rule covers the matter,[42] 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.[43] Remember, though, that the reader's considering my theme as to applying versus adopting is not at all dependent on accepting my views on this subsidiary question.

One way or another, state law will often apply 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,[44] statute of limitations in an action for breach of trust,[45] and burden of proof in a suit to

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40 *See, e.g.*, The Tungus v. Skovgaard, 358 U.S. 588, 592–94 (1959) (holding that the whole New Jersey Wrongful Death Act applies in federal court under maritime law).

41 *See, e.g.*, Bauer, *supra* note 36, 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").

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

43 *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 436–39 (1996) (using a balancing-of-interests approach for unguided *Erie* decisions, so that federal interests called for applying the deferential federal standard of appellate review in the federal court of appeals).

44 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938) (deciding plaintiff's status as trespasser or licensee).

45 *See* Guaranty Trust Co. v. York, 326 U.S. 99, 110–11 (1945) (applying state statute of limitations to state-created claim).

settle title to land.[46] In fact, the persisting dispute over judicial methodology does not leave the question of governing law terribly unclear. In the mentioned situations, the federal court 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 often even in diversity cases, as a consequence either of a constitutional or congressional choice or of an already decided or relatively predictable judicial-choice-of-law decision.[47] A lack of clarity on vertical choice of law extends only to a relatively small group of hard cases.[48] Therein lies the explanation of how our system can live with the lack of clarity.

B. Adoption of State Law

A prime example of a hard case lay in *Clearfield Trust Co. v. United States*.[49] There, the Court chose to apply federal law, perhaps questionably, and then created that federal law, perhaps even more questionably, to govern the rights and duties of the United States on its commercial paper.[50]

More generally, when will the federal courts on their own choose to apply federal law and so displace state law? This problem, sometimes called the *Clearfield* problem, is no more than a restatement of the *Erie* problem. If the judicial-choice-of-law methodology developed under *Erie* ends up pointing to federal law rather than state law, then the federal courts will choose federal law.[51]

Besides *Clearfield*, examples range from the usual filling of federal statutory interstices to inferring a private cause of action.[52] Another result of this judicial choice of federal law has

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46 *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)).

47 *See, e.g.*, *Hanna*, 380 U.S. at 466–74 (applicable Federal Rule).

48 *See infra* notes 49–55 and accompanying text.

49 318 U.S. 363, 366–69 (1943) (treating effect of United States' delay in notifying check's endorser of forgery); *see also* Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988) (holding that federal common law governs military contractors' liability).

50 *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 546–50, 656–57 (7th ed. 2015) (questioning the *Clearfield* decision).

51 *See supra* notes 41–43, 47 and accompanying text.

52 *See generally* FALLON ET AL., *supra* note 50, at 635–777 (examining and analyzing post-*Clearfield* cases where federal law was chosen).

been, crudely put, the formation of a series of "enclaves"[53] where federal common law normally prevails, including "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases"[54] and also some areas of uncodified federal procedure.[55] So, there is a whole lot of room for federal law in the federal courts.

If a judicial-choice-of-law decision points to federal law, or if a constitutional or congressional choice points that way, the further question of its content will arise. Here too there is a possible role for state law in the formulation of governing law.[56] But the role would be through adoption of state law, not application.

1. *Formulation by Constitution or Congress*

Just as the Constitution or the Congress could have chosen for state law to apply, either could instead have gone for application of federal law. Oftentimes when federal law governs by such nonjudicial choice, the Constitution or the Congress goes on to formulate the content of the applicable federal law.[57] That law is of course then binding on the federal courts.

If the choice by the Constitution or the Congress had been for state law to apply, the federal lawmaker would have simply delineated the realm of state-law application.[58] If instead the choice is for federal law to apply, any subsequent use of state law in formulation of the law would be incorporation by reference.[59] That is, the federal lawmaker could formulate the federal law's content so as to include some adopted state law. Such use of state law represents no more than a way for the

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53 *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964).

54 Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (footnotes omitted).

55 *See, e.g.*, Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537–39 (1958) (choosing federal law for nonconstitutional right to have jury decide a certain factual issue in diversity case); Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 822–23 (2008) (examining the "overlooked body of law" that is "procedural common law").

56 *See infra* notes 57–67 and accompanying text.

57 *See supra* note 38 and accompanying text; *see also infra* note 68.

58 *See, e.g.*, Rules of Decision Act, 28 U.S.C. § 1652 (2012) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

59 *See supra* note 11 and accompanying text.

federal lawmaker to draft the federal law.[60] A constitutional or congressional decision to adopt state law of course binds the federal courts to follow state law. The court would then be applying federal law, which includes adopted state law. The difference between this use of state law and *Erie* is very real.

The Constitution's federal regulation of unreasonable searches and seizures implicitly incorporates state definitions of crime.[61] Early examples of congressional adoption of state law include the adoption in large part of state procedure for federal courts via the static Process Act of 1789[62] and the dynamic Conformity Act of 1872.[63] Today examples are rampant in federal criminal and tax law, but they are also common in federal law that deals with property interests or personal relationships.[64] The adoption might be explicit[65] or implicit.[66] Indeed, it is sometimes a difficult question whether Congress meant to impose a uniform federal rule or to adopt state law, although that question is clearly one to be decided by federal law.[67]

2. *Formulation by Federal Courts*

More telling is the formulation of law by the federal courts in cases where federal law is to apply. If the Constitution or the Congress has not formulated the content of the applicable federal law, the federal courts must step in to formulate the federal law. In fact, there will be two different situations where the federal courts must formulate this federal common law.

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60 *See, e.g.*, Bd. of Comm'rs v. United States, 308 U.S. 343, 351–52 (1939) (adopting state rule as federal law and noting that "the state law has been absorbed . . . as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy").

61 *See* U.S. CONST. amends. IV, XIV; *cf.* United States v. Nardello, 393 U.S. 286, 287 (1969) (creating federal definition of "extortion," while adopting state criminal laws prohibiting such extortionate behavior to specify unlawful behavior, in construing federal statute "prohibiting travel in interstate commerce with intent to carry on 'extortion' in violation of the laws of the State in which committed").

62 Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93–94.

63 Act of June 1, 1872, ch. 255, 17 Stat. 196.

64 *See, e.g.*, De Sylva v. Ballentine, 351 U.S. 570, 581 (1956) (using state law to define an author's "children" under the Copyright Act, at least where the state's definition is not "entirely strange to those familiar with its ordinary usage").

65 *See, e.g.*, Richards v. United States, 369 U.S. 1, 11 (1962) (treating FTCA).

66 *See, e.g.*, Reconstruction Fin. Corp. v. Beaver Cty., 328 U.S. 204, 209–10 (1946) (holding that a federal statute implicitly adopted the state definition of "real property").

67 *See* FALLON ET AL., *supra* note 50, at 677–78.

First, the federal courts have to formulate the law pursuant to a constitutional or congressional declaration that chose federal law but explicitly or implicitly delegated to the courts the formulation of that law. For example, the federal courts might have to formulate federal common law pursuant to a federal statute like Federal Rule of Evidence 501, which chose federal law to govern privilege but expressly left it to the courts to formulate the content of that law.[68]

Second, when a federal court on its own chooses federal law to govern, it also has to formulate the content. In a situation where the lawmakers above the court in the lawmaking hierarchy are silent and stare decisis does not control, the court, once it chooses federal law, must create federal common law.[69] For example, in *Clearfield*, after choosing federal law, the Supreme Court formulated a federal rule for treating the effect of the United States' delay in notifying a check's endorser of forgery.[70] In such a situation, the federal court is not handling pre-existing federal law that already covers the particular question, because if the law did cover the point, the court would just apply it. Instead, the court must freshly look at federalism policies somehow to decide if federal law should govern.[71] If so, and because that federal law does not already exist, the court then must create the federal law.

Federal common law thereby ends up with this definition: the body of federal rules of decision whose content did not come directly from interpreting federal constitutional or statutory provisions.[72] This is occasionally termed "specialized federal common law," to distinguish it from the general common law that the federal courts created before *Erie*.[73]

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68 FED. R. EVID. 501 (treating privilege other than for "a claim or defense for which state law supplies the rule of decision"). Where state law supplies the rule of decision, Rule 501 provides that "state law governs privilege." *Id.* This provision was a congressional recognition that in those circumstances, state law has a sufficient claim to apply in federal court. *See* H.R. Rep. No. 93-650, at 9 (1973) ("The Committee's proviso, on the other hand, under which the federal courts are bound to apply the State's privilege law in actions founded upon a State-created right or defense, removes the incentive to 'shop'."); *see also supra* note 38.

69 *See* Field, *supra* note 8, at 885–86; *see also infra* note 76.

70 *Clearfield*, 318 U.S. at 366–69.

71 *See supra* notes 51–56 and accompanying text for a discussion regarding when federal law might govern.

72 *See* Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 832–33 (2005).

73 *See generally* Mitchell A. Lowenthal et al., Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1011 n.1 (1980) ("When federal rights are at issue . . . federal courts often engage in what, 'for want of a better term, . . . may [be] call[ed] specialized federal common law.'" (alteration in original) (quoting

In performing the task of formulating federal common law's content, federal courts sometimes purely create common law as in *Clearfield*.[74] More often they simply extend some closely related or analogous federal provision.[75] But most often federal courts opt to adopt as federal law on the point in issue the appropriate state's law.[76]

The Supreme Court has confided this healthy role for adoption of state law.[77] The leading case was *United States v. Kimbell Foods, Inc.*[78] There the question involved priority of liens

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Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964))).

74 *See supra* notes 49–51 and accompanying text.

75 *See, e.g.*, Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 156 (1987) (subjecting a civil RICO action to the Clayton Act's four-year limitations period).

76 As described in the text, this judicial turn to state law constitutes the last part of a two-step process: first, some federal authority chooses federal law to govern and, second, the court formulates the federal common law either as a new federal formulation or by adopting a state's law. *See* Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 802–10 (1957). If one were to take a narrow view of when federal courts can decide that federal common law should apply, such as only when federal interests call for a unique federal rule, then one would predict little role for the second step of the two-step process. *See* Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1665 (2008) (arguing for scaling down the scope of federal common law to situations where the state law is incompatible with pre-existing federal policy and hence preempted). An alternative way to minimize the two-step process is to posit such a radically broad view of the federal common law's scope that it virtually automates the first step. *See* Field, *supra* note 8, at 950–53 (arguing against the two-step process, on the view that the scope of federal common law is so very broad that usually the only issue is whether to formulate a uniform federal rule or adopt some state law).

77 *See, e.g.*, Owens v. Okure, 488 U.S. 235, 239 (1989) (holding that in absence of federal statute of limitations for a federally created claim, federal courts ordinarily should adopt the basic aspects of the forum state's statute of limitations for the most closely analogous state cause of action of general type). *But cf.* 28 U.S.C. § 1658 (2012) (providing, by a statute enacted in 1990, a default limitations period for future federal enactments); Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 382 (2004) (holding § 1658 to be applicable if the claim was made possible by a post-1990 statutory amendment). *See generally* Lowenthal et al., *supra* note 73 (examining federal common law of limitations and its frequent adoption of state law).

78 440 U.S. 715 (1979); *see* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508–09 (2001) (saying, while reviewing the respect a Maryland state court owed to a statute-of-limitations dismissal by a California federal court in a removed diversity case: "In short, federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity. . . . 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. . . . This federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests."); Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 108 (1991) (adopting state's futility-of-demand exception for ICA derivative suit).

on the same chattel, where one of the liens came from a federal agency's loan. The Court held that in the absence of a federal statute treating priority of liens in connection with federal loans, federal law governed.[79] "We conclude that the source of law is federal, but that a national rule is unnecessary to protect the federal interests underlying the loan programs. Accordingly, we adopt state law as the . . . federal rule for establishing the relative priority of these competing federal and private liens."[80] The federal court should adopt the priority scheme of the *appropriate* state (where the liens originated) as long as that scheme is *nondiscriminatory*.[81] The Court thereby indicated that the federal court can let federal interests guide which state's law to adopt and how much of it to adopt.

Adoption of state law is the dominant process for several reasons. First, it is a simple route to take. The law is already formulated, which could be an important consideration in a complicated area like priority of liens.[82] Second, it tends to reduce the federal courts' involvement in lawmaking. This appearance is comforting from a separation-of-powers vantage.[83] Third, state law probably conforms to local conditions and parties' expectations.[84] Fourth, it serves to accommodate any state interests that may be at risk, even if they are of insufficient weight to require application of state law under *Erie*.[85] Fifth, adopting state law helps to avoid any outcome-determinative effect.[86]

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79 *Kimbell*, 440 U.S. at 726, 740.

80 *Id.* at 718; *see also id.* at 727 ("Federal law therefore controls the Government's priority rights. The more difficult task, to which we turn, is giving content to this federal rule.").

81 *See id.* at 740; *see also id.* at 736 n.37 ("Adopting state law as an appropriate federal rule does not preclude federal courts from excepting local laws that prejudice federal interests.").

82 *See id.* at 740 (finding no "concrete reasons for rejecting well-established [state law] commercial rules which have proven workable over time" and noting that "the prudent course is to adopt the readymade body of state law as the federal rule of decision").

83 *See* Field, *supra* note 8, at 937 (noting separation-of-powers concerns associated with judicial lawmaking and, specifically, with federal common law).

84 *See Kimbell*, 440 U.S. at 739–40 (considering creditors' expectations of the law governing liens, in light of creditors' reliance on state law).

85 *See* United States v. Crain, 589 F.2d 996, 999 (9th Cir. 1979) ("[R]ejection of the state rule should be avoided where the adoption of a different federal rule would unduly interfere with the state's interests.").

86 *See* VON MEHREN & TRAUTMAN, *supra* note 7, at 1055–56 ("[F]ederal law is ordinarily deeply concerned not to introduce a potentially disturbing element of relativity into the legal universe of citizens who participate in both the federal and the state communities [because otherwise] the ordinary citizen might find that a wife for state purposes was not one for federal matters . . . .").

The result is that whenever a federal court decides that unformulated federal law is to govern, there is a rebuttable presumption in favor of adopting state law as the federal common law.[87] That is, federal courts should so adopt state law, unless there is a relatively significant federal interest in uniformity of the federal law throughout the nation or there are relatively important federal interests calling for a particular content in the federal law.[88]

Law students tend to view this adoption of state law as an oddity. True, the content of the federal law adopted from state law on, say, priority of federal liens will vary from state to state, or even from case to case depending on the particular facts involved. Also, it may change over time as any adopted state law changes, this being a dynamic adoption.[89] Nonetheless, there is nothing inherently weird about this adoption of state law. It captures the role of local law in any nonfederal system, be it France or a U.S. state. The unitary sovereign can always choose to incorporate a subdivision's law as the sovereign's law. Its incorporation of, say, local parking rules into some provision of the sovereign's law will likewise vary with place and with time.

C. Practical Implications

The Supreme Court has said that the difference between applying and adopting state law in federal court "is of only theoretical interest."[90] This is quite spectacularly wrong. Applying versus adopting "makes a very substantial difference, functionally."[91] Indeed, the point of this Article is to refute the Court's observation by showing the practical effects of the difference—and then by extending that important lesson from *Erie* to the other settings where a sovereign employs another sovereign's law.[92]

Applying another sovereign's law, rather than applying domestic law that has a few imported elements, should have nu-

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87 *See Kimbell*, 440 U.S. at 727–29.

88 *See, e.g.*, *id.* at 740 ("[F]ormulating special rules to govern the priority of the federal consensual liens . . . would be justified if necessary to vindicate important national interests.").

89 *See* Cent. Pines Land Co. v. United States, 274 F.3d 881, 892–93 (5th Cir. 2001) (saying that new state statute changed the federal common law).

90 O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994) (saying that if state law is employed, "it is of only theoretical interest whether the basis for that application is [the state's] own sovereign power or federal adoption of [the state's] disposition").

91 Mishkin, *supra* note 76, at 810.

92 *See infra* Parts III–IV.

merous effects.[93] True, many of these will be relatively unimportant or be a matter of degree. For one example, abstention and certification of unsettled questions are apt to be more common for applied foreign law than adopted foreign law.[94] For another example, after decision on foreign law and back in the foreign sovereign's court operating under its own law, issue preclusion by decision of applied law is apt to be more routine than by decision of adopted law, simply because the party can more easily establish the required identity of issue.[95]

More significantly, I have intimated that the optional adoption of state law as the federal common law under *Kimbell* is distinguishable as a practical matter from the binding application of state law in federal court under *Erie* in two big ways: the federal court can let federal interests guide which state's law to adopt and how much of it to adopt.[96] The adoption/application difference has other practical consequences of similar significance. I shall now run through the major, binary effects if the federal actor adopts rather than applies state law.

1. *Effect on Choice of Law in Federal Court*

Application of state law under *Erie* calls for pretty blind adherence by the federal actor to the state's view of the content of that law. Moreover, this duty demands considerable effort to determine correctly the state law.

A neat way to show these facts is to consider how the federal courts act when the content of state law is unclear on a particular matter to be governed under *Erie* by state law. The federal court must predict what the state law is.[97] The federal trial or appellate court would clarify state law by acting as if the federal court were then sitting as the forum state's highest court, taking into account all the latest precedent and other data that the state court would.[98]

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93 *See infra* Part III, subpart C.

94 *See* FIELD ET AL., *supra* note 38, at 407–09.

95 *See generally* ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA 114–23 (2001) (detailing how courts analyze the "same issue" requirement of issue preclusion).

96 *See supra* notes 59–67, 78–88 and accompanying text.

97 *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).

98 *See id.*; 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); Michael C. Dorf, *Prediction and the Rule of*

Going beyond the content of the law applicable by vertical choice of law, blind adherence also extends to the state's view on horizontal choice of law.[99] The so-called *Klaxon* rule provides, in connection with matters governed by state law under *Erie*, that the forum state's law governs conflict of laws.[100] So, to find the potentially applicable nonfederal law for any 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 would govern that matter if nonfederal law were to be applied. *Klaxon* is a definitive rule without exception.[101] Indeed, if the chosen foreign law is unclear in content, the federal court should determine the content as if it were sitting as the forum state's highest court.[102]

For adoption of state law, however, *Erie* does not unalterably bring into federal law how the state would decide.[103] The federal lawmaker has a much greater freedom of movement. The federal lawmaker can pick and choose among the state's provisions.[104] And the federal court could make its own determination of unclear content of the adopted state's law.[105]

Law, 42 UCLA L. REV. 651, 654–55 (1995) (arguing that a federal court should ignore individual state judges' personal predilections). *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), *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).

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

100 *See id.*

101 *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 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 (3d ed. 2016) (treating the special situations of transferred and consolidated cases).

102 *See* Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960) (Friendly, J.) ("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 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4507, at 209 (3d ed. 2016).

103 *See* Mishkin, *supra* note 76, at 804–05.

104 *See id.*

105 *See* 19 WRIGHT ET AL., *supra* note 102, § 4518, at 813–16.

Likewise, *Klaxon* has no effect on adoption of state law.[106] Federal law governs.[107] When adopting a state's law, the federal lawmaker can choose which state's law to adopt, rather than the law that the forum state would apply.[108]

2. *Effect on Choice of Law in State Court*

The decision by a federal court to apply state law will have no real effect on the state courts' future behavior.[109] If the federal court has to make an *Erie*-guess as to the content of state law, its decision might have persuasive effect but has no precedential effect at all in state court.[110]

By contrast, the decision by a federal court to adopt state law, as it views it, creates federal law.[111] Potentially, this federal law would override state law if the federal law later came to apply in state court under the reverse-*Erie* doctrine.[112]

3. *Modifiability of Other Sovereign's Law*

As already said, application of state law under *Erie* means pretty blind adherence to the state's view, requiring considerable effort to determine correctly the state law.[113] Pretty blind adherence further counsels against modifying the state law. A federal court must apply it as is, unless the Constitution or a congressional statute made within constitutional limits says otherwise.

By contrast, federal interests can override a presumptive adoption of state law.[114] 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. Thus, a federal court may

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106 *See* Mishkin, *supra* note 76, at 807–08.

107 *See id.*

108 *See, e.g.*, United States v. Kimbell Foods, Inc., 440 U.S. 715, 739 (1979) (applying the law of the state where the collateral was located); De Sylva v. Ballentine, 351 U.S. 570, 581 (1956) (indicating that the definition of "children" in the Copyright Act adopts law of the state that created the legal relationship); Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161–63 (1946) (authorizing an independent choice of law for adopted state law under the Bankruptcy Act); Young, *supra* note 76, at 1651.

109 *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).

110 *See id.*

111 *See supra* notes 59–67 and accompanying text.

112 *See* 19 WRIGHT ET AL., *supra* note 102, § 4518, at 813.

113 *See supra* notes 97–108 and accompanying text.

114 *See supra* notes 78, 81, 88.

alter or ignore part or all of the relevant state law in the case at bar.[115]

A nice illustration of the applied/adopted difference in bindingness of state law comes in connection with how to handle a state-generated correction, clarification, constriction, or change of state law while the federal action or appeal is still pending. Originally, as in *Burgess v. Seligman*,[116] the federal courts just disregarded any new development of state law after the lower federal court's decision. Accordingly, even if a state statute applied in federal court under the Rules of Decision Act of 1789,[117] and the statute or its construction changed while the federal case was on appeal, the federal appellate court ignored the alteration. But as time went on, the federal courts began to look at recent state developments.[118] The federal courts had come to realize that if they were actually *applying* state law, the law to be applied by any federal court should normally be the *actual* state law then prevailing—unless the state alteration was avowedly prospective in effect.[119] Once the Court decided *Erie*, it became even clearer that a state-generated correction, clarification, constriction, or change of applied state law should affect the appeal.[120] Today the general rule is that any federal court should use the latest available data in deciding what the applied state law is, to the extent a forum state court would.[121] Thus, a federal court of appeals could

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115 *See, e.g.*, Reconstruction Fin. Corp. v. Beaver Cty., 328 U.S. 204, 210 (1946) (holding that a federal statute adopted 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. Armbrecht, 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).

116 *See* Burgess v. Seligman, 107 U.S. 20, 33 (1883) (disregarding state decisions construing the state statute that came down after the lower federal court's decision, and saying: "The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws.").

117 28 U.S.C. § 1652 (2012).

118 *See* Sioux Cty. v. Nat'l Sur. Co., 276 U.S. 238, 240 (1928) ("We accept this construction of the statute and accordingly set aside the conflicting interpretation of the court below, even though it antedated the determination by the state court.").

119 *See* 17A MOORE ET AL., *supra* note 101, § 124.21; 19 WRIGHT ET AL., *supra* note 102, § 4507, at 119, 200–02.

120 *See* Note, Erie R.R. v. Tompkins *and Supervening Changes in State Law*, 50 YALE L.J. 315, 318–21 (1940).

121 *See* Vandenbark v. Owens-Ill. Glass Co., 311 U.S. 538, 542–43 (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 (1991)

consider fresh state legislation or decisional law. Indeed, the cutoff for considering supervening state-law data has not yet kicked in on a petition for rehearing by the appellate court or a petition to recall its mandate.[122] However, after the federal case finally ends, the cutoff has kicked in so that any alteration of state law, or discovered error in determining state law, is not by itself a ground for relief from judgment under Federal Rule 60(b) or otherwise.[123]

By contrast, a state-generated correction, clarification, constriction, or change of adopted state law during appeal should not affect the federal appeal's outcome, harkening back to *Burgess*.[124] Federal law might adopt state law dynamically.[125] But the federal actor is not necessarily trying to apply the state's law with perfect accuracy. It is not even trying to establish a federal law that would govern in other circumstances or at all times. The decision on state law was proper when adopted, even if the state law subsequently alters. In fact, sticking with the former state law would better conform the federal law to then-prevailing local conditions and parties' expectations.[126] Therefore, the appellate court should not reverse the lower court on account of a subsequent alteration in adopted state law.[127]

(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), *criticized in* Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. CAL. L. REV. 975, 977 (2004) (arguing that courts of appeal do, and should, continue to afford some deference). More generally and consistently, the proper treatment of a supervening change of law during appeal is to treat the change as retroactive—but the party likely forfeited the point by not raising it in the lower court, except in the rare situations where the plain error doctrine would relieve such forfeiture because the error seriously affected the fairness, integrity, or public reputation of the proceedings. *See* Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 925–28 (2006).

122 *See, e.g.*, Factors Etc., Inc. v. Pro Arts, Inc., 701 F.2d 11, 11–12 (2d Cir. 1983).

123 FED. R. CIV. P. 60(b); *see* 19 WRIGHT ET AL., *supra* note 102, § 4507, at 201–02; Comment, Pierce v. Cook & Co.*: Change in State Law as a Ground for Relief from a Federal Judgment*, 124 U. PA. L. REV. 843, 848–52 (1976).

124 *See supra* note 116 and accompanying text.

125 *See supra* note 89 and accompanying text.

126 *See supra* note 84 and accompanying text.

127 As far as I know, no case treats this effect of an alteration in adopted state law during appeal. *Cf.* Cent. Pines Land Co. v. United States, 274 F.3d 881, 891–92 (5th Cir. 2001) (saying that federal interests called for adopting the former state law as federal common law). The issue has most likely arisen, but the federal courts probably followed the practice for applied state law without thinking.

4. *Effect on Original Jurisdiction*

The jurisdictional differences between application and adoption are large and obvious.[128] When state law is applied to create a cause of action, original (or removal) federal question jurisdiction will normally not lie.[129] The courts do recognize a rare exception for cases with an important federal element.[130] In order for the exceptional state-law claim to fall within federal question jurisdiction, the test now appears to impose three requirements: "does a state-law claim [1] necessarily raise a stated federal issue, [2] actually disputed and substantial, which a federal forum may entertain [3] without disturbing any congressionally approved balance of federal and state judicial responsibilities"?[131] But the point is that jurisdiction would then rest on the federal element, not on the applied state law.

The situation is completely different for adopted state law that creates a cause of action. That adopted law is actually federal law, after all. So, it will support original (and removal) federal question jurisdiction.[132]

5. *Effect on Appellate Jurisdiction*

The same pattern holds for appellate jurisdiction. Applied state law presents no federal question supporting the Supreme Court's appellate jurisdiction over state courts.[133] However,

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A rough analogy gives some support for ignoring the alteration in adopted state law. If on appeal from the lower court's decision another case between the same parties decides the same issue of law or fact in a way different from the lower court, the appellate court does not invoke res judicata's last-in-time rule to reverse, but instead ignores the later decision by treating res judicata as a forfeited point that had to have been raised below. *See* Kevin M. Clermont, *Limiting the Last-in-Time Rule for Judgments*, 36 REV. LITIG. 1, 7 & n.22 (2017).

128 *See* FALLON ET AL., *supra* note 50, at 663 n.4.

129 *See* 28 U.S.C. § 1331 (2012).

130 *See* Smith v. Kan. City Title & Trust Co., 255 U.S. 180, 201–02 (1921) (holding that federal question jurisdiction exists for suit by a trust company shareholder to enjoin the trust company from investing in certain federal bonds, when state law limited permissible investment to legal securities and the plaintiff claimed that the federal statute authorizing the bonds' issuance was unconstitutional).

131 Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005) (allowing removal); *see* Gunn v. Minton, 568 U.S. 251, 258 (2013) (disallowing federal question jurisdiction under *Grable*'s test); Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 701 (2006) (same).

132 *See Empire Healthchoice Assurance, Inc.*, 547 U.S. at 713 (Breyer, J., dissenting) ("[F]or jurisdictional purposes those claims [involving adopted state law] must still arise under federal law, for federal common law determines the rule of decision."); Illinois v. City of Milwaukee, 406 U.S. 91, 99–100 (1972) (holding that federal common law supports federal question jurisdiction).

133 *See* 28 U.S.C. § 1257 (2012).

the Supreme Court can review any questions, state or federal, that arise in the lower federal courts.[134]

Contrariwise, the Supreme Court has full appellate jurisdiction on any question of adopted state law.[135] Again, it really is federal law. The Court can thus review even a state-court decision on a matter of state law that has been adopted into the federal law in issue.

II
FEDERAL LAW FOR STATE ACTORS

The same pattern emerges in the converse situation, the realm of reverse-*Erie*.[136] Incidentally, by reverse-*Erie*, I refer to the whole problem of federal law's impact on state actors, just as I have used *Erie* to refer generally to state law's impact on federal actors. Thus "reverse-*Erie*" subsumes preemption, as I shall explain.

Despite the similarities here to *Erie* and *Kimbell*, and despite the common usage of applying and adopting terminology, theorists are not used to thinking of states' applying and adopting federal law as related processes. Indeed, they seem now to be devoting decreased attention to state adoption of federal law.[137]

A. Application of Federal Law

Erie and reverse-*Erie* do not impose strictly the same task on courts in applying the other sovereign's law: *Erie* is telling, say, the federal actor when to apply state law rather than create federal law, while reverse-*Erie* is telling the state actor when to apply existing federal law under the influence of the

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134 *See* 28 U.S.C. § 1254 (2012).

135 *See* Reconstruction Fin. Corp. v. Beaver Cty., 328 U.S. 204, 206–07 (1946) (holding that where federal statute adopted state definition of "real property," the Supreme Court could review the state court's interpretation of the adopted state term); PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 566–67 (3d ed. 1988); Young, *supra* note 76, at 1651, 1653–54.

136 *See generally* Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1 (2006) (examining the reverse-*Erie* doctrine).

137 The "Note on State Incorporation by Reference of Federal Law" in HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 450–53 (1953), disappeared from those later editions that came after RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 518–23 (5th ed. 2003) (distinguishing application from adoption by the terms "compelled incorporation" and "gratuitous incorporation"). The evolution in the casebook's treatment is traced in David L. Shapiro, *An Incomplete Discussion of "Arising Under" Jurisdiction*, 91 NOTRE DAME L. REV. 1931 (2016).

Supremacy Clause.[138] Nevertheless, both these situations involve similar problems of determining the appropriate reach of state and federal laws under a system of cooperative federalism, and any such problem has an accommodation of interests, against a background consciousness of federal supremacy, as its proper answer.[139]

Accordingly, a great amount of federal law—be it constitutional, statutory, or common law—flows down to apply in state courts. This application occurs by the federal government's command.

1. *Choice by Constitution or Congress*

The generalized reverse-*Erie* question—whether federal law should displace state law—is a relatively simple one if the Constitution or Congress, the latter acting within constitutional limits, actually chose to displace state law in state courts, expressly or impliedly. If so, that choice is binding on the state courts under the Supremacy Clause.[140]

The Federal Constitution itself made some binding choices of law for state actors. For example, the Fourteenth Amend-

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138 *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2088–112 (2000).

139 Although reverse-*Erie* for state courts and *Erie* for federal courts are therefore nicely similar, the reverse-*Erie* scheme is not simply the mirror image of *Erie*. One major difference is that reverse-*Erie* seems to be the slightly more intrusive doctrine: in the procedural arena, state courts must apply federal law to federally created claims more extensively than federal courts must apply state law to state-created claims. *See, e.g.*, Brown v. W. Ry. of Ala., 338 U.S. 294, 295–98 (1949). In that case, a plaintiff brought a Federal Employers' Liability Act case in a Georgia state court, and the defendant demurred; contrary to federal practice, a Georgia rule would have construed allegations most strongly against the pleader and resulted in dismissal of the plaintiff's complaint with prejudice; but the U.S. Supreme Court held that in the state court the Georgia pleading rule had to bow to the more lenient federal practice. In the *Erie* setting of a diversity case, a federal court would never bow to such a state pleading practice. The explanation for this discrepancy between reverse-*Erie* and *Erie* is that in state court the Supremacy Clause plays an additional role through conflict preemption, which works in favor of federal law by rejecting any state law that imposes unnecessary burdens upon federal rights. In the FELA pleading example, because the state's anti-plaintiff pleading rule conflicted with the pro-plaintiff FELA, the state rule fell, regardless of any state interests. In the analogous *Erie* setting, where the question would be whether a state pro-plaintiff procedural provision must apply in a diversity case, the Supremacy Clause has no role to play, and the *Erie* balance manages to tilt in favor of federal procedural interests and hence call for applying federal pleading law. That is, in *Brown* the Supremacy Clause causes federal procedure to preempt state procedure, but in converse-*Brown* the Supremacy Clause plays no comparable role to cause the state sovereign's law to trump any conflicting procedural rules of the home court. Thus, reverse-*Erie* for state courts and *Erie* for federal courts are not and should not be perfect mirror images.

140 *See infra* notes 145–49 and accompanying text.

ment chose federal due process and equal protection for the states.[141]

Also, Congress can expressly or impliedly make the choice between state and federal law, within the constitutional limits on the powers of Congress to choose the applicable law for the states.[142] Congress frequently makes an express choice for federal law to apply in state courts. For example, in some areas, such as patents, Congress can decide to regulate and then specify substantive laws that will apply in federal and state courts henceforth.[143] Or Congress could provide procedural regulations for state courts when they handle certain types of federal-law cases.[144]

In discussing situations when Congress does so act, analysts frequently draw on the terminology of the preemption doctrine.[145] They look to preemption because it is a Supremacy Clause doctrine related to the task of determining the reach of federal law. Preemption, in brief, is an ill-bounded constitutional doctrine that invalidates state law if it interferes with federal law.[146] Although preemption tends to focus on displacement of state substantive law by congressional statute, it can occur by federal constitutional command or federal administrative activity or even by the effect of federal common law,[147] and it can extend its effect beyond substantive law to state procedural law.[148] Moreover, preemption can not only be express but also be implied; and implied preemption can trump a state provision that conflicts by discrimination against or contradiction to federal law or stands as an obstacle to federal law,

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141 *See* U.S. CONST. amend. XIV.

142 *See* Clermont, *supra* note 136, at 21–22; *see also* Anthony J. Bellia Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 950 (2006) (focusing on the "constitutional relationship between congressional power and state court jurisdiction").

143 *See* Donald Shelby Chisum, *The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation*, 46 WASH. L. REV. 633, 657–64 (1971).

144 As to the limit on congressional authority to legislate on the operation of state courts in state-law cases, *compare* Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 950–51 (2001) (arguing that Congress cannot regulate "state court procedures" for enforcing "state law cases"), *with* Jinks v. Richland County, 538 U.S. 456, 461–63 (2003) (upholding a federal tolling statute for state-law claims). *See also* Bellia, *supra* note 142, at 950, 954–55 (extending the focus to congressional control of state jurisdiction in state-law cases).

145 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.2, at 412 (5th ed. 2015); CHRISTOPHER R. DRAHOZAL, THE SUPREMACY CLAUSE 84–86, 89–125 (2004); Clermont, *supra* note 136, at 5–8, 40–41, 45.

146 *See* CHEMERINSKY, *supra* note 145, § 5.2, at 412.

147 *See* Clermont, *supra* note 136, at 5–6; Field, *supra* note 8, at 897.

148 *See* Bellia, *supra* note 144, at 959–62.

or it can authorize federal law to occupy exclusively a whole field—although of course all these categories of preemption are blurry.[149]

Even if not mentioned until this point, preemption obviously constitutes an important part of *Erie* in federal court, calling for the application of much federal law in federal court without any resort to judicial balancing.[150] Even more obviously, it is at work in state court. It rejects any state law that impermissibly collides with federal law, and does so regardless of the outcome of any independent judicial-choice-of-law balancing methodology.[151]

2. *Choice by State Courts*

In the absence of such a constitutional or congressional directive, the state courts and ultimately the U.S. Supreme Court must decide whether the existing federal law applies in state court.[152] On the one hand, they may choose federal law. Thus, in an interstate water case from the Colorado Supreme Court and through an opinion by Justice Brandeis issued on the same day as the *Erie* case, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*[153] held that the substantive federal common law of water, which would govern in the federal courts,[154] also binds the state courts under the Supremacy Clause. On the other hand, if they choose in favor of state law, the state is left free to create and apply it. Thus, *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*,[155] on review of the Oregon Supreme Court, held that state law solely governed the disputed ownership of lands along a navigable river inside the state, after the lands had become riverbed as a result of avulsive changes in the river's course.

The courts must use some technique for choosing between state and federal law for application in state court, whenever they may, under the Constitution and federal statutes, go either way. The courts must do so by employing the choice-of-law technique mandated by the Supreme Court.[156] Just as the

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149 *See* CHEMERINSKY, *supra* note 145, § 5.2, at 413–14, 422, 429, 435.

150 *See* Jeffrey L. Rensberger, Erie *and Preemption: Killing One Bird with Two Stones*, 90 IND. L.J. 1591, 1596–97, 1609 (2015).

151 *See id.*

152 *See* Bellia, *supra* note 72, at 840–45; Clermont *supra* note 136, at 20.

153 304 U.S. 92 (1938).

154 *See id.* at 110; *see also* Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972) (finding that federal common law applied).

155 429 U.S. 363, 381–82 (1977).

156 *See* Clermont, *supra* note 136, at 28–33.

Erie methodology itself is specialized federal common law, the reverse-*Erie* judicial-choice-of-law methodology is a federal-common-law creation of the U.S. Supreme Court that the state courts must follow.

The Court, unfortunately, has not been clear in developing the choice-of-law technique here.[157] However, the developments on the *Erie* front shed some light. The courts generally appear to balance state interests in having the state law applied in state court against federal interests in having federal law displace the state rule on this particular issue, while trying to avoid difference in outcome.[158]

Under such a methodology, state courts will often have to apply federal law.[159] It governs matters ranging from the substantive to the procedural. For example, federal law might apply in state courts not only on matters like patents and the FELA but also on matters such as burden of proof, joinder, and venue for federal claims[160] and likewise attorney's fees[161] and jury practice.[162]

In practice, judicial choice of law works together with preemption. If the state and federal laws directly collide, then the state court must recognize that federal law preempts;[163] if there is no collision, then the state court must perform the federally mandated accommodation of interests to choose the applicable law.[164] This judicial-choice-of-law methodology

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157 *See id.*

158 *See id.* at 22–35. Note, however, that here the outcome-determinative effect *adds* to the other federal interests in having federal law applied in state court because applying federal law would avoid any outcome-determinative difference between federal and state courts. *See id.* at 35–37.

159 *See generally id.* at 28–33 (analyzing case law).

160 *See* Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 736–37, 767 n.173 (1981).

161 *See* Maine v. Thiboutot, 448 U.S. 1, 10–11 (1980) (applying federal attorney's fee law in a state case for violation of federal civil rights).

162 *See* St. Louis Sw. Ry. v. Dickerson, 470 U.S. 409, 411–12 (1985) (holding that in state-court FELA case, federal law governs on measure-of-damages jury instructions); Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 496–98 (1980) (holding that in such a case, federal law governs jury instructions as to taxability of award); *see also* Monessen Sw. Ry. v. Morgan, 486 U.S. 330, 339–42 (1988) (holding that in such a case, federal law makes present-value calculation the jury's task); Neuborne, *supra* note 160, at 772–74.

163 *See* Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 363–64 (1952) (holding that in state-court FELA case, federal law governs jury right); Brown v. W. Ry. of Ala., 338 U.S. 294, 298–99 (1949) (holding that in such a case, federal law governs the pleading test).

164 *Compare* Felder v. Casey, 487 U.S. 131, 152–53 (1988) (refusing to apply state's notice-of-claim statute, which was preempted for federal civil rights case in state court), *with* Johnson v. Fankell, 520 U.S. 911, 913 (1997) (refusing, in such a case, to apply federal appealability doctrine).

complementarily explains, while it smooths, the outer reaches of preemption. On the one hand, in the setting that involves a matter more of inference by judge than of implication by statute, when state law would merely frustrate federal law, those *Erie*-like ideas provide refinement of how obstacle and field preemption should work: whenever federal interests outweigh state interests in a reverse-*Erie* sense, there should be preemption.[165] On the other hand, as one gets into more truly independent judicial choice of law, *Erie*-like ideas make the precise location of the outer boundary of preemption unimportant, as that boundary becomes merely a transitional zone between implied preemption and judicial choice of law, somewhere in the middle of the broad subject of reverse-*Erie*.

To sum up, the reverse-*Erie* doctrine, comprising both preemption and judicial choice of law, tells the state court when to apply existing federal law to displace state law. Subject to the Constitution or Congress having already chosen the applicable law, federal law—be it constitutional, statutory, or common law—will apply pursuant to the Supremacy Clause in state court whenever it preempts state law *or* whenever it prevails by an *Erie*-like judicial choice of law.

B. Adoption of Federal Law

When not compelled to apply federal law, states might adopt federal law as state substantive or procedural law. That is, they can gratuitously incorporate it by reference, either statically or dynamically.[166] They are more likely to do so legislatively than judicially. State tax statutes often incorporate federal definitions and other provisions from the Internal Revenue Code.[167] State tort law may incorporate federal duties, as when a state authorizes a negligence action for violation of federal regulatory standards for drugs, doing so where federal law does not authorize a federal cause of action for damages.[168]

A state may even copy in large part a federal law. For example, many states track the Federal Rules of Civil Procedure.[169] The result is state law. This example works nicely to show why a state sometimes adopts federal law, so acting for

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165 *See* Clermont, *supra* note 136, at 35–36.

166 However, some dozen states prohibit dynamic incorporation of federal law. *See* Dorf, *supra* note 16, at 108.

167 *See* FALLON ET AL., *supra* note 137, at 521–23.

168 *See* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 817 (1986) (blocking removal of a state negligence suit that was based on violation of FDCA).

169 *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1425

the same five reasons given above in regard to federal adoption of state law.[170]

A state could instead abdicate its role in lawmaking, and just defer dynamically to an already applicable federal provision. For example, a state might say that its personal jurisdiction extends to the current limits of federal due process.[171] In such event of fairly express abdication under state law, the federal law would apply of its own force. Therefore, such cases would fall under the heading of application of federal law, not adoption.

Still other state uses of federal law might look like adoption but, for my purposes, are not adoption. Most significantly, a state might look to federal law as an input to decision under state law. For example, a state might give a deduction or credit for a federal tax paid.[172] This is not an adoptive use of federal law in building state law. Such a reference to federal law "as a datum"[173] is neither adoption nor application of federal law as state law. It is merely the recognition of a legal fact, one that turns on federal law, as being relevant to the result under state law.

Among the reasons for a court to refer to another sovereign's law, Brainerd Currie drew a broad distinction between "(1) the purpose of finding a rule of decision and (2) all other purposes, including that of finding some datum made relevant by a rule of decision supplied by the law of the forum."[174] That is the line I am drawing here to delimit my focus.[175] Restricting

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(1986); *see also* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 354–55 (2003) (updating the prior article).

170 *See supra* text accompanying notes 82–86.

171 *E.g.*, CAL. CIV. PROC. CODE § 410.10 (West 2017); *see* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (giving review of a state decision where the state constitution's prohibition on searches was read to be the same as the Fourth Amendment).

172 *See* Hans W. Baade, *The Operation of Foreign Public Law*, 30 TEX. INT'L L.J. 429, 451–52 (1995).

173 *Id.* at 448–49.

174 Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 756 (1963); *see infra* notes 209 (expanding this point in connection with horizontal choice of law) & 294 (expanding this point in connection with international law).

175 Other lines are conceivable. The realm of adoption and application would expand under a view that distinguishes between *la prise en considération* (looking to foreign law for facts, say, to see what the foreign system might do in the future) and *l'application* (giving the foreign law all the public and private effects it would have at its home). *See* Marc Ekelmans, *L'ordre public et les lois prohibitives étrangères*, *in* 3 LES CONFÉRENCES DU CENTRE DE DROIT PRIVÉ ET DE DROIT ÉCONOMIQUE, L'ORDRE PUBLIC: CONCEPT ET APPLICATIONS 257, 270 (1995); *cf. id.* at 271 (contrasting the more classic distinction of "*l'application, qui consiste à donner un effet*

my discussion, and my definitions of application and adoption, to Currie's first category makes sense.[176] My pluralism-driven interest is the realm where application and adoption are possible alternatives. Application is possible only where the other sovereign's law has a defensible claim to governing, a realm limited to rules of decision. "One of the major differences between cases involving a reference to foreign law for the purpose of establishing a datum point and for the purpose of finding a rule of decision is that in the datum point cases, typically, there is no potential conflict of policy and interest with another state."[177] Thus, my focus falls on rules of decision, and on whether they are formed by application or adoption of another sovereign's law.

C. Practical Implications

Again there are many practical consequences of the difference between application and adoption. I shall now run through the consequences if federal law is adopted rather than applied by the state actor.

1. *Effect on Choice of Law in Federal Court*

On any issue as to which the state actor applies federal law, a federal actor would have applied federal law too.[178] The

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juridique à une règle [giving a juridical effect to a rule], *de la prise en considération, qui permet de tenir compte de la loi étrangère dans la mesure où elle fait partie de l'hypothèse de la règle* [allowing to take into account the foreign law to the extent it is a predicate of the rule]" (footnote omitted)).

176 Admittedly, drawing the line between adoption and datum can be difficult for choice-of-law purposes. *See* Herma Hill Kay, *Conflict of Laws: Foreign Law as Datum*, 53 CALIF. L. REV. 47, 59–62 (1965). A difficult example might be a borrowing statute for the statute of limitations. *See, e.g.*, N.Y. C.P.L.R. 202 (MCKINNEY 2017) ("An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply."). But for my purposes, not much turns on the precise location of the line where my brand of "adoption" fades into datum.

177 Kay, *supra* note 176, at 63.

178 *See* Clermont, *supra* note 136, at 37 n.161 (recognizing the theoretical possibility of "a circularity in application of procedural law, with the federal court applying state law in pursuit of conformity and the state court ironically applying federal law on the same issue in the same pursuit of conformity," but concluding: "Reassuringly, this highly unrealistic result could never occur in actuality, because the *Erie* balance always must precede the reverse-*Erie* balance and so the state court will know if the federal court would apply state law. That is, even in state court, the first question is what law the federal court would apply; and if the answer is state law, then under reverse-*Erie* the state court will likewise apply state law, because only state interests persist.").

decision by a state court to apply federal law will have no effect on the federal courts' future behavior. A state court's decision as to the content of federal law might have persuasive effect but has no precedential effect at all in federal court.[179]

By contrast, the decision by a state actor to adopt federal law creates state law. *Erie* and *Klaxon* have full application in bringing that state law into federal court. Indeed, the federal court would have to apply what it thinks the state's highest court would say is the content of adopted federal law.[180] This must be so because an adopting state could pick and choose among the federal provisions, or take a static approach or even adopt federal law as it existed before the Civil War. Moreover, a state court could make its own determination of the content of adopted but unclear federal law, perhaps developing idiosyncratic rules about what sources to consult. The issue is not what is the federal law, but rather how does the state choose to view adopted federal law.

To get a sense of the glory of this subject, imagine that a federal court decides a question of applied state law containing adopted but unclear federal law, that the state's practice is to conform any such adoptee to current federal law, and that the federal case comes up to the U.S. Supreme Court. The Supreme Court then needs to ask what the state's highest court would predict the Supreme Court would do. (Indeed, the lower federal courts could not look to what the Supreme Court would rule on the legal question, but rather to what the Supreme Court would think the state court would predict the Supreme Court would do.) In the real world, a federal court would probably just make a de novo determination of the federal law,[181] but in principle the mental process should be more gymnastic. There is a difference between what *X* thinks the law is and what *X* thinks *Y* thinks *X* thinks the law is.

Interestingly, this conundrum would not appear if a state were applying federal law and predicting what the Supreme Court would do.[182] When the state case applying unclear fed-

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179 *See id.* at 31–32 ("[A state court] will decide in accordance with existing federal law, but never create federal law.").

180 *See supra* notes 97–102 and accompanying text.

181 *Cf.* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 816 (1986) (dictum) (treating the analogous situation of Supreme Court review of a state-court decision on adopted federal law and assuming a de novo determination of federal law by the Court: "Petitioner's concern about the uniformity of interpretation, moreover, is considerably mitigated by the fact that, even if there is no original district court jurisdiction for these kinds of action, this Court retains power to review the decision of a federal issue in a state cause of action.").

182 *See infra* text accompanying note 187.

eral law reaches the Supreme Court, the Court will ask what the law is, not what the state would predict the law is. So that is another difference between adoption and application.

2. *Effect on Choice of Law in State Court*

If the state court determines that federal law governs, then the state court applies it as is. Here, it becomes ever clearer that applying another sovereign's law is a task different from a court's deciding under its own sovereign's law. Application of federal law under reverse-*Erie* calls for pretty blind adherence by the state actor to the federal government's view of that law's content.[183]

The federal law might be constitutional, statutory, or common law; it might be purely federal, or it might involve state law adopted as federal law. In the reverse-*Erie* setting, the state court is merely an applier of federal law and can never act as a creator of federal law. Although the state court is competent to decide questions of federal law, it must act as if it were a federal court and try to decide the federal questions in accordance with the U.S. Supreme Court's view of federal law.[184]

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 envisage the federal courts' *Erie* analysis to determine the reach of federal law and its content.[185] Indeed, sometimes the state court has to be the very first to enunciate the federal law. It has this 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 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 state-law creator. 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 and the *Erie* setting, the court's job is to apply the other sovereign's "existing" law, not to "make" law for the other.[186]

More precisely, if the content of the governing federal law is really 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

183 *See* Clermont, *supra* note 136, at 30–32.
184 *See id.*
185 Bellia, *supra* note 72, at 839 & n.65.
186 *See id.* at 839 n.64, 889, 908 n.369.

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 has ruled or would rule.[187] On the one hand, the state court should not consider itself actually bound, rather than merely informed, by the local federal courts' rulings.[188] 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 the profound implication of this view: it makes the state courts into judicial hierarchies 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.[189]

For state adoption of federal law, by contrast, reverse-*Erie* does not unalterably bring into state law how the federal courts would decide. The state lawmaker has complete freedom of movement. The state lawmaker can pick and choose among the federal provisions. And the state court could make its own determination of the content of federal law.

3. *Modifiability of Other Sovereign's Law*

As just said, application of federal law under reverse-*Erie* means pretty blind adherence to the federal government's view. A state court must apply it as is. By contrast, state interests control any adoption of federal law. State courts can refuse to adopt any part of federal law that impinges on state interests.

Again, a nice illustration of the difference in bindingness of federal law comes in connection with how to handle a federally generated correction, clarification, constriction, or change of federal law while the state action or appeal is still pending.[190] If the state courts are applying federal law, the law to be applied by any state court is the actual federal law then prevailing, unless the federal change was avowedly prospective in effect.

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187 *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, 735–37 (9th Cir. 1991); State v. Dukes, 745 S.E.2d 137, 141 (S.C. Ct. App. 2013). *See generally* 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, 1145 (1999) (arguing that state courts should decide questions of federal law the way they think the U.S. Supreme Court would decide them).

188 *See* Bellia, *supra* note 72, at 839.

189 *See* Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1473–78 (2005).

190 *Cf. supra* notes 116–23 and accompanying text.

The general rule is that any state court must use the latest available data in deciding what the federal law is, to the extent a federal court would.

By contrast, a federally generated correction, clarification, constriction, or change of adopted federal law during appeal should not necessarily affect the state appeal's outcome.[191] State law might adopt federal law dynamically. But the state actor might not be devoted to applying the federal law with complete accuracy. It is probably not trying to establish a state law that would govern in all circumstances and times. The decision on federal law was proper when adopted. Indeed, sticking with the former federal law would better conform the state law to then-prevailing local conditions and parties' expectations. Therefore, the appellate court should not reverse the lower court on account of a subsequent alteration in adopted federal law.

4. *Effect on Original Jurisdiction*

When federal law is applied to create a cause of action, original (or removal) federal question jurisdiction will normally lie.[192] The courts also recognize federal question jurisdiction for cases with an important element of applied federal law.[193]

The situation is completely different for adopted federal law. That adopted law is actually state law, and so it will not support original (or removal) federal question jurisdiction.[194]

5. *Effect on Appellate Jurisdiction*

Yet another pattern holds as to appellate jurisdiction. Of course, applied federal law presents a federal question supporting the U.S. Supreme Court's appellate jurisdiction.[195]

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191 *Cf. supra* notes 124–27 and accompanying text.

192 *See* 28 U.S.C. § 1331 (2012). *But cf.* Shoshone Mining Co. v. Rutter, 177 U.S. 505, 513 (1900) (holding that federal jurisdiction does not exist for a suit to determine the right to possession of a mining claim, when a federal statute authorized this type of suit but directed that local law should govern the rights involved); 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3563, at 225–26 (3d ed. 2008) (discussing limits on *Shoshone*).

193 *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312–14 (2005) (allowing removal); Smith v. Kan. City Title & Trust Co., 255 U.S. 180, 201–02 (1921) (upholding original federal question jurisdiction); *supra* text accompanying note 130.

194 *See* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 813–17 (1986) (blocking removal); 13D WRIGHT ET AL., *supra* note 192, § 3563, at 222–24; Ronald J. Greene, *Hybrid State Law in the Federal Courts*, 83 HARV. L. REV. 289, 322–25 (1969).

195 *See* 28 U.S.C. § 1257 (2012).

Such appeal serves a vital purpose, as it allows a federal authority to review any of the many applications of federal law by the state courts. Indeed, this is why the Supreme Court's appellate jurisdiction is typically much wider than the district courts' original jurisdiction, allowing the federal authority to get a crack at all the federal questions that end up in state courts because of restrictive original-jurisdiction doctrines like the well-pleaded complaint rule.[196]

As to questions of state law that adopts federal law, the early, and logical, position was that the Supreme Court had no appellate jurisdiction over any such question because it would involve only state law.[197] After all, the issue on review is not what is the federal law, but rather how does the state choose to view federal law.[198] But over the years, the Court appears to have come routinely, albeit of course rarely, to review state-court decisions on a matter of federal law adopted into or otherwise affecting state law.[199]

The rationale for this expansion of appellate jurisdiction is questionable.[200] If the state law copied federal law such as the Federal Rules without expressly referring to federal law, there would be no review by the Supreme Court. Even if there is an express adoption, there seems to be little federal interest in providing review, besides the abstract interest to ensure that even adopted federal law gets a "correct" and uniform interpretation—but how strong is that interest if a state's law has merely adopted the Internal Revenue Code's definition of taxable income? The interest grows only slightly stronger if the state has adopted federal law to impose a duty on persons not covered by federal law.[201] A better argument for Supreme

196 *See, e.g.*, Louisville & Nashville R.R. Co. v. Mottley, 219 U.S. 467, 471–73 (1911) (reviewing a federal issue in a state case, after having refused original federal question jurisdiction in *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908)).

197 *See* Miller v. Anderson, 150 U.S. 132, 136–37 (1893) (expressing the Court's former blanket view by dismissing writ of error where a railroad's power to convey was limited by a state statute, which incorporated a federal statute's limits on the railroad's power).

198 *See supra* text accompanying note 181.

199 *See Merrell Dow Pharm., Inc.*, 478 U.S. at 816 & n.14 (dictum); St. Louis, Iron Mountain & S. Ry. Co. v. Taylor, 210 U.S. 281, 293 (1908) ("But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union.").

200 *See* FALLON ET AL., *supra* note 137, at 521–23 (questioning the strength of the arguments for federal review).

201 *See* Note, *Supreme Court Review of State Interpretations of Federal Law Incorporated by Reference*, 66 HARV. L. REV. 1498, 1503 (1953) (focusing on Federal Safety Appliance Act cases, and saying inter alia: "If a state were to pass a

Court review exists if the state has adopted federal law by authorizing suit for violation of a person's existing federal duty, thus regulating the same primary conduct.[202] Therefore, the best solution might be a middle course, perhaps even a discretionary course, as opposed to going either for no appellate jurisdiction or for full appellate jurisdiction.[203]

To continue this Article's theme, I could just observe that the very hesitancy shown through the years as to appellate jurisdiction over adopted federal law[204] demonstrates the significant jurisdictional impact of adoption. Still, the current exercise of this strange appellate jurisdiction stands out as the one real perturbance in my scheme. Thus, I need to go further.

I maintain that it is the previous misunderstanding of this appellate jurisdiction that creates an illusion of perturbance. The Court here is not reviewing the state decision on adopted federal law, as others have viewed it doing, but rather the Court is resolving the federal question in order that the state court on remand can act without any misconceptions. In other words, the Court is using its jurisdiction, in its discretion, to create a rough analog to federal-court certification of unsettled state-law questions, which go to the state's highest court if the state is willing.[205] Once the Supreme Court clarifies the federal

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statute making the safety requirements of the FSAA applicable to intrastate trolley cars, the Supreme Court would not be justified in reviewing state interpretations of the incorporated federal law.").

202 *See* Greene, *supra* note 194, at 325–26 (suggesting as the test for appellate jurisdiction "if federal law of its own force is either actually or potentially regulative of the conduct which gave rise to the suit"); Note, *supra* note 201, at 1502 ("Through Supreme Court review that uniformity of state and federal law which was sought by the state in incorporating the federal duty is achieved; it must be clear that ultimate uniformity can only be achieved by having one final arbiter define the statute for both state and federal purposes."); *cf.* Greene, *supra* note 194, at 295, 308–09 (including, as satisfying his test, the situation where private parties by contract assume duties under federal law).

203 *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 565 (1985) (arguing broadly that the Court has an "implicit power to choose" whether to review issues of adopted federal law in light of "the strength of the federal interest"); *cf.* Daniel J. Meltzer, Jurisdiction and Discretion *Revisited*, 79 NOTRE DAME L. REV. 1891, 1893–97 (2004) (agreeing as to discretionary appellate jurisdiction, but disagreeing as to Shapiro's willingness to embrace discretionary original jurisdiction too).

204 *See supra* notes 128–32 and accompanying text.

205 *See* FIELD ET AL., *supra* note 38, at 408–09. The Court's exercise of this jurisdiction should not be seen as involving an advisory opinion because its decision relates to a genuine dispute actually pending in the state court and because any such decision is binding as far as it goes. *Cf.* Wendy L. Watson, McKinzie Craig & Daniel Orion Davis, *Federal Court Certification of State-Law Questions: Active Judicial Federalism*, 28 JUST. SYS. J. 98, 99–101 (2007) (discussing the federal-to-state procedure). Moreover, the Court advises in other, more ordinary contexts. *See, e.g.*, Perkins v. Benguet Consol. Mining Co., 342 U.S. 437,

question, the state court would be free to adopt that interpretation or to take any other view of what the state law has adopted as state law. Some of the Court's cases support this reading. The leading case of *Standard Oil Co. of California v. Johnson*[206] involved an unsettled question of adopted federal law. After declaring the federal law's content, the unanimous Court ended this way: "Whether the California Supreme Court would have construed [its law in the same way if it knew our view of federal law], we have no way of knowing. . . . Accordingly, we reverse the judgment and remand the cause to the court below for further proceedings not inconsistent with this opinion."[207] In sum, the Supreme Court has no appellate jurisdiction over state-law questions that entail adopted federal law, but it can and occasionally does choose to clarify federal-law questions that arguably bear on state law in state courts.

Thus far this Article has run through the accepted application/adoption distinction in the field of federalism. The trip took us through the doctrinal weeds of the subject. It thereby brought enhanced comprehension on some points, such as how to determine the other sovereign's law and how to account for late changes in that law, but also new insights on old problems, such as the current subsection on how to explain the Supreme Court's review of state law that adopts federal law.

III
FOREIGN LAW FOR U.S. ACTORS

Now this Article shifts gears, taking more of a bird's-eye view of horizontal choice of law and of international law. It innovatively applies the application/adoption distinction to these subjects. However, the twin aims of enhancing comprehension and sparking insight remain the same.

Admittedly, people do not usually think of horizontal choice of law in terms of applying versus adopting the foreign law.[208] But what if they did? The foregoing federal and state

448–49 (1952) (deciding that personal jurisdiction was constitutionally permissible because of a concern that the Ohio court's dismissal might have been influenced by that consideration); FALLON ET AL., *supra* note 137, at 522 & n.3 (citing cases where the Supreme Court's clarification of possibly applicable federal law permitted the state court on remand to act "free from any misconception").

206 316 U.S. 481 (1942).

207 *Id.* at 485.

208 Recall that "foreign" in this particular context can refer to the law of a U.S. state or another country. For the purposes of conflict of laws, U.S. states are treated as sovereigns, albeit ones sometimes constrained by constitutional limits. In fact, the American law for international conflicts largely overlaps interstate conflicts law. Thus, what is said in the text about international choice of law

lessons might carry over to this and all other settings where a sovereign resorts to another sovereign's law to govern a claim, a defense, or any element thereof.[209] In theory, the lessons should carry over, because federalism really is a choice-of-law problem.

True, our country's federalism problem 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, with special prominence in the contract given to its choice-of-forum and choice-of-law provisions. 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 conventional choice-of-law agreement, with the states here giving such-and-such legal matters to the federal government but retaining this-and-that for state law, and so on through the document.[210] Thus, the constitutional flavor of federalism's choice of law should not restrict its lessons.

Likewise true, the federal-state relation differs from the relation between states, between countries, or between nations and international law. The Supreme Court has explained that the Supremacy Clause and the fact that we are one nation make the federal-state relation unique for us.[211] States do not bear the same relation to the central government's laws that they bear to the laws of sister states, foreign countries, or the international community. Nonetheless, one can see methods of both application and adoption at work in all these settings.

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carries over to interstate choice of law. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 10 (AM. LAW INST. 1971).

209 Courts can look to foreign law for various other reasons. The foreign law could be a datum in the case at bar. *See* Zachary D. Clopton, *Judging Foreign States*, 94 WASH. U. L. REV. 1, 15, 19 (2016) (saying that "U.S. courts sit in judgment on foreign laws . . . when they serve as inputs in domestic doctrinal analyses," giving as an example where "defendants in breach of contract cases may plead supervening foreign illegality"). Or courts might look to foreign law for help in interpreting local law. *See* Steven G. Calabresi & Bradley G. Silverman, *Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron*, 2015 MICH. ST. L. REV. 1; David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U. L. REV. 1417 (2006). But such uses are weaker effects of foreign law, not a form of either application or adoption. *See supra* text accompanying note 174.

210 *Accord* Stephan, *supra* note 24, at 23 (calling the Constitution "an express domain-assignment compact").

211 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").

Therefore, application/adoption lessons can travel between the above-discussed federal and state categories and the other settings.[212] This new vantage, which takes into account application versus adoption, might make our legal practices a bit more comprehensible. In that discussion, I shall continue to emphasize the behavior of courts, but only because they provide familiar examples that are readily understood. Further, the reconceptualization might generate some new, even if modest, insights. For example, the treatment of foreign law in American courts appears to have evolved from adoption to application.

A. Adoption of Foreign Law

The old American view, before the revolutionary changes of the twentieth century, generally rested on territoriality in its restrictive sense and on comity in its usual sense of nonobligatory discretion.[213] The origin of that view lay in the writings of Ulrich Huber, who posited in 1689 both 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."[214] Joseph Story enshrined those ideas in American law while somewhat reshaping them, especially by stressing comity as the way to justify adopting foreign law:

> [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.[215]

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212 *See* Bauer, *supra* note 36, at 1239; Clermont, *supra* note 136, at 3 n.7.

213 *See* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS § 24.29, at 1485 (5th ed. 2010).

214 *Id.* § 2.5, at 15; *see* Ernest G. Lorenzen, *Huber's* De Conflictu Legum, *in* SELECTED ARTICLES ON THE CONFLICT OF LAWS 136, 136–37 (1947).

215 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 38, at 35 (Boston, Little & Brown 8th ed. 1883) (footnote omitted); *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."); SYMEON C. SYMEONIDES, CHOICE OF LAW 49–53 (2016) (stressing the lack of English influence on American private international law). Huber's idea of comity might have been more a mandatory command. *Compare* S. Nathan Park, *Equity Extraterritoriality*, 28 DUKE J. COMP. & INT'L L. (forthcoming 2017–2018) (manuscript at 69–70), http://ssrn.com/abstract=2824752 [https://perma.cc/2ME7-JJ4R] (stressing the need to balance proper respect for territoriality with the "mandatory obligation" of comity in developing a modern "[e]quity [e]xtraterritoriality" doctrine), *with* William S. Dodge, *International Comity in*

In other words, foreign law had no force of its own, and so could be overridden by local interests. Even though no one was expressly saying that the forum court was making the foreign law part of its domestic law, as the federal and state courts may do with each other's law, I still consider this "adoption" rather than "application," because 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. The forum court was not recognizing the foreign law's claim to govern of its own force, as it would do with application. The essential adoption/application distinction lies in whose law effectively governs the case: forum law or foreign law?

I do not mean to suggest that all courts and all theorists spoke with one voice. For one, Joseph Beale eventually 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."[216] He thereby gave a much more tangible sense than did comity for *when* the forum court should look to foreign law. But he still saw the judicial function as local adoption of foreign-accrued rights that should travel with the person or thing. He was endorsing the enforcement of foreign-created rights under the forum's law. He was not calling for applying the foreign law. Even more clearly than his predecessors, he called for applying forum law. One must recall that 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.[217]

Additionally, Herbert Goodrich's standard hornbook 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:

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). But Story made it more 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).

216 3 JOSEPH HENRY BEALE, JR., A SELECTION OF CASES ON THE CONFLICT OF LAWS 517 (1902) (citation omitted).

217 RESTATEMENT OF CONFLICT OF LAWS § 1 (AM. LAW INST. 1934).

> 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.[218]

Even as cracks started to develop in the traditional system, theorists still adhered to the view that the local law alone controlled.[219] Although Walter Wheeler Cook attacked the traditionalists, he argued that, when justice required, the local law should generate a remedy that approximated what the foreign law would do. As a legal realist, he saw the domestic sovereign as the sole source of law. So he, more clearly than his predecessors, was expressly arguing 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.[220]

In short, then, the various traditional approaches to choice of law, in the past and where they still prevail, could be seen as variations on the common theme of adoption of foreign law. American courts have usually so acted on a case-by-case basis. American sovereigns could legislatively adopt foreign law (or even nonsovereign law), but they have not normally done so.[221]

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218 HERBERT F. GOODRICH, HANDBOOK ON THE CONFLICT OF LAWS 7 (1927).

219 *See* ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW §§ 2, 4, 15 (6th ed. 2011) (discussing local law theory); HAY ET AL., *supra* note 213, § 2.8 (discussing Cook's contributions).

220 WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 20–21 (1942); *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.").

221 *See* Dorf, *supra* note 16, at 108–11.

Indeed, they could delegate the power to adopt foreign law to private actors.[222] A useful way to look at parties' choice-of-law contracts is as such a delegation, with the sovereign remaining able to override the parties' choice of law.[223]

B. Application of Foreign Law

The Conflicts Revolution of the 1960s introduced a good number of new choice-of-law methodologies.[224] The most prominent example might be interest analysis in its broad sense.[225] I elide the details of these methodologies, however, because my concern is not with the most important practical question: when to recognize some foreign law?[226] Instead, my concern is the 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, based on territorial factors without consideration of the laws' content, and a shift toward functional analysis of competing laws.[227] Of course, the motivation of the revolutionaries was the growing despair with the traditional approaches' techniques and results in actual cases. Yet in terms of doctrine, it looks like a shift from wooden rules to functional analysis.

Nonetheless, it might be equally effective 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 the same despair, the

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222 *See id.* at 114 n.29.

223 *See* MARIA HOOK, THE CHOICE OF LAW CONTRACT 16–18, 44–48, 63–73, 125–29 (2016).

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

225 *See* Bauer, *supra* note 36, at 1282 ("[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. LAW INST. 1971) (selecting the tort law of the state that "has the most significant relationship to the occurrence and the parties under the principles stated in § 6").

226 *See* Hannah L. Buxbaum, *Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and on the Role of Party Autonomy*, 27 DUKE J. COMP. & INT'L L. 381 (2017) (distinguishing the two steps of determining the scope of potentially applicable laws and of deciding the priority of those candidates).

227 *See, e.g.*, RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 3.1, at 55 (6th ed. 2010).

revolutionaries came to recognize that getting to the just result sometimes called for applying foreign law. There is at least a correlation: in the United States a switch from adoption to application came at the time of the Conflicts Revolution.[228]

After this switch to potential application, the judicial job became choosing which law applies in a pluralist world, divining by construction and interpretation which law should be seen in spatial terms as meant to apply.[229] Rather than thinking that the local law would wisely adopt the law of the place of the wrong to decide the case in the local court, the court worried about which law should regulate the behavior in issue. Symptomatic of the change in judicial thinking was the emergence of new doctrines such as "false conflicts," which considers the absence of a state's interest.[230] Such a consideration would be relevant only to an inquiry into which law has a claim to apply.

Thus, the horizontal choice-of-law process now works as *Erie* and reverse-*Erie* does, with the local legal actor deciding when the foreign law applies. Here the locally self-imposed, internal directive does not in fact result in the other sovereign's law applying *ex proprio vigore*, but rather it represents a choice by local law to treat the foreign law as if it were directly applicable. It is thus essentially a recognition of the foreign law's status as being almost co-equal.

The internal directive to apply foreign law could result from a dictate by constitution[231] or statute[232] or treaty,[233] or conceivably by adoption of international law.[234] Such provisions would provide that foreign law governs; or they could, and do sometimes, provide that foreign law does not apply.[235] The interpretation of statutes' extraterritoriality, in particular, is

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228 *See* HAY ET AL., *supra* note 213, §§ 2.2–.4, 2.6 (describing much earlier European roots for application of foreign law).

229 *See id.* § 2.12, at 52. *But see* Ernest A. Young, Sosa *and the Retail Incorporation of International Law*, 120 HARV. L. REV. FORUM 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.").

230 *See* HAY ET AL., *supra* note 213, § 2.9, at 30–32.

231 *See id.* § 3.61.

232 *See id.* § 3.62.

233 *See id.* § 3.56.

234 *See infra* Part IV.

235 *See* Eugene Volokh, *Foreign Law in American Courts*, 66 OKLA. L. REV. 219, 219 (2014) (discussing the growing trend among states to "bar the use of foreign law in American courts").

challenging and contested.[236] This interpretation task should fade into judicial choice of law as the statute becomes less express. Indeed, the choice of foreign law in most situations follows from the operation of the prevailing choice-of-law methodology, done on a case-by-case basis by a court.

Again, I do not mean to suggest that all modern courts and theorists speak with one voice. Some modernists abandon the search for the spatially correct solution and look instead for the substantively best solution.[237] The most prominent example of these value-oriented approaches is the choice-of-law methodology that selects the "better law."[238] If the better law is a foreign law, this methodology would seem to be a throwback to or beyond the forum's adopting the foreign law rather than applying it.[239] That is, instead of deciding whether the foreign law in spatial terms was meant to apply, the court is saying that local law applies and that it chooses the better law among the possibilities and hence the better result.[240]

C. Practical Implications

Because I am postulating an evolution from adoption to application, the reader may perceive the difference as more than ever a matter of degree. Although adoption (foreign law being consulted to define rights under the local law) and application (foreign law governing as if by its own force in recognition of its spatial reach) are different in theory, various jurisdictions might in reality fall along a spectrum.

Nonetheless, most of adoption/application's practical implications work out in binary fashion, so the switch from one side of the spectrum to the other would be consequential. It may be that the switch is not so significant as to encapsulate the Conflicts Revolution, in the way that I conceive of the Revolution's drastic move from incorporating foreign law to actually bowing to it. But the switch does have real conse-

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236 *See* Carlos M. Vázquez, *Out-Beale-ing Beale*, 110 AJIL UNBOUND 68 (2016) (arguing that the Supreme Court's presumption against extraterritoriality was a throwback to the strict territorialist approach to choice of law of Joseph Beale, but that lately the Court, by strengthening and expanding the presumption, has out-Beale'd Beale).

237 *See* HAY ET AL., *supra* note 213, § 2.12.

238 *See id.* § 2.13.

239 *See* FELIX & WHITTEN, *supra* note 219, § 7, at 12.

240 *See* HAY ET AL., *supra* note 213, § 2.12, at 53 (summarizing this view thus: "Resolving such disputes in a manner that is substantively fair and equitable to the litigants should be an objective of conflicts law as much as it is of internal law."); *cf.* Stephan, *supra* note 24, at 9, 59–68 (seeing the better-law approach as an attack on rule formalism).

quences. Moreover, theorizing about the switch makes those consequences a lot more comprehensible. Adoption/application is a useful lens through which to view choice of law.

As already intimated, one way to tell adoption from application is the decreasing freedom of the local court to override the foreign law in the name of public policy. Another obvious difference is that plaintiffs can sue and defendants can defend directly on foreign law if it is applied law. But there are other consequences. I shall now run through the practical differences if foreign law is applied rather than adopted.

1. *Effect on Choice of Law in Federal Court*

The shift from adoption to application should affect how a federal court determines and clarifies the content of foreign law. In the old days of adoption, courts could employ presumptions and develop idiosyncratic rules about what sources to consult.[241] In the new days of application, courts should put themselves into the shoes of the highest foreign court and decide what it would say.

Adoption versus application of foreign law does not have a direct effect on federalism. On the one hand, under *Erie* and *Klaxon*, state law will bring up into federal court whatever the state would do with respect to choice of law on an issue governed by state law.[242] On the other hand, if federal law governs choice of law, say, on a federal claim, then federal law would perform the choice unaffected by state views.[243] Both propositions hold true whether the state or federal court was adopting or applying the foreign law.

Adoption/application may have indirect effects on federal-court practice, however. Consider the important matter of pleading and proof of foreign law. It has undergone an evolution from treating the foreign law as a matter of fact to treating it as a matter of law. This change was not unrelated to the issue of adoption versus application of foreign law.

State courts traditionally treated the law of sister states and of foreign countries as "fact" to be pleaded and proved, although relief from failure to do so sometimes came by a presumption that such outside law was the same as the forum's. The fact characterization often went to the extreme of leaving the determination to the jury if there was a dispute on the outside law's content, and it considerably restricted appellate

241 *See* HAY ET AL., *supra* note 213, § 12.19, at 612–13; *infra* note 250.
242 *See supra* text accompanying note 100.
243 *See supra* text accompanying note 107.

review of the findings. The situation was the same in federal courts, except that the parties could rely on judicial notice of the states' laws.[244]

It was only in 1966 that Federal Rule 44.1 effected the change from treatment as fact for foreign-nation law.[245] The parties no longer need to plead foreign-nation law, although notice of raising it and some showing of its content must be given.[246] The judges have a new duty to inquire into the foreign law, which makes much more sense now than it would if foreign law were still a matter of fact.

The change worked by Rule 44.1 appears to have followed from the evolution from adoption to application. Consider this description of the former practice:

> Courts dealing with a choice-of-law problem treated foreign law not as law but as fact. This meant that they merely considered the foreign law along with the other facts in the case and gave it whatever effect it, as a fact, merited in any particular case. Local conflicts law at the forum actually controlled enforcement of claims based on extrastate facts. Awareness of this effect convinced some critics to conclude that there was no such thing as a "foreign-created right" at all; no right came into existence except as a court created it and declared it to exist and rendered judgment accordingly.[247]

In the old days, then, local law was the only law applicable to a case, and so foreign law was just a fact that the local court

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244 *See* FIELD ET AL., *supra* note 38, at 1305–07.

245 *See* FED R. CIV. P. 44.1; Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 617 (1967); *see also* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.10(2) (AM. LAW INST. Preliminary Draft No. 2, 2016) ("Ordinarily, the court should aim to determine foreign law in light of how a court in the foreign state would interpret and apply it."); Doug M. Keller, Comment, *Interpreting Foreign Law Through an* Erie *Lens: A Critical Look at* United States v. McNab, 40 TEX. INT'L L.J. 157, 179–84 (2004) (arguing that the federal court should determine uncertain foreign country law just as it decides the content of uncertain state law, by surmising what the other sovereign's highest court would say); *cf.* FELIX & WHITTEN, *supra* note 219, § 84, at 272–74 (discussing *Erie* issues).

246 *See* De Fontbrune v. Wofsy, 838 F.3d 992, 1000 (9th Cir. 2016) (holding that the district court may consider foreign legal materials, including expert testimony and declarations, outside the pleadings in ruling on a motion to dismiss); Bodum USA, Inc. v. La Cafetière, Inc., 621 F.3d 624, 628–29 (7th Cir. 2010) (questioning the propriety of relying on foreign-law experts); 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2447 (3d ed. 2008); *cf.* SOFIE GEEROMS, FOREIGN LAW IN CIVIL LITIGATION 392 (2004) (arguing against any burden of proof as to foreign law).

247 FELIX & WHITTEN, *supra* note 219, § 4, at 8 (footnote omitted); *see id.* § 83 (giving details of traditional practice).

might treat as significant.[248] At most, the local court would treat the foreign law as significant enough under its law to adopt as part of its solution.[249] In the new days, foreign law having come to be applied, parties and courts should determine the foreign law pretty much as they would local law. That is, it is more appropriately treated as a matter of law rather than fact.

2. *Effect on Choice of Law in State Court*

The shift from adoption to application should similarly affect how a state court determines and clarifies the content of foreign law. Gone should be the old oddities.[250] The court should now imagine itself in foreign shoes.

Yet, adoption versus application of foreign law does not have a direct effect on federalism's call for the proper line between state and federal law in the state courts. State courts will look to federal law sometimes under reverse-*Erie*'s preemption and choice of law. But their behavior will be unaffected by the adoption versus application distinction.

Again, in state courts the whole tradition of sister-state and foreign-nation law as fact is now moving toward extinction. They too have evolved from treating foreign law as a matter of fact, which requires pleading and proof, to treating it as a matter of law.[251]

3. *Modifiability of Other Sovereign's Law*

From the beginning, local interests could justify overriding foreign law. The idea was that public policy generated all law, and so it should be able to shape or override law, whether created at home or adopted from elsewhere. "The public policy of the forum is the basis for all of its law including its conflicts

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248 *See* Ekelmans, *supra* note 175, at 271–72.

249 *See* HAY ET AL., *supra* note 213, § 12.15, at 602 ("'Law,' in a strict territorial sense, comprises only the legal norms (statutory and decisional) that have binding force in the court's own territory. A court, in this view, can only apply its own law. Foreign 'law' thus is not 'law,' but, in situations having a requisite foreign connection, as determined by local law, constitutes a 'fact' like any other fact of the case.").

250 For example, in the pre-*Erie* days New York followed a *Swift*-like 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).

251 *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.10(1) (AM. LAW INST., Preliminary Draft No. 2, 2016) ("The court is responsible for determining foreign law."); John G. Sprankling & George R. Lanyi, *Pleading and Proof of Foreign Law in American Courts*, 19 STAN. J. INT'L L. 3, 5–9 (1983).

of laws."[252] Early on, public policy expressed itself through the exception of "substantial dissimilarity," whereby an American court would refuse to adopt a foreign law that was substantially dissimilar to the local provision.[253] This doctrine morphed into the more discerning but still free-ranging judicial exception for "public policy."[254]

As the modern approach to choice of law has become more functional and sensitive, one would expect a lessened role for the public-policy exception to relieve unjust choice of law. Moreover, as the approach to foreign law moved from adoption to application, one would expect the greater respect for foreign law to reduce the realm of the public-policy override.

However, one would not expect such overrides to disappear. The contraction of the exception would not be binary, or on/off. Moreover, in eschewing the public-policy exception, the modern court does not necessarily blind itself to policy in the course of bowing to the applied foreign law. The local court could override foreign law by invoking some other exception.[255] Also, the court could play with the choice-of-law process to avoid bringing over distasteful laws or parts of those laws, so that in effect a public-policy exception would be built into the choice of law itself.[256]

Consequently, public-policy overrides by courts today occur but are rare. Public policy "is to be construed narrowly: fundamental policies of the forum must be offended; mere differences between the law of the forum and of the foreign jurisdiction are not enough."[257] The override requires viewing a foreign system's provision as "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."[258] Very, very rarely would another American law fall "so far outside the pale of social, economic, and moral standards currently imposed by our civilization."[259]

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252 HERBERT F. GOODRICH & EUGENE F. SCOLES, HANDBOOK OF THE CONFLICT OF LAWS 14 (4th ed. 1964).

253 *See* FELIX & WHITTEN, *supra* note 219, § 32, at 103–04.

254 *See* HAY ET AL., *supra* note 213, § 3.15.

255 *See id.* § 3.19 (discussing rare cases that refuse to apply foreign law because of lack of local judicial machinery or remedy).

256 *See id.* § 3.16; *cf.* FELIX & WHITTEN, *supra* note 219, § 68, at 248–49 (arguing that the public-policy exception is therefore no longer necessary). Interestingly, one could say the same about the *Erie* doctrine: the vertical choice-of-law process might take policy partly into account.

257 HAY ET AL., *supra* note 213, § 3.15, at 169.

258 Intercont'l Hotels Corp. v. Golden, 203 N.E.2d 210, 212 (N.Y. 1964).

259 FELIX & WHITTEN, *supra* note 219, § 32, at 105.

Thus, the switch from adoption to application has prompted American courts more fully to embrace sister-state and foreign-nation law as it is. Recognition of the move to application might also affect a few of the classic problems of the public-policy exception. First, any argument that a public-policy rejection of the chosen foreign law should lead to the application of domestic law becomes weaker.[260] Today some might even say, "Under no circumstances should a forum use public policy to apply its own law on the merits."[261] Second, any argument that the local court can strike down solely a defense to a foreign claim on public-policy grounds should weaken.[262] Again, some might say, "In no event should a neutral forum invoke its own public policy to affect the result on the merits as it would, for example, if it denied effect to a defense based on obnoxious foreign law."[263] Third, arguments against dépeçage start mounting when one invokes it so as to apply separate sovereigns' laws on related issues. Such a technique would result in an affront to the *application* of the foreign law.[264]

Another area in which the switch from adoption to application might eventually be felt is in connection with how to handle a foreign-generated correction, clarification, constriction, or change of foreign law while the American action or appeal is still pending. If the American court is effectively applying foreign law, the law to be applied by it is the actual foreign law

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260 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 cmt. a (AM. LAW INST. 1971) ("The [public-policy exception] has a narrow scope of application. It applies only to situations where the forum refuses to entertain the suit on the ground that the cause of action is contrary to a strong local public policy. The rule does not apply to situations where the forum does decide the controversy between the parties and, on the stated ground of public policy, applies its own local law, rather than the otherwise applicable law, in determining one or more of the issues involved.").

261 WEINTRAUB, *supra* note 227, § 3.6, at 124.

262 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 cmt. a (AM. LAW INST. 1971) ("The [public-policy exception] does not justify striking down a defense good under the otherwise applicable law on the ground that this defense is contrary to the strong public policy of the forum. Such action involves more than a mere denial of access to the court. Rather, it is a preliminary step to the rendition of a judgment on the merits. It involves application of the local law of the forum to determine the efficacy of a defense and thus to decide the ultimate rights of the parties. The Supreme Court of the United States has held that it is a violation of due process for a State to strike down a defense under a foreign law as being contrary to its public policy if the State has no reasonable relationship to the transaction and the parties. Home Ins. Co. v. Dick, 281 U.S. 397 (1930).").

263 WEINTRAUB, *supra* note 227, § 3.6, at 122.

264 *See* FELIX & WHITTEN, *supra* note 219, § 70, at 251 (arguing against "decoupling two laws of a state that are inextricably linked in a policy sense and should be applied together"); WEINTRAUB, *supra* note 227, §§ 3.4–.5.

then prevailing, unless the foreign alteration was avowedly prospective in effect.

4. *Effect on Original Jurisdiction*

Although plaintiffs do not have to, and most often do not, specify the applicable law,[265] the switch from adoption to application means that now a plaintiff can assert a claim directly on sister-state or foreign-nation law. In state courts of general jurisdiction, such a claim presents little theoretical problem.[266] In federal courts, such a claim would obviously not support federal question jurisdiction. But a plaintiff could bring it under supplemental jurisdiction pendent to a federal question claim or under diversity or alienage jurisdiction.[267] Federal jurisdiction does not require a nonfederal claim to arise under local state law. The plaintiff would simply state the nonfederal claim in the ordinary way and give notice under Rule 44.1 if foreign-nation law was the basis of the claim.

A subtlety undiscussed elsewhere is which law would be choosing to apply the sister-state or foreign-nation law on which the plaintiff bases the suit. It would be the forum state's choice-of-law rules. Even for supplemental jurisdiction, the same is presumably true. Although the supplemental claim has no connection to the forum state's law, the federal court should be conforming to what would be the forum state's result.[268]

The subtlety becomes more subtle when one hypothesizes a federal statute properly giving federal question jurisdiction but not providing the rule of decision, perhaps similar but not identical to the Alien Tort Statute.[269] What if the plaintiff invokes the federal jurisdiction but permissibly sues under a

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265 *See* 2 MOORE ET AL., *supra* note 101, § 8.04[3].

266 *See, e.g.*, N.Y. C.P.L.R. 3016(e) (MCKINNEY 2017) ("Where a cause of action or defense is based upon the law of a foreign country or its political subdivision, the substance of the foreign law relied upon shall be stated.").

267 *See* Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 892–93 (2011).

268 *See* Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

269 *See* 28 U.S.C. § 1350 (2012). Because of various case-imposed limitations, this problem is unlikely to arise under the Alien Tort Statute itself. *E.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013) (holding that the Alien Tort Statute does not apply to "violations of the law of nations occurring outside the United States"); Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004) (requiring that claims brought under the Alien Tort Statute emanate from violations of "well defined" norms of "customary international law").

foreign nation's especially favorable law?[270] The argument that the federal court should then make its own choice of law becomes stronger, but still maybe not strong enough to justify rejecting the forum state's conflicts law.[271] Entertaining the foreign-law claim remains in the nature of jurisdiction supplemental to a possible federal question claim.

5. *Effect on Appellate Jurisdiction*

The Supreme Court can review any questions, state or federal or foreign, that arise in the lower federal courts.[272] Adoption versus application has no effect.

If a state were to adopt sister-state or foreign-nation law, the Supreme Court would have no appellate jurisdiction over a state court's treatment of related issues.[273] If a state were instead to decide to apply sister-state or foreign-nation law, the state case would likewise present no federal question supporting the Supreme Court's appellate jurisdiction; in the new era of applying foreign law, no argument could prevail that the applied foreign law had somehow become federal law. By contrast, for federally adopted or applied law from a state or foreign nation that raises issues in state court, the Supreme Court would have appellate jurisdiction as usual.

IV
INTERNATIONAL LAW FOR U.S. ACTORS

Compared to foreign law, the situation of international law exhibits a reversed pattern. People are used to thinking about international law in terms of adoption versus application. But America has seen a shift from application to adoption, rather than vice versa.

In the international law arena, the debate is phrased as the choice between monist (application) and dualist (adoption) approaches. The monist/dualist distinction is not altogether

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270 *See* Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980) (envisaging that Paraguayan law would apply and observing that the defendant "confuses the question of federal jurisdiction under the Alien Tort Statute, which requires consideration of the law of nations, with the issue of the choice of law to be applied, which will be addressed at a later stage in the proceedings").

271 *Cf.* Griffin v. McCoach, 313 U.S. 498 (1941) (holding that *Klaxon* applies even when the forum state court could not have entertained the action, such as a statutory interpleader case).

272 *See* 28 U.S.C. § 1254 (2012).

273 *See* 28 U.S.C. § 1257 (2012). Of course, a federal question could arise in connection with applying the foreign law, such as the obligation to give full faith and credit to a sister-state law.

clear in theory, and practices tend to be mixed and flexible.[274] Moreover, some consider the debate merely to be a matter of civil law's "high theory" located on "the glacial uplands of juristic abstraction."[275]

Nonetheless, something is here to be learned. In the old days, monism saw international law as applying of its own force. The general principles of international law, at least, were considered part of natural law into the nineteenth century.[276] Once natural law lost its bindingness, however, dualism was destined to prevail broadly. International law today mostly has a part to play only after being adopted by national law.

A. Application of International Law

From natural law and from universalist notions of a world society comes monism. A monist state directly applies international law qua international law.[277] The monist view is that international law is already part of the nation's one legal order. A party can invoke and a judge can apply international law, just as if it were national law. International law thus does not need to be translated into national law. It has effect automatically. Taking the appropriate steps under national law to join an international treaty immediately incorporates the treaty into the monist nation's law. Customary international law and general principles of international law are treated as part of national law as well, although it could be that a monist nation treats treaties and other international law differently.[278]

Monism does not necessarily imply that international law is the supreme law, even if many casual commentators assume it does. That is, supremacy is not a marker of the monist/dualist distinction correctly conceived. Some monist states,

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274 *See* Lando Kirchmair, *The Theory of the Law Creators' Circle: Re-conceptualizing the Monism-Dualism-Pluralism Debate*, 17 GERMAN L.J. 179, 180 (2016) ("Current challenges . . . overburden these out-dated theories."); *cf.* Gib van Ert, *Dubious Dualism: The Reception of International Law in Canada*, 44 VAL. U. L. REV. 927, 928 (2010) ("Canada is neither dualist nor monist, but a hybrid of the two models.").

275 JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 48, 50 (8th ed. 2012).

276 *See* Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUR. J. INT'L L. 269, 270–73 (2001); William J. Moon, *The Original Meaning of the Law of Nations*, 56 VA. J. INT'L L. 51, 69–72 (2016).

277 *See* CRAWFORD, *supra* note 275, at 48–49.

278 *See id.* at 55–56; Antonios Tzanakopoulos, *Domestic Judicial Lawmaking*, *in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING 222, 227–28 (Catherine Brölmann & Yannick Radi eds., 2016).

like the Netherlands,[279] do view international law as supreme. There a judge could declare a national provision invalid because it contradicts international law. Contradictory national law is null and void, whether it pre- or post-dates the international law, and even if it is constitutional in stature. Other monist states, like Germany,[280] allow a later national statute to override international law. For example, treaties there have the same effect as legislation and, by the principle of *lex posterior derogat legi priori*, take precedence over legislation enacted prior to their ratification but not over legislation enacted after their ratification.

Neither does monism require a dinosaurian jurisprudence. Rather than resurrecting natural law, one can turn to the modern idea of global constitutionalism.[281] Compared to natural law, this modern turn better poses the right questions, even if its answers are just as subjective. Global constitutionalism's idea would be that the peoples of the world, acting as the global constituent powers, somehow consented in the creation of certain norms, which constitute international law and bind the nonconsenting nation states.

Some commentators see the application of European Union regulations by the member states as an example of application of international law, somewhat in the monist tradition.[282] A regulation is an EU legal act that becomes immediately enforceable as law in all member states. By contrast, one might more shakily view EU directives as acting in the dualist tradition. A directive is an EU legal act that sets out a goal that all EU countries must implement by devising their own laws.

But EU law is a poor example of international law. True, the acceptance of EU law by the member states and their peoples resembles the acceptance of international law by treaty, with each member state applying or adopting the original

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279 *See* CONSTANTIJN A.J.M. KORTMANN & PAUL P.T. BOVEND'EERT, DUTCH CONSTITUTIONAL LAW ¶¶ 442–47 (2000); PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 67–68 (7th ed. 1997).

280 *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 164 (3d ed. 2013); MALANCZUK, *supra* note 279, at 67, 70.

281 *See generally* JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009) (reassessing the evolution of international law as a process of constitutionalization and providing a sketch of what a constitutionalized world order could look like).

282 *E.g.*, JÜRGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION 36–37 (Ciaran Cronin trans., 2012); Neil Walker, *Post-Constituent Constitutionalism? The Case of the European Union*, *in* THE PARADOX OF CONSTITUTIONALISM 247 (Martin Loughlin & Neil Walker eds., 2007).

agreement and the subsequent EU law. Nonetheless, the current situation in Europe is better viewed as an application of EU law by the member states in a manner similar to U.S. states' application of federal law under the reverse-*Erie* doctrine.[283] Each member state has agreed to apply EU law, which is supreme.

A more fruitful example of the application of international law in the monist tradition is the treatment of international law by the EU itself. At least compared to the United States, the EU's own tradition is more monist:

> Even while it has imposed conditions for the reception of international treaties into the EU legal order, the European Court nevertheless has continued to declare that international treaties concluded by the EU or to which the EU has succeeded are 'an integral part' of EU law. Further, customary international law is regularly interpreted and applied by the Court as an 'integral part' of EU law.
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> . . . The [US] Supreme Court links the internalization of international law to congressional intent, whereas the CJEU links it to a broader obligation on the EU to comply with international law. The Supreme Court's judicial discourse on the internalization of international law fits with a political discourse on US sovereignty and independence within which international law is understood as a voluntarily accepted instrument of US law and policy, while the CJEU's fits with an official EU discourse of the EU as a committed adherent to and promoter of international law.[284]

The EU thus spoke in monist terms early on. But one must update that statement. More recently, the CJEU has started to take an approach increasingly similar to the U.S. Supreme Court's dualist approach.[285]

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283 *See* Kevin M. Clermont, Book Review, 57 AM. J. COMP. L. 258 (2009); s*ee also* THE EUROPEAN UNION AND NATIONAL CIVIL PROCEDURE (Anna Nylund & Bart Krans eds., 2016) (collecting articles that discuss the ways increasing Europeanization has influenced the civil procedure systems of various EU members).

284 Gráinne de Búrca, *Internalization of International Law by the CJEU and the US Supreme Court*, 13 INT'L J. CONST. L. 987, 1005 (2015) (footnotes omitted).

285 *See id.* at 1003–04; Katja S. Ziegler, *Beyond Pluralism and Autonomy: Systemic Harmonization as a Paradigm for the Interaction of EU Law and International Law*, 35 Y.B. EUR. L. 667 (2016) (arguing for systematic harmonization as an antidote for the CJEU's increasing stress on autonomy).

B. Adoption of International Law

Today dualism is the more common approach.[286] For examples, it prevails in the United Kingdom[287] and the United States.[288] Dualists emphasize the difference between national and international law by drawing on notions of positivism and sovereignty. They require the adoption of international law into national law.[289] Without this adoption, international law does not exist as law. To accept international law as binding without adoption would involve too direct an assault on positivism and too great a sacrifice of sovereignty.

Accordingly, under dualism, national judges never apply international law. They apply only national law, which may have adopted international law:

> International law as such can confer no rights cognizable in the municipal Courts. It is only in so far as the rules of international law are recognized as included in the rules of the municipal law that they are allowed in the municipal Courts to give rise to rights or obligations.[290]

If one wants international law to bind of its own force, or to bind after adoption is withdrawn, one must resort to some residue of monism. Thus, few in the United States argue that international law applies here.[291] Indeed, not many push adopting it when it is contrary to U.S. law or even to U.S. interests.

Here, adoption only "occurs when an international norm is incorporated into the domestic legal system and becomes domestic law through executive action, legislative action, judicial interpretation, or some combination of the three."[292] First,

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286 *See* MARK WESTON JANIS, INTERNATIONAL LAW 87 (7th ed. 2016).

287 *See* MALANCZUK, *supra* note 279, at 69.

288 *See* Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988) (describing our "dualist jurisprudence"); JANIS, *supra* note 286, at 88.

289 *See* CRAWFORD, *supra* note 275, at 48.

290 Commercial & Estates Co. of Egypt v. Bd. of Trade, [1925] 1 KB 271 (CA) 295.

291 *See, e.g.*, Young, *supra* note 229, at 34 n.41 (arguing that, in the United States, "international law never applied 'of its own force'"). *But see* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561–62 (1984) ("Unlike federal common law, customary international law is not made and developed by the federal courts independently and in the exercise of their own law-making judgment. In a real sense federal courts *find* international law rather than make it . . . ." (footnote omitted)).

292 Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 642 (1998); *see* Mark A. Pollack, *Who Supports International Law, and Why?: The United States, the European Union, and the International Legal Order*, 13 INT'L J. CONST. L. 873, 882 (2015).

treaties are a way to adopt international law into U.S. law. Unlike executive agreements, which are adopted by the executive branch, treaties do not automatically come into effect upon signing. Treaties need to be adopted by Congress, sometimes merely by ratification but usually also by implementing legislation.[293] A later federal statute can override an executive agreement or a treaty.[294] Second, the legislature can adopt international law. But of course a later statute can override that international law. Third, American courts can adopt international law, either expressly or through interpretation of already adopted international law.[295] Courts will not normally adopt international law that is contrary to local law or interests, and later local law can override adopted international law.[296] In sum, executive agreements, treaties, customary international law, and probably even general principles of international law govern only to the extent that domestic lawmakers choose to adopt them.[297]

Another way to express the idea of adoption is that the binding effect of international law under dualism results only from and to the extent of national consent.[298] Consent, or

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293 *See* Medellín v. Texas, 552 U.S. 491, 504–06 (2008); CHEMERINSKY, *supra* note 145, § 3.6.1, at 291–93; DAVID L. SLOSS, THE DEATH OF TREATY SUPREMACY (2016).

294 *See* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 320 (1992).

295 *See, e.g.*, Water Splash, Inc. v. Menon, 137 S. Ct. 1504 (2017) (holding that the Hague Service Convention did not prohibit service of process by mail, looking in part to the Convention's subsequent interpretations).

296 *See* ROBERT KOLB, THEORY OF INTERNATIONAL LAW 180 (2016) ("In reality, municipal organs apply municipal law first and foremost, and are more sensitive to the interests of their State than to remote or sometimes lofty international interests.").

297 *See Medellín*, 552 U.S. at 520–21; Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 935–36 (D.C. Cir. 1988). Courts can look to international law in connection with various so-called interpretive incorporation techniques, such as by looking at unratified international human rights treaties in interpreting national law. But this use is a weaker effect of international law, not a form of application or even adoption. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (AM. LAW INST. 1987); JANIS, *supra* note 286, at 117–19; *cf.* Tzanakopoulos, *supra* note 278, at 227–29 (discussing other weak effects of international law on domestic law, such as an implicit feedback loop between international law and the general principles that a court invokes); *supra* text accompanying note 174. *But see* Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007) (discussing a judicial shift to monism with respect to international human rights treaties).

298 *See* Clayton P. Gillette & Steven D. Walt, *Judicial Refusal to Apply Treaty Law: Domestic Law Limitations on the CISG's Application*, 22 UNIFORM L. REV. 452 (2017); Hall, *supra* note 276, at 282–84; *cf.* Wouter G. Werner, *State Consent as Foundational Myth*, *in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNA-

voluntarism, is a powerful notion. It can provide a route for a dualist state to assume some of the trappings of monism, while remaining essentially dualist. First, a dualist state could revocably consent to a delegation of lawmaking power to international authorities.[299] The state could thereby enact a rule providing that changes in international law will have automatic effect. Second, the dualist state could revocably consent even to international law being supreme over the remainder of national law. Nonsupremacy is not a marker of the dualist/monist boundary line.

C. Practical Implications

The differences between monist (application) and dualist (adoption) approaches certainly would affect how one conceives of international law. Is it a real thing already applicable locally or is it more a set of ideas and norms that the local law can draw on? Take for example Hans Kelsen, the most prominent theorist of monism.[300] For him, "[i]nternational and national law form a single system of norms because they receive their validity from the same source," which he called the *Grundnorm*.[301] So for him, international law should apply of its own force, co-equal with national law.

If that difference seems a bit lofty, there is also the obvious difference that dualism requires the extra step of the national law incorporating international law. The nation must expressly accept the international provision. But this difference may be more formal than real. Even a monist state must take some steps to put an executive agreement or a treaty into force. Likewise, the monist legislature may enact and the monist court may enforce the international law, with the only real difference from dualism being that it views itself as applying rather than adopting international law. In other words, this difference reduces to how the state conceives of international law as a matter of theory.

Accordingly, some commentators consider the monism/dualism debate as a bit of outdated theory that is not terribly important anymore. They are willing to leave the debate up in

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TIONAL LAWMAKING 13 (Catherine Brölmann & Yannick Radi eds., 2016) (stressing the limits of consent as the foundational idea for all of international law).

299 *See* Dorf, *supra* note 16, at 105–06; Tzanakopoulos, *supra* note 278, at 227 ("[I]t is the domestic legal system that regulates the reception of international law into domestic law, even if it does so in an international law-friendly manner . . . .").

300 *See* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 553–88 (Robert W. Tucker ed., 2d ed. 1966).

301 CRAWFORD, *supra* note 275, at 49.

the air. "It is more useful to leave this dogmatic dispute aside" and look to practice.[302] They end up in a place like this:

> In fact legal systems are experienced by those who work within them as having relative autonomy (how much autonomy depends on the power and disposition of each system, and varies over time). The only theory which can adequately account for that fact is some form of pluralism. . . . [E]ach system reserves to itself the authority to determine for the time being the extent and terms of interpenetration of laws . . . .[303]

Yet, how the state conceives of international law can have real effect. For example, customary international law gets established by showing (1) commonly established state practice and (2) the states' sense that they are bound by the law (*opinio juris*).[304] The states would have to be applying the custom, rather than adopting it, to satisfy the requirement of *opinio juris*. So the conception of the law affects the generation of international law.

The difference between applying and adopting in the three other settings surveyed above proved to have practical effects. It should be worth comparably running through the other potential practical differences if international law were applied rather than adopted.

1. *Effect on Choice of Law in Federal Court*

Adoption versus application of international law will affect the degree of deference to international authorities in determining the content of the international law. But the distinction will not have a direct effect on federalism. On the one hand, on issues governed by state law under *Erie*, a federal court would follow whatever the state would do with respect to international law. On the other hand, if federal law governs, say, on a federal claim, then federal law would turn to international law whenever deemed appropriate by federal authority. Both propositions hold true whether the state or federal actor was adopting or applying the international law.

Of course, the split between state and federal law in the realm of foreign relations is a difficult, complicated, and odd one. Although there is considerable federal control over this

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302 MALANCZUK, *supra* note 279, at 64.

303 CRAWFORD, *supra* note 275, at 50 (footnote omitted).

304 *See* JANIS, *supra* note 286, at 48–50.

realm,[305] the states are certainly not excluded from international matters.[306] Indeed, an argument for dualism in the United States is that the federalism situation is so confusing that we should require affirmative *adoption* before international law comes to govern on the state or the federal level.

Even where federal law should govern after an *Erie/Clearfield* analysis, there may be a separation-of-powers debate as to whether it is for a federal court to act as lawmaker by adopting international law.[307] Regardless, today in the United States, it is only adoption that is being argued about. The argument is not over whether the federal court should decide that international law applies by its own force, but only over

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305 *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423–24 (1964) (adopting the act-of-state doctrine as a matter of federal common law); 19 WRIGHT ET AL., *supra* note 102, § 4517, at 781–86 (describing the unclear extent of federal power).

306 *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (holding that state law can govern horizontal choice of law); John Norton Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 265 (saying that state law can govern reciprocity in recognition of foreign-nation judgments). *But cf.* Daniel C.K. Chow, *Limiting* Erie *in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165 (1988) (arguing against the rule that state law can govern international choice of law); John D. Brummett, Jr., Note, *The Preclusive Effect of Foreign-Country Judgments in the United States and Federal Choice of Law: The Role of the* Erie *Doctrine Reassessed*, 33 N.Y. L. SCH. L. REV. 83 (1988) (arguing against the rule that state law can govern recognition of foreign-nation judgments).

307 *See generally* FALLON ET AL., *supra* note 50, at 702–22 (discussing the issues surrounding judicial adoption of international law). The attack on the prevailing view of the federal courts' power to adopt international law as federal common law is led by Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing against status of customary international law as federal common law). They base their argument on the implications of *Erie* with regard to the federal courts' power to create federal law without congressional authorization. I disagree on their reading of *Erie* and on their reading of the many cases incorporating customary international law into federal law. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 628 (2006) (shaping law of war); Sosa v. Alvarez-Machain, 542 U.S. 692, 724–28 (2004) (upholding federal courts' power to recognize certain claims under the law of nations as federal common law); Hamdi v. Rumsfeld, 542 U.S. 507, 520–21 (2004) (plurality opinion) (shaping law of war); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 reporters' note 3 (AM. LAW INST. 1987); FALLON ET AL., *supra* note 50, at 714–15; William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. FORUM 19 (2007) (arguing against a view of positivism that would require adoption by a political branch); *cf.* Young, *supra* note 229, at 34–35 (arguing that federal courts can adopt customary international law, similarly to how they apply foreign law). Also, their approach would make it impossible for federal courts to formulate federal choice-of-law rules for federal question cases and much other federal common law. The federal courts can properly adopt international law as part of the pattern of U.S. courts looking to general law to make common law. *See* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006).

the extent to which a federal court on its own can adopt international law as federal common law.

2. *Effect on Choice of Law in State Court*

Similarly, adoption versus application of international law affects the degree of deference to international authorities by state courts. But the distinction does not have a direct effect on federalism's call for the proper line between state and federal law in the state courts. State courts will look to federal law sometimes under reverse-*Erie*. But their behavior will be unaffected by the adoption/application distinction.

3. *Modifiability of Other Sovereign's Law*

Under this heading—the nation's creation of exceptions that allow modifying or ignoring international law—is where the biggest difference between adopting and applying should play out. National interests can much more readily override international law if the legal actor sees international law as merely something possibly to be adopted, rather than as applying of its own force. Admittedly, any nation's lawmakers would be able to find a way for its interests to override international law, except perhaps in the purest monist regime. But everywhere the difference between application and adoption would have a real effect in the national courts. If international law already applies, the court would have to treat it as part of the law of the land. If the court were instead considering whether to adopt international law, then contrary local law and interests could defeat the adoption at the outset. Given the dualist jurisprudence in the United States,[308] we would not expect here, nor do we see, a great subservience to international law[309] or to decisions of international tribunals.[310]

The switch from application to adoption in U.S. jurisprudence might also be felt in connection with how to handle an internationally generated correction, clarification, constriction, or change of international law while an appeal in an American case is pending. Because the American court is adopting inter-

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308 *See* Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988).

309 *See* David H. Moore, *Constitutional Commitment to International Law Compliance?*, 102 VA. L. REV. 367, 368 (2016) (arguing that constitutional history supports "national discretion to violate international law"). *But see* Jordan J. Paust, *Actual Commitment to Compliance with International Law and Subsequent Supreme Court Opinions: A Reply to Professor Moore*, 39 HOUS. J. INT'L L. 57 (2017) (questioning the existence of an early historical basis for the current approach).

310 *See* Medellín v. Texas, 552 U.S. 491, 520–21 (2008).

national law, it is hard to imagine that the supervening alteration in adopted law would affect the appeal's outcome. No case law exists on the point, however. The fact is that the monism/dualism debate seems not to have attracted the attention of American courts.[311]

4. *Effect on Original Jurisdiction*

The switch from application to adoption affects original jurisdiction. In a dualist country like the United States, a party could not found original jurisdiction directly on international law.[312] But given state or federal law adopting international law, original jurisdiction could lie under the usual rules for state and federal claims. In state courts of general jurisdiction, such a claim presents little theoretical problem. In federal courts, a claim based on federally adopted international law would support federal question jurisdiction.[313] Thus, jurisdiction for a federal claim under the Alien Tort Statute[314] exists by virtue of the federal common law adopting the law of nations.[315]

5. *Effect on Appellate Jurisdiction*

The switch from application to adoption affects appellate jurisdiction in a similar way. The Supreme Court can review any questions, state or federal, that arise in the lower federal courts.[316] Federally adopted international law will present a federal question supporting the Supreme Court's appellate jurisdiction over state courts.[317]

D. Juristic Pluralism Revisited

As already suggested,[318] adopting vs. applying another source of law expresses the local sovereign's approach to a

311 The only American case to have employed the monist and dualist terminology is *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988).

312 *See, e.g.*, Kadic v. Karadžić, 70 F.3d 232, 238, 246 (2d Cir. 1995) (indicating that a suit for international law violations must rest on federal law that adopts the international law).

313 *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 62–70 (5th ed. 2011).

314 *See* 28 U.S.C. § 1350 (2012).

315 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724–28 (2004) (upholding federal courts' power to recognize certain claims under the law of nations as federal common law).

316 *See* 28 U.S.C. § 1254 (2012).

317 *See* 28 U.S.C. § 1257 (2012).

318 *See supra* text accompanying note 31.

pluralist world. Does all law come from the local sovereign as a single validating source or do multiple sources of law have a claim to governing human behavior?

Pluralism posits multiple legal systems having some force within one population or area. The theory emerged through study of colonial societies, but now operates in a much wider and more fluid realm.[319] Once contemplated, and then accepted as a fact on the ground, the theory will tend to undermine the notion of law as embodying one formally positive legal order or even one coherently unified legal system.[320]

Federalism, in a sense, is the ultimate in juristic pluralism.[321] The definition of federalism is a governmental system by which its people live under the authority of more than one sovereign. "The Framers split the atom of sovereignty."[322] To maintain such a system, there must be some zone of constitutionally entrenched decentralized power, where the constitutive sovereign can act without being subject to the central sovereign's override. There must also be a zone where the central sovereign reigns supreme. It is those zones that permit us to speak of there being more than one sovereign in place. As a consequence, application by each sovereign of the co-sovereign's law has a big role to play. Still, a voluntary role for adoption remains, deployed in the spirit of cooperative federalism.

Extending the theory of this national pluralism to global pluralism,[323] we first encounter horizontal choice of law. Adoption worked as a means of recognizing foreign law, while absorbing it into the local law as the single validating source of law. The modern move to application represents the acknowledgment that foreign law has a claim to govern directly. In the United States, we see a growing acceptance of a pluralist world, as we have evolved from adoption to application of foreign law.

Coming to the subject of international law, the United States seems to have taken a different path, one that goes toward rather than away from state-centered jurisprudence. In

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319 *See* Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 381–86 (2008).

320 *See* Margaret Davies, *Legal Pluralism*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 805, 806–09 (Peter Cane & Herbert M. Kritzer eds., 2010).

321 *See id.* at 818 (defining juristic, or weak, pluralism as the situation where a statist authority acknowledges another normative system only if it clearly is "law" already).

322 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

323 *See* Tamanaha, *supra* note 319, at 386–89.

the old days, monist American courts applied international law, while today the solidly dualist courts require adoption of international law. That evolution looks like a divergence from the path of horizontal choice of law. However, this divergence of international law is an illusion.

In the very old days of our system—the days of custom, church, guilds, boroughs, merchants, lords, and kings—a jumble of pluralism was the internal norm.[324] Only with the rise of the nation-state in seventeenth-century Western Europe did statist thinking emerge, along with its consolidation of law.[325] Foreign law was often left outside the ramparts, despite any justice values that called for recognizing it. Later, national self-interest in reciprocally recognizing each other's laws became apparent.[326] Increasing legal instrumentalism in the face of increasing interactions with other countries encouraged a more pluralist outlook on horizontal choice of law. This outlook countenanced adopting other sovereigns' laws and, much later, applying those laws.

International law, however, could initially weather the rise of nation-states by remaining internal within each nation-state's own law. Natural law and universalism enshrined it and called for it to apply directly. That early practice might look pluralist to us, yet in fact the practice was not at all pluralist. The nation-state was applying its own law. The very term "monism" itself belies pluralism and proclaims statism. Later, as the theoretical foundation of monism weakened in the nineteenth century, sacrifice of sovereignty at the altar of internationalism did not obviously serve self-interest. Dualism and its adoption of law seemed more than enough of a generous concession. Only still later, the disasters of the twentieth century perhaps induced us to see a possible role for the United States as a leader in the embrace of internationalism, a role that might serve self-interest and more surely would serve humanity.[327]

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324 *See* Davies, *supra* note 320, at 807–08.

325 *See* Tamanaha, *supra* note 319, at 377–81. "The key characteristic" that non-statist law "lost over time was their former, equal standing and autonomous *legal* status" as "independently applicable bodies of *law*." *Id.* at 381.

326 *See* Timothy Endicott, *Comity Among Authorities*, 68 CURRENT LEGAL PROBS. 1 (2015); *cf.* Michael Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 MELB. U. L. REV. 416 (1999) (analyzing recognition as an iterative prisoner's dilemma game).

327 *See* SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 24–30 (2d ed. 2012) (tracing the history of U.S. interaction with international law).

Thus, the motion toward dualism did not present a rejection of pluralist application of law, but only a rejection of monism. Because the discarding of natural law and universalism awaited the nineteenth century, and because U.S. aspirations for internationalism awaited the twentieth century, the youthful idea of dualism and its adoption of international law remain in place. But perhaps today's dualism is a waystation on the road to application of international law. The future might see, once again, more application of international law, and this time as a true expression of pluralism.[328]

E. Treatment of Nonsovereign Law

An arguable reason to follow a dualist approach is that no ordinary sovereign stands behind international law. As a result, some more traditional sovereign needs to adopt it for it to have force. But there is in fact already a sovereign of sorts behind international law. The international community of nations, deciding on legal norms, acts as a quasi-sovereign.[329]

Moreover, the absence of a usual sovereign behind law is not determinative. Native Americans have a complicated sort of sovereignty.[330] Nonetheless, their laws receive treatment like a U.S. sister state's law for choice-of-law purposes.[331] That is, federal and state courts *apply* tribal law.[332]

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328 *See* Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 889 (1988) (observing that the pluralist "perspective requires a shift away from an essentialist definition of law to an historical understanding since any situation of legal pluralism develops over time through the dialectic between legal systems, each of which both constitutes and reconstitutes the other in some way").

329 *See* JENS DAVID OHLIN, THE ASSAULT ON INTERNATIONAL LAW 24 (2015) (looking to "the general will of the *world's* peoples, mediated through the decision-making procedure of each state as it participates in the formation of international legal rules"); Stephan, *supra* note 24, at 4–5 & n.12.

330 *See* Alex Tallchief Skibine, *Dualism and the Dialogic of Incorporation in Federal Indian Law*, 119 HARV. L. REV. FORUM 28, 30 (2005) ("In previous writings, I have argued that one of the reasons for the Court's anti-tribal decisions was its refusal to include tribes in its federalism jurisprudence under a third sphere of sovereignty.").

331 *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.06[2], at 656 (Nell Jessup Newton ed., 2012) ("Application of choice-of-law principles will sometimes lead state and federal courts to apply tribal law to disputes arising in Indian country."); *cf. id.* § 7.06[1] (describing similar choice of law by tribal courts).

332 *See* Jones v. Meehan, 175 U.S. 1, 29–32 (1899) (applying tribal probate law); Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 AM. U. L. REV. 1627 (2006) (arguing for acceptance of applying tribal law); Craig Smith, Comment, *Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions Revisited*, 98 CALIF. L. REV. 1393 (2010) (arguing for the position that tribes are "territories" within the federal full faith and credit statute); *cf., e.g.*, Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1903(2), 1911(d) (2012) (applying tribal law by statute).

Still, the absence of a usual sovereign means that the dualist analysis of international law easily carries over to "nonsovereign" law, such as custom or religion. Dualist analysis extends as well to matter that further stretches the concept of "law,"[333] such as private regulatory codes.[334] Therefore, whatever we include as nonsovereign law (excluding international and tribal law), it is likely that American law would at most *adopt* it in a dualist way, and not apply it.[335]

Occasional pluralists push back here against such "legal centralism," arguing that nonsovereign law could apply of its own force.[336] Oftentimes their view seems unrealistic or, at the least, leads to conceptual problems.[337] In other words, as long as adoption or application of law is being directed by a statist authority, championing the application of nonsovereign law as opposed to its adoption normally is not a promising theoretical avenue to follow.[338] Yet sometimes a sovereign's treatment of nonsovereign law does look a lot like application. An example, one with which this Article began, might be a sovereign's following the bar's rules of professional conduct: some sovereigns appear to have created an internal directive that the bar's rules actually govern.[339]

CONCLUSION

The basic distinction between applying and adopting another sovereign's law is of primary importance to a legal system's rules for external recognition of another legal order. No doubt, differences exist as to how application and adoption work out in federal and state relations, on the one hand, and in the settings of horizontal choice of law and international law, on the other hand. Yet in the main, the distinction's signifi-

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333 *See* Michaels, *supra* note 28, at 95–97; *cf.* Frank J. Garcia, *Law and Globalization: Conceptual Issues* (TLI *Think!* Paper, No. 33/2016, 2016), http://ssrn.com/abstract=2834299 [https://perma.cc/925Z-MXWS] (considering "transnational law" and "global law").

334 *See* Michaels, *supra* note 28, at 92–93; Frederick Schauer, *Law's Boundaries*, 131 HARV. L. REV. (forthcoming 2017–2018), http://ssrn.com/abstract=2871723 [https://perma.cc/8J96-B7DR].

335 *See* Nelson, *supra* note 307, at 505.

336 *See* Griffiths, *supra* note 30, at 5–8.

337 *See* Michaels, *supra* note 28, at 97–99, 114–15.

338 *See* Tamanaha, *supra* note 319, at 411 ("State law is in a unique symbolic and institutional position that derives from the fact that it is *state* law—the state holds a unique (domestic and international) position in the contemporary political order.").

339 *See supra* text accompanying note 34.

cance holds regardless of the setting. Across the board, the distinction shapes our approach to a pluralist world.

First, in the *Erie* setting, for federal actors, a certain state's law can apply of its own force. By contrast, when federal law is to govern but there is no extant federal law, the federal actor may adopt state law as federal law, incorporating it by reference. The status of adoption carries with it all sorts of practical implications. The most obvious implications are that the federal lawmaker can let federal interests guide which state's law to adopt and how much of it to adopt.

Second, in the reverse-*Erie* setting, a state often must apply existing federal law under the command of the Supremacy Clause. This result may follow from preemption or from a federally imposed judicial-choice-of-law. By contrast, the state might choose to adopt federal law as state law even in the absence of such compulsion. A state statute might gratuitously incorporate federal tax definitions, for example. Here the consequences of adoption, as opposed to application, include that the federal courts will lack original jurisdiction to consider the matters of adopted federal law, even though the U.S. Supreme Court retains some appellate jurisdiction to review them.

Third, as to horizontal choice of law, over time the dominant U.S. approach evolved from adoption of the foreign law into local law, in the name of comity, to recognition that the foreign law had a claim to its own application, via some sort of pluralist impulse. One result of this move toward application was to constrain the power of the local court to override the foreign law, and another result was to empower the parties to sue and defend directly on the basis of the foreign law.

Fourth, as to the status of international law, the evolution appears to have gone in the opposite direction. Over time the dominant U.S. approach went from application of international law, in the name of natural law, to adoption of international law, via a positivist outlook. A result of this move toward adoption was to subordinate international law and so further subject it to national override.

The applying/adoption distinction emerges undeniably from a study of the federalism settings. When one searches for that distinction in the other settings of a sovereign's looking to another's law, one perceives a sharp drop in deference when going from current U.S. treatment of a foreign sovereign's law to our international-law/nonsovereign-law constructs. In fact, application and adoption do not have the exact same extent or

effect in all four settings. The dividing line between them can shift if not fade, and their binary implications can differ somewhat in each setting. On the ground, the binariness in the different effects of application/adoption is more pronounced in the *Erie* and reverse-*Erie* settings than in horizontal choice of law and especially in international law.

Still, throughout all the settings, a focus on the applying/adoption distinction clarifies the theory of external recognition. The distinction also makes the practical consequences that are already enshrined in doctrine—the federalist implications for federal and state courts, the bindingness of the other's law, and the local availability of original and appellate jurisdiction—much more comprehensible. The reason is that the essence of the distinction between application and adoption stays the same across settings. Application means recognizing that by its proper reach the other sovereign's law governs under its own force, while adoption means voluntary consultation of the other sovereign's law in formulating the local rule of decision for reasons of fairness, convenience, or other local policies. This essential distinction is the instructive one.