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INCORPORATED STATE LAW

Radha A. Pathak†

ABSTRACT

In the familiar case of Erie Railroad Co. v. Tompkins, the Supreme Court held that the Constitution forbade the federal courts from generating a body of general common law and required them instead to apply state substantive law when adjudicating many common-law causes of action. A rich body of scholarly literature and case law has developed to analyze the Erie doctrine and to guide federal courts in interpreting and applying state law when the litigants assert causes of action that have their source in state law (e.g., when a federal court is exercising diversity or supplemental jurisdiction). But those are not the only cases that call upon federal courts to apply state law; rather, state law is often connected to federal law in a way that necessitates its adjudication in federal court. Notably, federal courts must interpret and apply state law that has been incorporated into federal statutes and federal common law. Such “incorporated” state law has received little attention from scholars, but it should be of significant interest because it arises routinely, and the federal court applying incorporated state law is not bound by the Erie imperative to apply state law accurately. This Article seeks to focus attention on the subject of incorporated state law and to explore the potential challenges that it might present.

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INTRODUCTION

It has never been the case that the federal judiciary’s sole responsibility is to adjudicate questions of federal law. Federal courts did not enjoy general federal question jurisdiction until 1875, about eighty-six years after they came into existence. In contrast, the federal courts have always been empowered to adjudicate lawsuits between parties of diverse citizenship, even when no federal law is applicable. While the federal courts have come to be seen as essential

1 See Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470 (confering jurisdiction over civil suits “arising under the Constitution or laws of the United States” on “the circuit courts of the United States”); 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3561 (3d ed. 2008) (discussing federal question jurisdiction). Congress briefly conferred federal question jurisdiction on the federal courts in section 11 of the Midnight Judges Act, ch. 4, 2 Stat. 89, 92 (1801), but that grant was repealed one year later by section 1 of the Act of March 8, 1802, ch. 8, 2 Stat. 132, 132. 13D WRIGHT, MILLER, COOPER & FREER, supra, § 3561, n.5. The federal courts were created by the Judiciary Act of 1789, ch. 20, 1 Stat. 73. 13 WRIGHT, MILLER, COOPER & FREER, supra, § 3503 (describing the creation of the first federal courts, their organization, and the Judiciary Act of 1789).

2 In the Judiciary Act of 1789, Congress conferred federal jurisdiction over any lawsuit in which one party was a citizen of the state in which the suit was brought and another party was a citizen of another state, Ch. 20, § 11, 1 Stat. at 78; see also 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3602 (3d ed. 2009) (describing the jurisdiction conferred by the Judiciary Act of 1789). In the Judiciary Act of 1875, Congress conferred jurisdiction on suits between citizens of different states, or
to the enforcement of federal law, the exercise of diversity jurisdiction continues to be an important part of their caseload. In exercising this jurisdiction, the federal courts necessarily interpret and apply state law.

But federal courts routinely encounter state law even when enforcing federal law. For example, a litigant may argue that state law is preempted by federal law, violates the U.S. Constitution, or has been previously interpreted by a state court so as to bar collateral review of federal claims. All of these examples potentially require the federal courts to interpret and apply state law.

Much has been written about the interpretation and application of state law by the federal courts in these contexts. For example, rich academic literature and case law has developed to provide the federal courts with guidance in addressing state law in cases—such as those based on diversity jurisdiction—where litigants assert state-law claims. Similarly, much scholarship and litigation has been

“between citizens of a State and foreign states, citizens, or subjects,” regardless of whether the suit was brought in the home state of any of the parties, ch. 137, § 1, 18 Stat. at 470, and that requirement has never been resurrected. Wright, Miller & Cooper, supra, § 3602.  

3 See, e.g., Erwin Chemerinsky, Federal Jurisdiction § 5.2.1, at 265 (4th ed. 2003) (“The core of modern federal court jurisdiction is cases arising under the Constitution and laws of the United States. Termed federal question jurisdiction, these cases comprise the largest component of the federal courts’ docket and are widely viewed as the most important component of the federal courts’ workload.”).


5 See infra Part I.A (discussing state law that applies of its own force).

6 See infra Part I.B (discussing “antecedent” state law).


9 Such cases are not, of course, limited to those based on diversity jurisdiction. See infra
devoted to the complex issues presented when the federal courts must address questions of state law because their resolution will affect the adjudication of related questions of federal law.12

Comparatively little, however, has been written about the manner in which federal courts should address state law that is embedded within federal (nonconstitutional) law.13 That subject is the focus of this Article. This topic should be of significant interest because federal statutes and federal common law routinely (and in a wide range of subject areas) incorporate state law.14 And they do so for many purposes—for example, federal law may define a term with reference to state law;15 it may look to state law to provide a

notes 21–28 and accompanying text (discussing other types of cases, for example, ones in which supplemental jurisdiction is exercised).


13 The U.S. Constitution also incorporates state law. For example, the Contracts Clause, U.S. Const. art. 1, § 10, cl. 1, and the Takings Clause, U.S. Const. amend. V, incorporate state-law concepts of contracts and property, respectively. Constitutional incorporation of state law is beyond the scope of this Article.

procedural rule; or it may borrow from state law a substantive rule of decision.

This Article proceeds as follows. Part I rehearses the familiar instances where federal courts encounter state law. Part II contrasts these instances with circumstances in which federal (nonconstitutional) law borrows—i.e., incorporates—state law. Part III then identifies and explores the unintended consequences of existing doctrine regarding this incorporated state law.

I. FAMILIAR INSTANCES WHERE FEDERAL COURTS ENCOUNTER STATE LAW

A. State Law That Applies of Its Own Force (“Erie cases”)

Ever since the Supreme Court’s decision in *Erie Railroad Co. v. Tompkins*, federal courts have been required to apply state law in a large number of cases. While the precise holding of *Erie* is the subject of some debate, it is clear that, as a result of *Erie* and its progeny, the federal courts will often be required to apply state law because they lack the power to apply anything else. That is, in many situations, the source of law that governs liability in a federal court

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16 See, e.g., N. Star Steel Co. v. Thomas, 515 U.S. 29, 33 (1995) (explaining that federal courts routinely borrow state statutes of limitation for federal claims); Robertson v. Wegmann, 436 U.S. 584, 589–94 (1978) (holding that survival of a § 1983 action depends on borrowed state law); cf. 1 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 1.02, at 1–6 (3d ed. 2010) (“In 1872, Congress passed the so-called ‘Conformity Act,’ which required that federal district courts conform their procedure ‘as near as may be’ with that of the state in which the district was located.”).


18 304 U.S. 64 (1938).

will be a state sovereign. Put yet another way, state law will apply of its own force.\textsuperscript{20}

This category of cases is most easily associated with the exercise of federal diversity jurisdiction, which permits federal courts to adjudicate any lawsuit with complete diversity of citizenship and an amount in controversy exceeding $75,000.\textsuperscript{21} It also includes cases heard pursuant to jurisdictional statutes that require only minimal diversity of citizenship—e.g., the Class Action Fairness Act;\textsuperscript{22} the Multiparty, Multiforum Trial Jurisdiction Act;\textsuperscript{23} and the federal interpleader statute.\textsuperscript{24}

This category is not limited, however, to cases in which the federal adjudicatory power is ultimately based on the diversity or alienage clauses of Article III, Section 2.\textsuperscript{25} The exercise of supplemental jurisdiction permits federal courts to resolve state-law claims.\textsuperscript{26} Specific grants of federal question jurisdiction also sweep state-created causes of action within the federal judicial power—e.g., federal courts are permitted to hear any “civil proceedings” that are “related to” a bankruptcy case.\textsuperscript{27} And federal courts will sometimes have federal question jurisdiction over a state-law cause of action that has a federal issue embedded within it.\textsuperscript{28}

Before \textit{Erie}, the federal courts were permitted to craft their own common-law rules when adjudicating disputes in which no federal or

\textsuperscript{20} See, e.g., United States v. Little Lake Misere Land Co., 412 U.S. 580, 592–93 (1973) (using the phrase “state law govern[s] of its own force” to describe cases where \textit{Erie} requires the federal court to apply state law).


\textsuperscript{22} Id. § 1332(d).

\textsuperscript{23} Id. § 1369.

\textsuperscript{24} Id. § 1335.

\textsuperscript{25} U.S. \textit{CONST}. art. III, § 2, cl. 1, \textit{amended by} U.S. \textit{CONST}. amend. XI (“The judicial Power shall extend to all Cases, in Law and Equity, . . . to Controversies . . . between Citizens of different States, . . . and between . . . the Citizens [of a State], and foreign States, Citizens or Subjects.”).

\textsuperscript{26} See 28 U.S.C. § 1367. If a cause of action is part of the same “case or controversy” as a claim that falls within the federal court’s original jurisdiction, then the cause of action may be heard by the federal court, even if the claim could not be heard in federal court if it were asserted alone. \textit{Cf. Maternally Yours, Inc. v. Your Maternity Shop, Inc.}, 234 F.2d 538, 540 n.1, 543 (2d Cir. 1956) (holding that \textit{Erie} requires the application of state law to an unfair-competition claim of which the federal court had subject matter jurisdiction based on 28 U.S.C. § 1338(b), which “confers jurisdiction of ‘a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, or trade-mark laws’”).


\textsuperscript{28} See, e.g., Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg., 545 U.S. 308 (2005); Smith v. Kan. City Title & Trust Co., 255 U.S. 180 (1921).
state statute governed. The Rules of Decision Act required the federal courts to apply the “laws of the several states” as the “rules of decision” in the absence of federal law. But the Supreme Court in Swift v. Tyson interpreted the term “laws” to mean state statutes and state judicial opinions interpreting those statutes, as well as state judicial opinions concerning “real estate, and other matters immovable and intraterritorial in their nature and character.” Moreover, “laws” excluded state judicial opinions regarding legal issues “of a more general nature,” such as contract law or commercial law. Tort law also came within the purview of general law. As a result, when Harry Tompkins sued Erie Railroad Company after he was injured by a passing train, the federal trial court did not consider itself bound by the standard of liability that the Pennsylvania state court would have applied to the railroad’s conduct.

The facts of Erie are familiar: Tompkins was walking along a path that ran closely parallel to the railroad tracks. As the train passed him, he was struck by an object protruding from the train. He fell to the ground and his right arm was severed by the wheels of the train. According to the defendant-railroad, the Pennsylvania courts would have considered Tompkins to be a trespasser and hence entitled only to protection from the railroad’s willful and wanton misconduct. Other jurisdictions would have considered Tompkins to be a licensee and hence entitled to a standard of ordinary care.

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29 See, e.g., Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (holding that federal courts were free to develop federal common law), overruled by Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
30 Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.
32 Id. at 18.
33 Id.
34 Id. at 19.
35 See 19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4502 (2d ed. 1996) (discussing what “general law” was held to encompass).
36 See Erie, 304 U.S. at 69 (describing facts and suit in federal district court in New York); Tompkins v. Erie R.R. Co., 90 F.2d 603, 603–04 (2d Cir. 1937) (describing facts in more detail).
37 Erie, 304 U.S. at 70; Tompkins, 90 F.2d at 604.
38 Tompkins, 90 F.2d at 603–04 (describing the location of the accident in detail).
39 Id. at 604 (“[As the train passed Tompkins,] ‘a black object that looked like a door’ loomed up in front. Before he could even raise his hands, he was struck on the head and thrown to the ground in such a way that his right arm came under the wheels of the train.”).
40 Erie, 304 U.S. at 70; Tompkins, 90 F.2d at 604.
41 See Tompkins, 90 F.2d at 604 (citing cases from various jurisdictions in favor of its conclusion that Erie Railroad owed Tompkins a duty of reasonable care).
court adopted the ordinary-care approach. Cit ing Swift, the court of appeals affirmed: the proper standard of care to be exercised by a railroad was a question of general law. Thus the federal trial court was not required to determine the content of Pennsylvania law, but rather was permitted to “exercise [its] independent judgment” as to the issue.

The Supreme Court reversed, stating, “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.” It is clear today that the quoted sentence is not literally true—the U.S. Constitution, federal statutes, and state law are not the only three sources of law that a federal court is permitted to apply to resolve disputes. Even though “[t]here is no federal general common law,” there is some federal common law. But it is equally clear that the Supreme Court in Erie was denying the federal court’s power to craft a common-law rule to apply in Tompkins’s case against Erie Railroad. And since Erie, there have been two lines of cases in which the Supreme Court has grappled with the question of whether the federal courts are required to apply state law because they lack the power to apply anything else. That is, there are two lines of cases in which the federal courts have been prohibited from crafting common-law rules to apply to a situation where no other source of federal law applies.

The first line of cases is the Erie line: for example, Guaranty Trust Co. v. York, Byrd v. Blue Ridge Rural Electric Cooperative, Inc., Hanna v. Plumer, and Gasperini v. Center for Humanities, Inc. York and Gasperini required the federal courts to apply state law: the

42. See Erie, 304 U.S. at 70 (noting that, in response to the defendant’s argument that under Pennsylvania law Tompkins should be considered a trespasser, “[t]he trial judge refused to rule that the applicable law precluded recovery”); Tompkins, 90 F.2d at 604 (“[U]pon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law.” (citing Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368 (1893); Redfield v. N.Y. Cent. R.R. Co., 83 F.2d 62, 65 (8th Cir. 1936); Cole v. Pa. R.R. Co., 43 F.2d 953 (2d Cir. 1930))).

43. Tompkins, 90 F.2d at 604.

44. Erie, 304 U.S. at 80.

45. Id. at 78.

46. Id.

47. 326 U.S. 99 (1945).


49. 380 U.S. 460, 465–68 (1965) (explaining that, even if Federal Rule of Civil Procedure 4 did not govern the issue at hand, the federal court would be required to apply state rules of service only if doing otherwise would lead to “forum-shopping” or “inequitable administration of the laws”).

state statute of limitations\textsuperscript{51} and the state standard for determining whether a jury’s award of damages was excessive,\textsuperscript{52} respectively. More specifically, the federal courts were required to apply state law \textit{instead of} federal common law: the federal common law of laches and the federal “shocks the conscience” standard for determining whether a jury verdict was excessive. Even cases like \textit{Walker v. Armco Steel Corp.}\textsuperscript{53} can be viewed in this way: the Court, after determining that no Federal Rule of Civil Procedure was applicable, further held—only after a consideration of the “twin aims” of \textit{Erie}\textemdash that the federal court was required to apply state tolling law.\textsuperscript{54} Implicit in this analysis is the conclusion that the federal court was not empowered in that particular case to craft a common-law rule regarding the tolling of the statute of limitations.

The second relevant line of cases concerns federal common law: cases such as \textit{Bank of America National Trust and Savings Ass’n v. Parnell}\textsuperscript{55} and \textit{Miree v. DeKalb County}.\textsuperscript{56} In these cases, the Supreme Court found that the federal courts lacked the authority to craft a common-law rule.\textsuperscript{57} In \textit{Parnell}, one private party (a bank) sued other private parties (individuals and banks) for conversion of federal bonds.\textsuperscript{58} The trial court applied state law to the issue of whether the defendants took the bonds in good faith, but the Third Circuit reversed, holding that federal common law governed the dispute.\textsuperscript{59} The Supreme Court disagreed, distinguishing the case from \textit{Clearfield Trust Co. v. United States},\textsuperscript{60} where it had held that federal common law governed a suit by the United States against a private party to recover the value of a forged government check.\textsuperscript{61} The dispute in \textit{Parnell}, the Court declared, did “not touch the rights and duties of the United States” and thus did not “justify the application of federal law to transactions essentially of local concern.”\textsuperscript{62}

\textsuperscript{51} See \textit{York}, 326 U.S. at 108–10 (holding that federal court was required to apply New York’s statute of limitations, rather than the doctrine of laches).

\textsuperscript{52} See \textit{Gasperini}, 518 U.S. at 428–31 (holding that New York’s “deviates materially” standard for determining the excessiveness of a jury verdict would apply in a diversity case, rather than the federal “shocks the conscience” standard).

\textsuperscript{53} 446 U.S. 740 (1980).

\textsuperscript{54} \textit{Id.} at 752–53.

\textsuperscript{55} 352 U.S. 29 (1956).

\textsuperscript{56} 433 U.S. 25 (1977).

\textsuperscript{57} See, \textit{e.g.}, \textit{Wallis v. Pan Am. Petroleum Corp.}, 384 U.S. 63 (1966) (vacating the Fifth Circuit’s judgment because state law, not federal law, should govern a leasing-contract case).

\textsuperscript{58} \textit{Parnell}, 352 U.S. at 30.

\textsuperscript{59} \textit{Id.} at 31–33.

\textsuperscript{60} 318 U.S. 363 (1943).

\textsuperscript{61} \textit{Id.} at 366–67.

\textsuperscript{62} \textit{Parnell}, 352 U.S. at 33–34.
In *Miree*, victims of an airplane crash at the DeKalb-Peachtree Airport sued DeKalb County as third-party beneficiaries of contracts between DeKalb County and the Federal Aviation Administration. The court of appeals applied federal common law to a particular issue of contract law, but the Supreme Court reversed, holding that the federal court lacked the power to create a federal common-law rule to govern the particular issue and thus Georgia law applied. It was clear from *Miree* that the refusal to allow the federal court to create federal common law necessarily meant that state law would apply because of *Erie*. Of course, there are a number of cases in which the Court has determined that federal courts do have the power to create federal common law. Taken as a whole, these cases are important building blocks in the wall that divides instances in which the federal court has the power to craft a common-law rule from the instances in which the federal court must instead apply state law.

Within the category of cases where a federal court is required to apply state law, it is well established that the federal court must apply the state law “accurately.” To the extent that state law is clearly established by the highest court of the state, the federal court must follow it, rather than substituting its own judgment regarding what the state law should be. Support for this proposition can be found in *Erie* itself, and it was made explicit just one year after *Erie*, in *Wichita Royalty Co. v. City National Bank of Wichita Falls*. The Supreme

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64 See id. at 27–28 (explaining that the Fifth Circuit sitting en banc applied federal common law to the question of whether the plaintiffs had standing to sue as third-party beneficiaries of the contracts).
65 Id. at 28–33.
66 See id. at 28 ("[T]he case would unquestionably be governed by Georgia law, but for the fact that the United States is a party to the contracts in question, entered into pursuant to federal statute." (internal citation omitted) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)); see also id. at 35 (Burger, C.J., concurring) (explaining that the case should be resolved under Georgia law because “the rule of *Erie R. Co. v. Tompkins* applies” (citation omitted)). The Court in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 & n.22 (1979), seemed to cite *Miree* for the proposition that state law was adopted as a matter of federal common law, but it did not explain why it characterized *Miree* that way. *Miree* is more accurately viewed as a case where the federal court was required to apply state law because it lacked the power to apply anything else, rather than as a case where “state law [was] incorporated as the federal rule of decision.” *Id.* at 728.
68 306 U.S. 103 (1939). The procedural route by which this case reached the U.S. Supreme Court was somewhat unique. The lawsuit was filed in Texas state court, and the state trial court directed a verdict for the plaintiff and against the defendant’s crossclaim. *Id.* at 104–05. The Texas Supreme Court reversed and remanded with a statement of the applicable principles of law to guide the trial court. The case was subsequently removed to federal district court. *Id.* at 105. On appeal, the Fifth Circuit Court of Appeals reversed and remanded with
Court has reaffirmed the rule of Wichita Royalty on several occasions. 69

Although the foregoing proposition is well settled, it is of limited utility because there is only a narrow category of cases where state high court precedent can be applied in an entirely uncontroversial manner, such that any court—state or federal—will reach the same conclusion. This is true for several reasons. Broadly speaking, it is often necessary for a court to exercise judgment in deciding how any rule—even one that has been clearly articulated—should apply to a particular set of facts. In the Erie context, this uncertainty may be compounded in multiple ways. First, as the facts of a given case bear less and less resemblance to the salient facts of a state high court opinion, a rule of law announced by that opinion will appear to be less and less “clearly established.” Second, there may be reason to doubt the force of a state high court precedent if sufficient time has passed. Finally, there will be cases where there simply is no directly applicable state high court precedent.

Much has been written about how a federal court should ascertain the content of state law in the absence of a clearly established rule announced by the highest state court. 70 In Fidelity Union Trust Co. v.

instructions to guide the district court on the principles of law the court of appeals thought applicable. The principles contravened those provided by the Texas Supreme Court. Id. at 106. The Supreme Court of the United States reversed, pronouncing, “It was the duty of the federal court to apply the law of Texas as declared by its highest court.” Id. at 107 (citing Erie, 304 U.S. 64). Although the Court agreed with the Fifth Circuit Court of Appeals that Texas law permitted the federal court to “depart from the earlier rulings to the extent that . . . later opinions of the Texas Supreme Court showed that it had modified its opinion on the first appeal,” id., the Court did not believe there had been any such modification. Id. at 109. The Supreme Court thus required the district court on remand to follow the Texas Supreme Court’s instructions. Id. at 110.

69 See, e.g., Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 204–05 (1956) (holding that state law regarding revocation of an arbitration clause should be governed by a forty-six-year-old Vermont Supreme Court case, where “it was agreed on oral argument that there is no later authority from the Vermont courts, that no fracture in the rules announced in those cases has appeared in subsequent rulings or dicta, and that no legislative movement is under way in Vermont to change the result of those cases”); West v. Am. Tel. & Tel. Co., 311 U.S. 223, 236 (1940) (“[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted.” (citing Wichita Royalty, 306 U.S. at 107)); Fid. Union Trust Co. v. Field, 311 U.S. 169, 177 (1940) (“The highest state court is the final authority on state law . . . .” (citing Beals v. Hale, 45 U.S. (4 How.) 37, 54 (1846); Erie, 304 U.S. at 78)).

Field, the Supreme Court appeared to announce a rule that federal courts are bound by the decisions of intermediate state appellate courts. In West v. American Telephone and Telegraph Co., however, which the Supreme Court decided on the same day as Fidelity Union, the Court clarified that a federal court should defer to—but not be controlled by—the opinion of a state intermediate appellate court. And in Commissioner v. Estate of Bosch, the Court made clear “that while the decrees of ‘lower state courts’ should be ‘attributed some weight . . . the decision [is] not controlling . . .’ where the highest court of the State has not spoken on the point.” Thus, in cases of “open” state law, federal courts will attempt to predict what the highest state court would say about the question.

B. State Law That Is Antecedent to Federal Law

The foregoing discussion is limited to those cases in which federal courts encounter state law that applies of its own force. Even when enforcing federal law, however, the federal courts routinely encounter


71 311 U.S. 169 (1940).

72 See id. at 178–79 (“We have held that the decision of the Supreme Court upon the construction of a state statute should be followed in the absence of an expression of a countervailing view by the State’s highest court and we think that the decisions of the Court of Chancery are entitled to like respect as announcing the law of the State.”) (citations omitted). But see id. at 177–78 (“An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.”) (emphasis added).

73 311 U.S. 223 (1940).

74 See id. at 237 (“Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.” (citing Six Cos. of Cal. v. Joint Highway Dist. No. 13, 311 U.S. 180 (1940); Fid. Union Trust Co., 311 U.S. at 169)).

75 387 U.S. 456 (1967).

76 Id. at 465 (omissions and alteration in original) (quoting King v. Order of United Commercial Travelers of Am., 333 U.S. 153, 160–61 (1948)). Bosch was not an Erie case—to the contrary, it was an incorporated state law case, but the Court appeared to be announcing principles that are relevant to the Erie obligation. See, e.g., Helvering v. Stuart, 317 U.S. 154, 172 (1942) (“When state law has not been authoritatively declared . . . it is a federal court’s duty to ascertain from all available data what the highest court of the state will probably hold the state law to be.” (citing West, 311 U.S. 223; Wichita Royalty Co. v. City Nat’l Bank of Wichita Falls, 306 U.S. 103 (1939)); see also Dorf, supra note 70, at 695 n.151 (collecting cases).
state law—for example, a litigant may argue that state law is preempted by federal law, violates the U.S. Constitution, or has been previously interpreted by a state court so as to bar collateral review of federal claims. All of these examples may require the federal courts to interpret and apply state law. Because the federal-law questions in such cases cannot be addressed until the meaning (and, perhaps, significance) of state law has been determined, the state law in this context can be described as “antecedent” to federal law.

When encountering antecedent questions of state law, the federal courts often have little or no difficulty ascertaining the meaning and scope of such law. Consider, for example, a case that alleges that state law violates federal law. As a preliminary matter, it is certainly necessary to understand the challenged state law. The meaning and scope of such law, however, is frequently beyond dispute. Such is true whether the federal challenge is initially commenced in state court or federal court. There are many cases, however, where questions of antecedent state law have vexed the federal courts. In particular, two categories of cases have engendered a substantial body of scholarship and case law: (i) U.S. Supreme Court review of a state court’s interpretation of federal law where the state court’s decision arguably relied on an “independent and adequate” state-law ground, and (ii) federal-court

78 Such a challenge could take several forms. For example, a litigant could argue that the state law violates the U.S. Constitution. Alternatively, a litigant could argue that the state law is preempted by a federal statute.

79 If the challenge is commenced in state court, the federal courts become involved only if the U.S. Supreme Court conducts appellate review of the state-court judgment. As such, no federal court is necessarily required to directly ascertain the content of state law. Rather, the preceding state-court decisions are likely to have defined the content of the state law; the Supreme Court need only decide whether it will accept the state courts’ representations about their own law.

80 If the challenge is commenced in federal court, the federal courts must independently determine the content of state law before deciding whether it is illegitimate. The federal court may, however, have a definitive pronouncement about the meaning of the state law, issued by the highest state court. Even without such a definitive pronouncement, the relevant meaning of the challenged state law may be beyond dispute. State law may, for example, explicitly treat men and women differently, and so the federal court’s focus will be on the question of whether such differential treatment violates the U.S. Constitution. See, e.g., Craig v. Boren, 429 U.S. 190 (1976) (holding that a state statute prohibiting the sale of nonintoxicating beer to males of a certain age, but not females, violated the Equal Protection Clause). In such a case, it may not even be apparent that the federal court is in fact deciding an issue of state law.


82 The doctrine of independent and adequate state grounds bars the U.S. Supreme Court from reviewing a state court’s determination of federal law if the judgment can be affirmed on the basis of “a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural.” Coleman v. Thompson, 501 U.S. 722, 729 (1991) (citations omitted). “In the
habeas review of a state-court conviction where a state court has already held that the federal claim was waived because the litigant has violated state procedural law in presenting the federal claim.\(^{83}\) Put simply, both of these categories involve prior state-court determinations regarding state law that may bar entirely consideration of a federal claim by the federal courts.

In both of these contexts, the Supreme Court has adopted an important presumption in order to address whether the prior state-court ruling relied on an “independent” state-law ground. In *Michigan v. Long*,\(^{84}\) the Court adopted a “plain statement” rule, holding that a federal court has jurisdiction to review a state-court judgment unless the state court clearly expressed reliance on an adequate and independent state-law ground.\(^{85}\) In *Harris v. Reed*,\(^{86}\) the Court extended that rule to the federal habeas context.\(^{87}\) As a justification context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional.” *Id.; see also* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) (describing as “settled” the “rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.”).

A federal habeas court will not review a state-court judgment for violations of federal law if the state court rejected the federal claim on state procedural grounds. *E.g., Coleman*, 501 U.S. at 729–30 (“We have applied the doctrine of independent and adequate state ground doctrine not only in our own review of state court judgments, but in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions. The doctrine applies to bar federal habeas when a state court declined to address a prisoner’s federal claims because the prisoner had failed to meet a state procedural requirement.”). Procedural default is not jurisdictional, *e.g.,* Trest v. Cain, 522 U.S. 87, 89 (1997) (“[I]n the habeas context, a procedural default, that is, a critical failure to comply with state procedural law, is not a jurisdictional matter.”), but it is functionally equivalent to the independent-and-adequate-state-grounds doctrine: before a federal court can reach the federal questions presented by a petition for the writ of habeas corpus, the federal court must determine whether it will second-guess the state court’s determination of state law, specifically state procedural law regarding the presentation of federal claims to a state court. Like the independent-and-adequate-state-grounds doctrine, the doctrine of procedural default does not require the federal court to determine for itself whether the state procedural rule should be applied in a particular way: the federal court will refuse to entertain the claim only if the state court explicitly rules that the claim fails on the basis of state procedural grounds.

\(^{83}\) 463 U.S. 1032 (1983).

\(^{84}\) Id. at 1042 & n.7.


\(^{86}\) See *id.* at 263 (“Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case “clearly and expressly” states that its judgment rests on a state procedural bar.” (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)).
for this presumption, the Supreme Court has expressly articulated a desire to defer to the determination of state law by state courts.\(^88\)

If a state court expressly states that its judgment rests on state-law grounds, the federal courts may nonetheless find that the “independent” state-law ground was “inadequate” to prevent federal review of the federal claims presented by the case. As Professor Meltzer has noted, “[i]t is not easy to categorize” the various instances in which state law is labeled “inadequate.”\(^89\) Drawing on Professor Meltzer’s description of “four overlapping themes,”\(^90\) Professor Struve has identified two principles that underlie the instances in which state law is deemed inadequate.

First, state procedural law will be considered inadequate if it undermines the “supremacy rationale,” which can be understood as the federal interest in enforcing federal law.\(^91\) There is no serious argument that cases involving the supremacy rationale are cases in which the federal court is second-guessing a state court’s determination of state law. Rather, the federal court is simply holding that the existence of an independent state-law ground for the decision will not bar federal review in this case because to hold otherwise would undermine federal interests.\(^92\)

The second group of cases in which state grounds are considered “inadequate” are those in which the federal court has process-based concerns about the state law. For example, the Supreme Court has identified a state procedural basis for decision as inadequate if the procedural requirement is “novel” or inconsistently imposed.\(^93\) These cases do begin to raise the question of whether the Supreme Court is refusing to defer to determinations of state law by state courts, because the Court speaks in terms of honoring only those state-law

\(^88\) See, e.g., id. at 264 (“Requiring a state court to be explicit in its reliance on a procedural default does not interfere unduly with state judicial decisionmaking. As Long itself recognized, it would be more intrusive for a federal court to second-guess a state court’s determination of state law;” (citing Long, 463 U.S. at 1041)).

\(^89\) Meltzer, supra note 10, at 1137.

\(^90\) Id. at 1138.

\(^91\) See Struve, supra note 10, at 252.

\(^92\) Indeed, the issue can be cast as one of preemption. In Felder v. Casey, 487 U.S. 131, 137–38 (1988), the state court had denied the plaintiff’s federal claim on the basis of a state procedural requirement (a notice of claim provision). The Supreme Court reached the federal claim despite the existence of an independent state procedural ground that could sustain the outcome in the state court. In doing so, the Court explained that the state procedural requirement “conflict[ed] in both its purpose and effects with the remedial objectives of § 1983” and was thus preempted. Id. at 138.

grounds that have “fair or substantial support.” But even in these cases, the concern is misplaced: the Supreme Court is not telling the state court that its interpretation or application of state law was wrong as a matter of state law. Rather, the Court is simply determining that certain state laws—because of the manner in which they are administered—will not bar federal review of a state court’s adjudication of federal claims. Thus, even the process-based inadequacy cases demonstrate the high level of deference that federal courts give to state-court determinations regarding the meaning of state law.

II. FEDERALIZING STATE LAW THROUGH INCORPORATION

In contrast to situations where only state law is applicable to a claim or where a claim presents an issue of state law that is antecedent to federal law, federal courts also confront claims in which state law has been intertwined with federal law. Any type of federal law—constitutional, statutory, or judicial—can borrow state law, and state law can be borrowed for either substantive or procedural purposes. In these cases of incorporated state law, the source of the right sued upon is federal, and state law forms one part—either substantive or procedural—of the federal cause of action. State law is applied not because the federal court lacks the power to apply anything else, but rather because the relevant federal rule maker—e.g., Congress or the federal court—made a choice to have state law applied. The rule maker could have chosen to create a uniform federal rule but it instead decided to adopt a rule from state law. As a formal matter, therefore, the borrowed state law is actually federal law.

95 See, e.g., Bd. of Cnty. Comm’rs v. United States, 308 U.S. 343, 349, 352 (1939) (recognizing, in a case brought by the United States to recover taxes from a county in Kansas on behalf of a woman of Pottawatomie descent, that federal law—in particular a treaty—is the "origin of the right to be enforced," and that the "source of the right" is federal, rather than state law).
96 See id. at 351–52 ("With reference to other federal rights, the state law has been absorbed, as it were, 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.").
97 See id. at 349–50 ("Since the origin of the right to be enforced is the Treaty [between the United States and the Pottawatomi Nation of Indians], plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of Kansas." (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)); see also Ernest A. Young, Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption, 95 CAL. L. REV. 1775, 1785 (2007) ("When a court ‘adopts’ a state rule of decision as part of federal law, the resulting rule is federal in character.").
Section A will discuss a few illustrative examples of the wide variety of circumstances in which federal law borrows state law. Section B will then describe the relevant doctrinal landscape governing the treatment of “state law” in this category of cases.

A. Illustrative Examples

1. State Law Incorporated into a Federal Statute

Congress can explicitly incorporate state law into a federal statute. For example, Congress in the Federal Tort Claims Act created a private right of action for persons injured by the tortious conduct of any employee of the federal government and instructed that the federal government would be held liable “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” Thus, the federal statute both created the private right of action and also incorporated state law as the substantive law governing the cause of action. State law does not govern every aspect of a claim under the Federal Tort Claims Act. Nonetheless, important aspects of any claim brought under the Act are governed entirely by state law.

The Foreign Sovereign Immunities Act operates much in the same way as the Federal Tort Claims Act. Foreign governments can be held liable “in the same manner and to the same extent as a private individual under like circumstances.” Again, state law is not entirely applicable because federal law governs the availability of a sovereign immunity defense, and federal law also prohibits the award of punitive damages against the foreign government.

98 Throughout this Article, references to “state law” contemplate the law of a particular state, rather than the laws of the several states. Congress can of course decide to craft a federal rule by looking to the collective wisdom of the states as a whole, but that type of state law is not the subject of this Article.
99 See 28 U.S.C. § 1346(b)(1) (2006) (“[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . .”).
100 Id.
102 Id. § 1606 (2006).
103 See id. §§ 1602–1605, 1607 (providing and defining the limits of the sovereign immunity defense).
104 Id. § 1606.
Another example of a federal statute that borrows from state law is 42 U.S.C. § 1988. This statute explicitly incorporates state law for various federal civil rights actions when federal law is “not adapted to the object [of protecting all persons of the United States in their civil rights], or [is] deficient in the provisions necessary to furnish suitable remedies and punish offenses against law.”

Even when Congress has not explicitly incorporated state law, federal courts may use state law to give meaning to a federal statute. For example, a term in a federal statute may be given a state-law definition. In *Reconstruction Finance Corp. v. Beaver County*, the Supreme Court held that state law defined the term “real property” as used in the Reconstruction Finance Corporation Act. A federal statute provided that the Reconstruction Finance Corporation (RFC) and its subsidiaries would be partially immune from state and local taxes, but that their “real property” would be subject to such taxes. Beaver County in Pennsylvania assessed a tax on the machinery of an RFC subsidiary because Pennsylvania tax law provided that such machinery was real property. The Supreme Court held that the tax was proper. The federal statute did not define the term; there was no “decisive piece of evidence as to congressional intent”; and “congressional purpose [was] best . . . accomplished by application of settled state rules as to what constitutes ‘real property.’” Similarly, the Supreme Court held in *De Sylva v. Ballentine* that state law defined the word “children” used in the Copyright Act. The question before the Court was whether an illegitimate child was entitled to renewal rights, which the Copyright Act granted to “children.”

Of course, the federal court may borrow state law to do more than simply define a term within the federal statute. For example, the Supreme Court has held that a county can be held liable under 42

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106 328 U.S. 204 (1946).
107 Id. at 210.
109 Id. at 208 (noting that the Pennsylvania Supreme Court held earlier in this case that the machinery at issue was real property under settled Pennsylvania law).
110 Id. at 208.
111 Id. at 210.
112 351 U.S. 570 (1956).
113 Id. at 580–81 (“We think it proper, therefore, to draw on the ready-made body of state law to define the word ‘children’ in § 24 [of the Copyright Act].”).
114 See id. at 580 (“We come, then, to the question of whether an illegitimate child is included within the term ‘children’ as used in § 24.”).
U.S.C. § 1983 for an individual’s behavior only if that individual is a “policymaker” for the county, and the Court determines whether a person is a “policymaker” by looking to state law. Additionally, the Bankruptcy Code looks to state law to determine whether a creditor has a claim against the debtor: “the ‘basic federal rule’ in bankruptcy is that state law governs the substance of claims.”

2. Incorporation as a Matter of Federal Common Law

In addition to being incorporated into federal statutes, state law is also often incorporated into federal common law. For example, federal courts sometimes use state law to fill a gap in a federal statute. It should be acknowledged that such gap-filling is conceived by some as the creation of federal common law and by others as statutory interpretation. But even those who resist the federal-common-law label should be comfortable with the discussion that follows.

A well-known example of gap filling is the adoption of state statutes of limitations for federally created causes of action. Federal statutes often fail to specify the statute of limitations for explicitly created causes of action, and the courts must determine the

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116 Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co., 549 U.S. 443, 450 (2007) (quoting Raleigh v. Ill. Dep’t of Revenue, 530 U.S. 15, 20 (2000)) (internal quotation marks omitted); see also Butner v. United States, 440 U.S. 48, 57 (1979) (“The essential point is that in a properly administered scheme in which the basic federal rule is that state law governs, the primary reason why any holder of a mortgage may fail to collect rent immediately after default must stem from state law.”); Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161 (1946) (“What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed is a question which, in the absence of overruling federal law, is to be determined by reference to state law.” (citing Sec. Mortg. Co. v. Powers, 278 U.S. 149, 153–54 (1928); Bryant v. Swofford Bros. Dry Goods Co., 214 U.S. 279, 290-91 (1909))).

117 The label of federal common law could be eliminated in favor of statutory interpretation and the basic points made in the Article would remain the same. The only significance of the debate, such as it is, over the legitimacy of federal common law is as follows: if federal common law is generally illegitimate because federal courts should not be “making law,” then perhaps a federal court’s choice to adopt state law is slightly more palatable than the creation of a uniform federal rule, because the federal court is not creating a new rule of law, but rather is relying on the rules formulated by legitimate (state) lawmakers. On the other hand, even a more palatable version of an illegitimate enterprise should be considered illegitimate.


appropriate statute of limitations for implied private rights of action. In 1990, Congress enacted a generally applicable four-year statute of limitations, but the catchall statute does not govern statutory causes of action that existed before December 1, 1990. The default rule for those claims is that federal courts should adopt “the most closely analogous state limitations period” for the federal cause of action. Statutes of limitations in other federal statutes may fill the gap, but states are “the lender of first resort.”

Similarly, federal courts may borrow state law when engaging in exercises of federal common law making that are farther from the line of statutory interpretation. In the seminal federal common-law case of Clearfield Trust Co. v. United States, the Court recognized, “In our choice of the applicable federal rule we have occasionally selected state law.”

B. The Doctrinal Landscape of Incorporated State Law

Unlike state law that applies of its own force, state law applies in the incorporated context as a matter of federal choice. That is, a federal decision maker—Congress or the federal judiciary—decides to adopt state law as a component of federal law. To be clear, that same decision maker is authorized to create federal law, and so it can legitimately choose to create a uniform federal rule to govern a particular issue, for example the standards by which the United States v. Thomas, 515 U.S. 29, 33 (1995) (“A look at this Court’s docket in recent years will show how often federal statutes fail to provide any limitations period for the causes of action they create . . . .”); Mikva & Pfander, supra note 118, at 393 (“Such congressional omissions have occurred with monotonous regularity and frequently confound the judicial branch . . . .”). 120 28 U.S.C. § 1658(a) (2006) (“Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues.”).

Section 1658(a) obviously applies to causes of action contained within entirely new statutes. The courts of appeals, however, were divided as to how to handle causes of action based on post–December 1, 1990, amendments to statutes enacted before that date. See Jones, 541 U.S. at 374–75 (citing cases illustrating the circuit split). The Court in Jones held that the four-year period in § 1658 applies “if the plaintiff’s claim against the defendant was made possible by a post-1990 enactment.” Id. at 382. It is unclear whether the Court’s rule extends to implied private rights of action.

Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 545 U.S. 409, 415 (2005) (holding that the express statute of limitations in the False Claims Act does not govern retaliation claims and remanding for consideration of which state statute of limitations should be borrowed).

N. Star Steel Co., 515 U.S. at 33–34 (“Although these examples show borrowing from federal law as well as state, our practice has left no doubt about the lender of first resort.”).

318 U.S. 363, 367 (1943) (citing Royal Indem. Co. v. United States, 313 U.S. 289 (1941)).
can be held liable in tort. Instead of creating such a uniform federal rule, however, the federal decision maker chooses to borrow state law to govern the particular issue. And when the federal decision maker does so, the state law is—as a formal matter—no longer state law but rather federal law.

The Supreme Court has long recognized the federal nature of incorporated state law.125 In 1939, the Court in Board of County Commissioners v. United States,126 spoke of “absorb[ing]” state law “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.”127 In United States v. Brosnan,128 the Court again spoke in terms of “adopt[ing] as federal law state law governing divestiture of federal tax liens.”129 And in United States v. Kimbell Foods, Inc.,130 the Court spoke of incorporating state law “as the federal rule of decision.”131 On the other hand, there is some ambiguity regarding the principle. The Court in Boyle v. United Technologies Corp.132 spoke disparagingly of the “borrow or incorporate or adopt” language,133 and questioned “the distinction between displacement of state law and displacement of federal law’s

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125 See, e.g., United States v. Little Lake Misere Land Co., 412 U.S. 580, 594–95 (1973); United States v. Standard Oil Co. of Cal., 332 U.S. 301, 308 (1947) (“[R]ights, interests and legal relations of the United States are determined by application of state law, where Congress has not acted specifically.”); Bd. of Cnty. Comm’rs v. United States, 308 U.S. 343, 352 (1939) (“In the absence of explicit legislative policy cutting across state interests, we draw upon a general principal that the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions.”); cf. Clearfield Trust Co. v. United States, 318 U.S. at 366 (starting from the proposition that “[t]he rights and duties of the United States on commercial paper which it issues are governed by” federal common law rather than Erie).

126 308 U.S. 343 (1939).
127 Id. at 351–52 (citing Brown v. United States, 263 U.S. 78 (1923); Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299 (1923)).
129 Id. at 241.
131 Id. at 728 (“Undoubtedly, federal programs that ‘by their nature are and must be uniform in character throughout the Nation’ necessitate formulation of controlling federal rules. Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision.” (citations omitted) (quoting United States v. Yazell, 382 U.S. 341, 354 (1966)) (citing Illinois v. Milwaukee, 406 U.S. 91, 105 n.6 (1972); United States v. Standard Oil Co. of Cal., 332 U.S. 301, 311 (1947); Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943))).
133 Id. at 507 n.3 (“Some of our cases appear to regard the area in which a uniquely federal interest exists as being entirely governed by federal law, with federal law deigning to ‘borrow[w]’ or ‘incorporat[e]’ or ‘adopt’ state law except where a significant conflict with federal policy exists.” (alterations in original) (citations omitted) (quoting United States v. Little Lake Misere Land Co., 412 U.S. 580, 594 (1973); Kimbell Foods, 440 U.S. at 728–30)).
incorporation of state law,” wondering whether such a distinction “ever makes a practical difference.”¹³⁴ Justice Scalia authored the opinion in Boyle, and he had elsewhere argued that when state statutes of limitations were originally applied to federal causes of action, the state law was not borrowed as a matter of federal law, but rather applied of its own force.¹³⁵ At the same time, however, he acknowledged that “a different historical practice had ... intervened,”¹³⁶ thereby suggesting that state statute of limitations were now indeed borrowed only as a matter of federal law. It is unclear whether Justice Scalia in Boyle was attempting to resurrect the argument that he had seemed to concede earlier, but there is at least the possibility that he was. Moreover, there is some reason to believe, in light of the opinion in Empire Healthchoice Assurance, Inc. v. McVeigh,¹³⁷ that a majority of the Court in 2006 agreed.¹³⁸

Regardless of whether there has been erosion of the principle in the context of federal common law, it is obvious that state law applies only as a matter of federal law when it is incorporated into a federal statute. Where Congress is legitimately exercising its legislative authority, it is constrained by the Constitution as to the content of the federal law, but there is no constitutional provision that will require Congress to use state law to give content to federal law. The Constitution certainly reserves some areas of legislation to the states, but once Congress has the constitutional green light to legislate in a particular area, it is free to depart entirely from any state law in the same area. Thus, if Congress adopts state law, it does so entirely as a matter of choice. And it is equally clear that when Congress creates law, it is creating federal law, not state law. That is the case even when the federal law is based (either entirely or only in part) on state law.

It should be acknowledged that when Congress adopts state law as a component of a federal statute, the federal court that interprets and adopts the federal statute has no choice in the matter of whether state law applies. If Congress has explicitly incorporated state law into a federal statute, then the federal court is bound by this congressional choice. And even in cases where Congress has not explicitly incorporated state law, the federal court’s decision to adopt state law

¹³⁴ Id.
¹³⁶ Id. at 164.
¹³⁸ Id. at 692.
may not be the result of a meaningfully free choice. If there is a strong indication of congressional intent to adopt state law, then the federal court will do so. The absence of an explicit directive to apply state law is not dispositive; the weight of evidence regarding congressional intent may leave the federal court with only one real option: to adopt state law as a component of federal law. Ultimately, however, this lack of choice on the part of the federal court in these circumstances is irrelevant: the fact that Congress had a choice is what makes incorporated state law an expression of federal law.

Because state law applies as a matter of choice in the incorporated-state-law context, the *Erie* obligation to apply state law accurately does not apply.\(^{139}\) As discussed above, the Supreme Court in *Erie* held that the federal court lacked the power to create a rule governing the standard of care to which Erie Railroad would be held vis-à-vis individuals like Harry Tompkins.\(^{140}\) And the subsequent “*Erie* cases” in which federal courts were required to apply state law are all cases that reflect the conclusion that the federal court lacked the power to apply anything other than state law.\(^{141}\) It is this same line of cases that recognized the federal obligation to apply state law “accurately,” that is, to apply state law as the state courts would. Where the precedent condition—the lack of power to apply anything other than state law—does not exist, the consequent obligation—to apply state law accurately—does not exist either.\(^{142}\)

The Supreme Court has on occasion given indications that federal courts should apply state law accurately even in the incorporated-state-law context. In *McMillian v. Monroe County*,\(^{143}\) the Court arguably created a bridge between the incorporated-state-law and *Erie*

\(^{139}\) Of course, the obligation to apply state law accurately could be imposed by Congress. That is, when Congress incorporates state law, it could instruct the federal courts to apply state law as the state courts would. Alternatively, Congress might instruct the federal courts to apply state law accurately, but only when an accurate application is consistent with the federal statute.

\(^{140}\) See *supra* notes 44–46 and accompanying text.

\(^{141}\) See *supra* notes 50–53 and accompanying text. The federal common-law cases are the same: there is no federal statute that governs the issue at hand, one party seeks to have the federal court create a federal common-law rule to govern, but the exercise of federal common law making is considered illegitimate and so the federal court is required to apply state law. See *supra* notes 55–66 and accompanying text (discussing cases in which federal courts were denied the authority to craft common-law rules).

\(^{142}\) Federal common law is an area “untouched by . . . *Erie*.” United States v. Standard Oil Co. of Cal., 332 U.S. 301, 305, 308 (1947) (holding that the U.S. government’s tortious-interference claim against tortfeasors who injured a soldier was “governed by the rule of *Clearfield Trust Co. v. United States* . . . rather than that of *Erie R. Co. v. Tompkins*” (citation omitted)); see also Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943) (stating that “the rule of *Erie R. Co. v. Tompkins* does not apply” to the instant case, which was instead governed by federal common law (citation omitted)).

\(^{143}\) 520 U.S. 781 (1997).
lines of cases. The federal statute at issue in that case, 42 U.S.C. § 1983, imposed liability on Monroe County for the behavior of its sheriff only if the sheriff was a “policymaker” as a matter of state law. In determining whether the sheriff was a policymaker, the Court invoked a principle that was associated at the time with *Erie* cases. In particular, the Court invoked the principle that it would defer to the Eleventh Circuit’s interpretation of Alabama law because Alabama was located within the Eleventh Circuit. Nonetheless, the Court has expressly required federal courts to apply state law “accurately” in the incorporated-state-law setting, and opinions like *McMillian* do not change that. When federal courts apply incorporated state law, they are not currently under a doctrinal obligation to apply the state law as state courts would.

A final point to be made about the doctrinal landscape of incorporated state law is that state law is generally borrowed with the understanding that it should serve federal interests. This need not be the case: Congress could instruct federal courts to apply state law even when faithful application appears to undermine the very federal statute for which state law was borrowed. But it is unlikely to do so. To the contrary, Congress is more likely to do what it has done, which is to instruct the federal courts to borrow state law but only insofar as it “is not inconsistent with the Constitution and laws of the United States.” Thus, the Supreme Court in *Robertson v. Wegmann* held that the fate of a § 1983 action filed in the Eastern District of Louisiana was governed by the Louisiana survivorship statute. The Court recognized that “the ultimate rule adopted under § 1988 is a federal rule responsive to the need whenever a federal right is impaired.”

144 See id. at 786 (“[O]ur inquiry [of whether the sheriff was a final policymaker] is dependent on an analysis of state law.” (citing Jett v. Dall. Indep. Sch. Dist., 491 U.S. 701, 737 (1997); Pembaur v. Cincinnati, 475 U.S. 469, 483 (1986) (plurality opinion)))).
145 Id. (“Since the jurisdiction of the Court of Appeals includes Alabama, we defer considerably to that court’s expertise in interpreting Alabama law.” (citing Jett, 491 U.S. at 738; Pembaur, 475 U.S. at 484 n.13)). As the dissent pointed out, this principle was arguably inappropriate in light of the Court’s recent holding in *Salve Regina College v. Russell*, 499 U.S. 225 (1991), that courts of appeals should review district courts’ determinations of state law. *McMillian*, 520 U.S. at 797 n.1 (Ginsburg, J., dissenting). That disagreement is not relevant to my point here, which is simply to acknowledge that there are some indications of *Erie*-type deference in the incorporated-state-law context.
148 See id. at 589–95 (holding that federal law does not address the survival of a § 1983 action and adopting the Louisiana survivorship statute).
149 Id. at 588–89 (quoting Moor v. Cnty. of Alameda, 411 U.S. 693, 703 (1973)); see also
govern if the plaintiff’s death was itself caused by the deprivation of
civil rights or if the state rule regarding survival was inconsistent with
federal civil rights law.\footnote{\textit{Robertson}, 436 U.S. at 594–95.} Perhaps the most likely scenario is that
Congress will fail to specify the extent to which it wants state law
incorporated.

Just as Congress could theoretically choose to incorporate state
law even if it undermines federal interests, federal courts could
choose to adopt state law, as a matter of statutory interpretation or
federal common law, even when state law would be inconsistent with
the relevant body of federal law for which state law was adopted. But
this is unrealistic. When a federal court adopts state law as a matter of
statutory construction or federal common law, it will do so in order to
advance, rather than undermine, federal interests. Thus, in
\textit{Reconstruction Finance Corp.}, the Court made clear that state
property laws would not apply if they “effect a discrimination against
the Government, or patently run counter to the terms of the Act.”\footnote{\textit{Reconstruction Finance Corp.} v. Beaver Cnty., 328 U.S. 204, 210 (1946).} And in \textit{De Sylva v. Ballentine}, the Court adopted the state-law
definition of the word “children” only “to the extent that there are
permissible variations in the ordinary concept of ‘children.’”\footnote{\textit{351 U.S. 570, 581 (1956).}} Thus,
when state law is adopted as a matter of federal common law, it is
typically adopted with the understanding that it should serve, rather
(acknowledging that “specific objectives of the federal programs” and/or a need for uniformity
may weigh against incorporation of state law).}

\section*{III. Exploring the Unintended Consequences
of Existing Doctrine}

At first glance, incorporating state law might look like an
opportunity for federal law to be more sensitive to variations among
states and to expand the reach of state law. For this reason,
incorporating state law may appear to be more “respectful” of state

\begin{quote}
predominance of the federal interest’ in the borrowing process” (quoting \textit{Burnett v. Grattan}, 468
process and the third step “asserts the predominance of the federal interest: courts are to apply
state law only if it is not ‘inconsistent with the Constitution and laws of the United States.’”
(“The rule of damages, whether drawn from federal or state sources, is a federal rule responsive
to the need whenever a federal right is impaired.”).}
\end{quote}
law. It is, however, worth scrutinizing incorporated state law closely because there exists the possibility that it will lead to federal courts more often mispredicting open areas or even inaccuracy articulating state-law principles. This is because a federal court that is interpreting and applying state law in the incorporated context will consider federal interests in a way that it could not in the *Erie* context.

**A. Conceptual Problems**

Whenever a federal court applies state law, there is a risk that the federal court may apply the law in a way that is different than the state courts would have. I use the term “error” as shorthand for this difference, but in doing so I do not intend to bury the discussion of whether such deviation is problematic or perfectly acceptable. The federal court may make at least two types of error when it applies state law: outcome and process error. Outcome error occurs when the federal court arrives at a conclusion that is different from the conclusion that a state court faced with the same case would have reached. Process error occurs when the federal court employs reasoning that the state courts would not have employed. For example, federal courts may look to authorities that state courts would not consider persuasive and/or take policies into account that the state courts would not have.

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154 The reference to state courts in general, rather than the highest state court in particular, is deliberate. Doctrinally, a federal court in the *Erie* context is required to apply state law as the highest state court would. See, e.g., *Wichita Royalty Co. v. City Nat’l Bank of Wichita Falls*, 306 U.S. 103, 107 (1939) (“It was the duty of the federal court to apply the law of [the state] as declared by its highest court.” (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938))). The federal court is permitted to depart from interpretations of law issued by state trial courts and intermediate state appellate courts. See, e.g., *Comm’r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (“[W]hen the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should a fortiori not be controlling.”). At the same time, the opinions of intermediate state appellate courts are important “dat[a] for ascertaining state law.” *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) (cautioning federal courts to disregard a state appellate court’s pronouncement of law only if the federal court “is convinced by other persuasive data that the highest court of the state would decide otherwise” (citing *Six Cos. of Cal. v. Joint Highway Dist. No. 13*, 311 U.S. 180 (1940); *Fid. Union Trust Co. v. Field*, 311 U.S. 169 (1940))). Moreover, the outcomes in federal courts acting under the *Erie* obligation should not substantially differ from outcomes in state courts. See, e.g., *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945) (“[I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.”). Thus, a federal court may certainly not casually disregard the opinions of lower state courts, and the federal court arguably should defer to those courts in at least some situations. For example, if all intermediate state appellate courts are in agreement about a particular principle of law, it would be troubling for a federal court to blaze its own trail.

155 There are scholars who would object to the “error” label here on the grounds that
go together, but one may occur without the other. Process error standing alone is not necessarily problematic, but it is nonetheless worth identifying because a particular type of process error is likely to occur in the area of incorporated state law, and this particular process error might increase the risk of outcome error.

Errors occur even when the federal courts are acting under the obligation of *Erie* to apply state law faithfully. These errors typically occur when federal courts are uncertain about the content of state law. If the content of state law were entirely clear, then the federal court would be obliged to follow it. If the highest state court, however, has not addressed the issue confronting the federal court, then the Supreme Court has instructed the federal court to decide the case in a way that is most consistent with the way in which the highest state court would decide it. But the federal court’s prediction may turn out to be incorrect—i.e., the highest state court may resolve the question differently than the federal court predicted it would. Similarly, if the issue confronting the federal court is highly fact-sensitive, such that authority from the highest state court does not clearly point to one conclusion, then too the federal court must use its judgment in analyzing the facts, and it may reach a result that is different than the one state courts would have reached. As another example, if the authority from the highest state court has been weakened by the passage of events over time, the federal court may.

federal courts *should* engage in reasoning that is different from that of state courts because the federal courts’ reasoning may be superior or generate a productive dialogue between the state and federal judiciaries. Some level of cross-pollination may be beneficial, but I believe there is reason to be suspicious of whether there truly exists a dialogue between state and federal judiciaries, rather than a one-sided conversation in which the federal courts enjoy the advantage. In any event, even if a productive dialogue exists, my view is that the particular process error discussed later—the insertion of federal interests—is not desirable.

Process error in one case, even if unaccompanied by outcome error, could lead to outcome error in subsequent cases. For example, if a federal court reaches the “right” conclusion about state law but does so for the “wrong” reasons, a subsequent court might rely on the first federal court’s erroneous reasoning—for example, the primacy of a particular interest that the state courts would not take into account—and such reasoning might lead the subsequent court to commit an outcome error.

At least one scholar argues that it is bizarre to call this an error because the federal court is not getting anything wrong at the time it predicts state law. That is, if state law is only what the state sovereign declares, then there can be no error if the highest court has not yet spoken. Glassman, *supra* note 70, at 281. At a minimum, however, the federal court is “wrong” in its prediction, and the term “error” allows for discussion of the instances in which a federal court reaches a result (or utilizes a process) that state courts would not.
be forced to use its judgment to determine the now-applicable law, and it may arrive at a conclusion that is different than the one the state courts would have reached.

The incorporated-state-law context, however, is even more prone to error than the *Erie* context. This is because the federal court in the incorporated-state-law context applies state law for a different reason. In short, the federal court (in the incorporated-state-law context) applies state law to serve federal purposes. When federal courts borrow state law to fill in the content of a federal common-law rule, they do so only insofar as state law serves federal interests; they retain the option of discarding state law if it does not do so. The Supreme Court has declared more than once that it is appropriate to reject state law if it is inconsistent with federal law. Where Congress has explicitly incorporated state law, the federal courts’ ability to discard state law may be constrained by congressional intent, but Congress is unlikely to have directed the federal courts to apply state law even when doing so would undermine the federal statute for which it has been borrowed (or any other federal law). Thus, regardless of whether Congress or the courts made the choice to borrow state law, it is always borrowed in service of federal law.

Because state law is borrowed to advance federal objectives, the federal court seeks to accomplish at least two goals when it applies incorporated state law: to apply the law that will best—or at least adequately—serve federal interests and to apply the borrowed law accurately. These goals may be in harmony with each other: federal interests may be best served by applying the law exactly as the state courts would. Alternatively, these two goals may be in tension: an accurate application of state law may be contrary to federal interests.

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159See, e.g., Wilson v. Garcia, 471 U.S. 261, 269 (1985) (“[S]tate law shall only apply ‘so far as the same is not inconsistent with’ federal law.” (quoting 42 U.S.C. § 1988(a))); Burnett v. Grattan, 468 U.S. 42, 48 (1984) (“[C]ourts are to apply state law only if it is not ‘inconsistent with the Constitution and laws of the United States.’” (quoting 42 U.S.C. § 1988(a))); DelCostello v. Int’l Bhd. of Teamsters, 462 U.S. 151, 172 (1983) (Stevens, J., dissenting) (“[W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law.”).

160This second goal is considerably less important than the first. See, e.g., Wilson, 471 U.S. at 269 (“The importation of the policies and purposes of the States on matters of civil rights is not the primary office of the borrowing provision in § 1988. . . . Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.”).

161See, e.g., United States v. Brosnan, 363 U.S. 237, 242 (1960) (“We think it more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area, not to . . . displac[e] . . . state [law] . . . or superimpos[e] on [it] a new
Where a state’s law is clear, and its conflict with federal law is also clear, federal courts may well recognize and publicly identify the conflict. In the face of such a conflict, the federal court may create a uniform federal rule rather than adopting state law as the rule of decision. It may also discard one particular state’s law, while keeping open the possibility that the federal common-law rule will continue to borrow the law from every other state. In United States v. Little Lake Misere Land Co., the Supreme Court retained the option of borrowing state property law to “generally govern federal land acquisitions,” but refused to borrow Louisiana’s law in the case before it.

The following hypothetical three-step analysis would be even more transparent: First, the federal court would analyze state law in the absence of the federal context in which state law resides (or might reside) in the particular case before it. In other words, the federal court would attempt to strip away any federal interests that might influence its analysis of state law. This should be exactly the type of analysis that a federal court conducts in the Erie context. Second, the federal court would consider whether the state law would comfortably fit within the federal statutory or common-law scheme into which it has been (or might be) incorporated. If it did, the federal court would apply state law. But if it did not, the federal court would explain that the state law does not adequately serve federal interests. The federal court would then proceed to the third step, in which it would announce that it will do one of the following: (1) abandon the borrowing approach altogether in favor of a uniform federal rule to govern the issue, (2) abandon the borrowing approach in favor of a federal rule for this state only, or (3) adopt a modified version of state law as the federal rule for this state. In so doing, the federal court would clearly identify the rule it ultimately adopted as a federal one. If there were any confusion, one need only refer to the first step, in which the federal court analyzed state law in the absence of federal interests. If the rule ultimately adopted by the federal court were federal rule.” (citing Bd. of Cnty. Comm’rs v. United States, 308 U.S. 343 (1939)).

Id. at 580 (1973).

Id. at 595 (“[E]ven if it be assumed that the established body of state property law should generally govern federal land acquisitions, we are persuaded that the particular rule of law before us today—Louisiana’s Act 315 of 1940, as retroactively applied—may not.”).

The only difference between the second and third option is the similarity between the federal rule and state law: option two contemplates a federal rule that does not resemble state law at all, whereas option three contemplates a federal rule that looks somewhat like state law.
different from the rule announced in step one, it would be clear that
the rule ultimately adopted was not state law.

Federal courts do not, of course, engage in this three-step analysis
when they apply incorporated state law. No one has suggested that
they should analyze state law in the absence of federal interests before
applying it in its incorporated context, nor is such a development
likely. Rather, federal courts confront and ascertain state law within
the federal context into which state law has been imported. As a
result, federal interests are likely to occupy a primary position in the
court’s process. Federal courts may (rightly, at least as a formal
matter) perceive their task as formulating federal law, and they are
unlikely to be focused on the reality that they are also interpreting and
announcing state law. Nor are the litigants likely to be concerned
about the broad significance of any state-law principles articulated. If
an accurate application of state law will serve their interests, they will
certainly argue in favor of such interpretation. But it is as likely that
they will argue in favor of an “erroneous” application. As a result,
and especially if a state’s law is unclear, a federal court may allow—
consciously or unconsciously—the federal interests at stake to
influence its understanding of state law. The federal court will
therefore interpret the state law in a way that is consistent with federal
interests. This may lead to different results than would have obtained
if a state court were interpreting the law. In other words, the federal
court may announce a different rule than a state court would have
announced, or it may apply a rule to facts in a different manner than
state courts would. And it will do so because its interpretation of state
law better fits the federal law than any other interpretation. This
process error leads to outcome error: the federal court’s interpretation
is not what the state courts would adopt.165

Before considering the potential impact of outcome errors in the
incorporated-state-law context, it is worth noting that it may be
impossible to avoid error in the incorporated-state-law context. The
potential existence of two competing goals—furtherance of federal
interests and accurate application of state law—may lead to process
error every time the federal court applies incorporated state law. It
will be nearly impossible—and probably not even desirable—for the
federal court to apply state law without taking federal interests,
values, and policies into account when determining the content of

165 Nor would the federal interpretation be the one that a federal court discharging its Erie
obligation would reach, because that federal court would not have any federal interests weighing
in favor of a particular result.
borrowed state law. Such federal considerations would not inform the state courts’ interpretations and applications of state law, because state legislatures and courts are highly unlikely to be formulating state law in the hopes—or even the recognition—that it will be incorporated into federal law.

On the other hand, perhaps state lawmakers consider federal interests once a particular body of state law has been incorporated into federal law. If the state lawmakers are happy to have state law incorporated into federal law—that is, if incorporation of state law benefits the state and promotes state interests—then further developments of state law will seek to keep state law consistent with federal interests, so that state law will remain part of federal law. If this is the case, then perhaps the accommodation of federal interests is not a process error. But even if a state were to take federal interests into account, it is unlikely to elevate such interests above state concerns. A federal court interpreting incorporated state law, on the other hand, will be required to focus primarily on the federal law, and it is likely to elevate the federal context in which a particular state rule of law appears above the various other state contexts in which that rule functions. Thus, at least minor process errors are bound to occur, and in the more likely scenario—where state law has not been formulated by state lawmakers to take federal interests into account—a more significant process error may occur because the federal court will take federal interests into account which a state court would not. These federal interests may lead the federal court to commit an outcome error.

Outcome errors have the potential to spread beyond the particular incorporated-state-law context in which they first occurred. If the state law has been borrowed for more than one federal purpose, then a federal opinion interpreting the state-law concept in one incorporated context is likely to be followed by federal courts interpreting that same state-law concept in other incorporated contexts. For example, assume that several different federal statutes borrow the state-law concept of property, and a federal court is confronted with the question of whether state law recognizes X as property. (Assume further that it is appropriate to furnish only one answer to that question. In other words, state law will not say that X both is and is not property, depending on the situation.)166) If there is no clear

166 As stated, this assumption may be too unrealistic to swallow, especially because it is all too common for something to constitute property for some purposes and not for others. Cf. Thomas W. Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885 (2000) (arguing that the Supreme Court has endorsed three different conceptions of property for
guidance from the highest state court as to whether X is property as a matter of state law, the federal court could very well be faced with one choice that is more consistent with state precedents, but another choice that better serves federal objectives.

Ultimately, the federal court commits an error: it decides that X is property as a matter of state law, but the highest state court, faced with the same case, would have decided the opposite. Moreover, the federal court reached its erroneous conclusion because it was more consistent with the federal statute. The federal court’s outcome error is unlikely to be limited to this one federal statute; the opinion is likely to be followed by subsequent federal courts—interpreting different federal statutes—that are facing the question of whether X is property as a matter of state law. These subsequent federal courts are unlikely to consult state-court opinions to determine for themselves whether X is property as a matter of state law, because there is a federal opinion that is almost directly on point. The only reason why the opinion is not completely on point is that the state-law concept of property was embedded within a different federal statute than is at issue in the subsequent federal cases. Indeed, if the court of appeals in a given circuit had written the federal opinion, it would be difficult to imagine that a federal district court within that circuit or future three-judge panels of that circuit would not feel bound to follow the first court’s (erroneous) conclusion that X is property as a matter of state law. Courts from other circuits may be free to disagree with the first federal court, but they may not if they have developed principles of deference. For example, a court from a circuit may defer to another court within the circuit that encompasses the relevant state.\textsuperscript{167} They may defer even if state courts have cast doubt on the rule announced by the first federal court.\textsuperscript{168}

As discussed above, the first federal court can avoid error if it explicitly departs from state law in favor of a uniform federal rule or a

\textsuperscript{167} See, e.g., Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 282–83 (2d Cir. 1981) (deferring to the Sixth Circuit’s determination that Tennessee law did not allow a right of publicity to survive the celebrity’s death, even though it had concerns about that rule).

\textsuperscript{168} See, e.g., Factors Etc., Inc. v. Pro Arts, Inc., 701 F.2d 11, 12 (2d Cir. 1983) (continuing to defer to the Sixth Circuit’s interpretation of Tennessee law in the face of contrary expressions of law by state trial courts).
federal rule crafted for one particular state. But it may not feel the need to do so if there is room to interpret the state law in a way that is consistent with federal law. The federal court could also avoid error if it engaged in the hypothetical three-step analysis outlined above and clearly labeled as federal the rule it ultimately adopted a federal rule. Federal courts are unlikely to take on the obligation to engage in such a comprehensive analysis. There is yet a third way in which a federal court could make it process transparent, thereby diminishing the possibility of error replication. The court could disclose the influence of federal interests on its analysis of state law. This would make the case distinguishable as a matter of precedent, and it might communicate the need for subsequent federal courts to independently investigate state law to determine whether the first court’s state-law conclusions are correct. Again, however, such transparency is unlikely: the federal court would have to be completely conscious of the role that federal interests are playing in its determination of state law, and it would also have to be comfortable with that role, such that it would be willing to share its process with the world.

In the absence of a clear signal from the federal court that federal interests have influenced its interpretation of state law, subsequent courts will not necessarily reveal the prior court’s process. Especially if state law is uncertain, those subsequent federal courts may still continue to follow (or defer to) the first court’s opinion. To do otherwise might be perceived as accusing the first court of engaging in unseemly results-oriented behavior. Imagine what the subsequent federal court would say: “State law is unclear. The first federal court decided that X is property, but we read the state law to conclude that X is not property.” Why? “Because the first federal court reached its conclusion on the basis of federal interests that are not present in this case.” In other words, the first federal court did not reach the result that is most consistent with state precedent, but rather reached a conclusion that works best for the federal system. It is difficult to imagine that a district court would be willing to say this about an appellate opinion or that an appellate panel would say this about a prior panel from its own circuit. Again, a court from a different circuit may be able to provide an alternative by simply saying, “We disagree with the first court about whether X is property as a matter of state law.” This will be more difficult to do if the court ordinarily defers to the opinions of courts that are geographically connected to the state.

The federal court’s error may also spread to federal courts that are interpreting and applying state law in the Erie context. Again, the first federal opinion is almost directly on point: what makes it
distinguishable is that the federal court could have discarded the state-law concept of property in favor of a federal rule (uniform across states or crafted just for state). But of course, the federal court did not do that. Instead, the federal court reached a conclusion that X is property as a matter of state law.

These errors by federal courts are likely to affect how prospective litigants—individuals and entities—understand state law. For the reasons discussed above, other courts might consider a federal court’s erroneous opinion controlling or at least highly persuasive. Similarly, prospective litigants may look to federal opinions to understand how state law operates: the case with the most similar facts will be significant to a lawyer, even if it comes from a federal court, rather than a state court. Whatever the formal force of an announced legal rule, “by way of written and openly available decision[,]” it can exert persuasive force and affect the path of the law. Brendan S. Maher, The Civil Judicial Subsidy, 85 Ind. L.J. 1527, 1537 (2010).

Indeed, federal judges occupy a position of prestige in the hierarchical legal profession, so a federal opinion addressing an issue of state law may not be viewed as inferior to a state judicial opinion at all. At a minimum, the federal misinterpretation of state law will lead to confusion and uncertainty, as well as forum shopping.

B. Practical Examination: Evans v. Chavis

This Article does not attempt to empirically test the hypothesis that doctrinal freedom in the category of incorporated state law causes federal courts to misapply state law. If does, however, explore the conceptual problems articulated above by examining a comparatively recent (and largely unknown) case. In this case, the Supreme Court of the United States appears to have misapplied California law because a faithful application would have undermined its vision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the federal statute in which California law was embedded. To understand the Court’s decision in Evans v. Chavis, it is necessary to provide some background about AEDPA and the Court’s prior interpretation of it.

AEDPA governs petitions for writ of habeas corpus filed in federal court by individuals wishing to challenge their state criminal convictions. Congress passed AEDPA in 1996, and it created for


172 AEDPA governs petitions filed by federal prisoners as well. See 1 RANDY HERTZ &
the first time a statute of limitations for filing a federal habeas petition. AEDPA requires most federal petitions to be filed within one year of the date on which the state court judgment of conviction becomes final. A state court judgment becomes final upon “the conclusion of direct review or the expiration of the time for seeking such review.” AEDPA also requires total exhaustion of state remedies. In order to obtain federal review of his or her constitutional claims, the petitioner must first present those claims to the state courts. Petitioners often find themselves having to employ state collateral proceedings because they neglected to raise all of their claims in the process of direct review or because they want to assert claims that cannot be raised in the process of direct review. These state collateral proceedings can consume more than one year.

To allow petitioners to satisfy the exhaustion requirement, AEDPA tolls “[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending.” In other

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174 28 U.S.C. § 2244(d)(1)(A) (2006). Actually, the one-year statute of limitations can begin to run from a number of different dates, see id. § 2244(d)(1)(A)-(D), but the date in subsection (A) is the “date likely to apply to most [28 U.S.C. § 2255 motions related to habeas corpus] (or to most claims in such motions).” 1 HERTZ & LIEBMAN, supra note 172, § 5.2b, at 247–48. For petitioners whose convictions became final before AEDPA took effect, the one-year statute of limitations began to run on April 24, 1996, the effective date of AEDPA. See Carey v. Saffold, 536 U.S. 214, 217 (2002) (explaining that the respondent had one year from AEDPA’s effective date to file a habeas petition).


176 Id. § 2254(b)(1)(A); see also Baldwin v. Reese, 541 U.S. 27, 29 (2004) (explaining that before seeking a federal writ of habeas corpus the prisoner must exhaust state remedies).

177 See, e.g., Baldwin, 541 U.S. at 29 (“[T]he prisoner must ‘fairly present’ his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim.” (citing O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Duncan v. Henry, 513 U.S. 364, 365–66 (1995)); O’Sullivan, 526 U.S. at 845 (“[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.”).

178 “Generally, a petitioner satisfies the exhaustion requirement if she properly pursues a claim (1) throughout the entire direct appellate process of the state, or (2) throughout one entire judicial postconviction process available in the state.” 2 HERTZ & LIEBMAN, supra note 172, § 23.3b, at 1065. “As long as the petitioner pursued a claim throughout a ‘full round’ of state postconviction proceedings — i.e., as long as she takes advantage of the available trial-court postconviction procedures and appeals any adverse trial-court rulings to as many courts as state law requires to adjudicate an appeal — the claim will be considered exhausted even though it was not raised at trial and/or on direct appeal.” Id. § 23.3b, at 1073.

words, the statute of limitations to file a federal habeas petition is tolled while a state habeas petition is “pending.” Congress included this tolling provision in § 2244(d)(2) of AEDPA to allow federal habeas petitioners to exhaust state remedies by using the postconviction proceedings to present their claims to state courts without worrying that AEDPA’s one-year statute of limitations would expire.\textsuperscript{180}

\textit{Carey v. Saffold}\textsuperscript{181} required the Court to interpret the meaning of the word “pending” in § 2244(d)(2). In particular, the Court had to decide whether “that word cover[s] the time between a lower state court’s decision [on a state habeas petition] and the filing of a notice of appeal to a higher state court.”\textsuperscript{182} The Court held that it did.\textsuperscript{183} The Court relied on the ordinary meaning of the word “pending” to conclude that “an application is pending as long as the ordinary state collateral review process is ‘in continuance’—i.e., ‘until the completion of’ that process.”\textsuperscript{184} As a result the Court stated, “[U]ntil the application has achieved final resolution through the State’s postconviction procedures, by definition it remains ‘pending.’”\textsuperscript{185} Agreeing with every circuit to have addressed the issue, the Court concluded that a state habeas petition is “pending” during the interval between a lower court’s determination and filing of [a request for review] in a higher court.”\textsuperscript{186} Importantly, however, the Court in

\textsuperscript{180}See Duncan v. Walker, 533 U.S. 167, 179–80 (2001) (explaining that the tolling provision was included within AEDPA to “promote[] the exhaustion of state remedies”).

\textsuperscript{181}536 U.S. 214 (2002).

\textsuperscript{182}Id. at 217.

\textsuperscript{183}Id. at 218–21.

\textsuperscript{184}Id. at 219–20 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1669 (1993)).

\textsuperscript{185}Id. at 220.

\textsuperscript{186}Id. at 220–21. I use the term “request for review” rather than “notice of appeal” because the Court in \textit{Saffold} had to consider whether its newly announced rule—that a state habeas petition is “pending” in the interval between a lower court’s decision and a filing in the higher court—applied in California, where state habeas petitioners are not required to file a notice of appeal from denial of their petition for writ of habeas corpus, but rather are allowed to file an \textit{original} petition for writ of habeas corpus at every level. \textit{See id.} at 221.

That is, in most states, state habeas petitioners file a petition in the state trial court, then file a notice of appeal in the intermediate appellate court, and then file a request for review in the highest state appellate court. \textit{See id.} at 219 (describing the collateral review process in most states and citing the rules of Alabama, Colorado, Connecticut, and Kentucky).

In California, by contrast, the ordinary practice is to file an original petition for habeas corpus at every level. \textit{Id.} at 221; \textit{see also id.} at 224 (“California . . . has engrained original writs—both at the appellate level and in the supreme court—into its normal collateral review process.”). The superior courts, the courts of appeal, and the California Supreme Court all have original jurisdiction to hear petitions for habeas relief. \textit{CAL. CONST.} art. VI, § 10.

Indeed, if a superior court denies a habeas petition, the prisoner’s only recourse is to file a new original petition in a higher state court, rather than a notice of appeal. \textit{In re Clark}, 855 P.2d 729, 740 n.7 (Cal. 1993). If the superior court denies the petition, the prisoner may file a new
Saffold added that a state habeas petition would not be considered “pending” during that interval if the filing in the higher court were untimely as a matter of state law.\(^{187}\)

The specific facts before the Court concerned Tony Saffold, who filed a federal habeas petition challenging his California state conviction and who was seeking tolling of AEDPA’s statute of limitations for the period of time in which he had sought California state habeas relief.\(^{188}\) Specifically, Saffold sought tolling for an interval of four-and-one-half months between a decision by the California Court of Appeal and his filing in the California Supreme Court.\(^{189}\)

The California Supreme Court had denied Saffold’s habeas petition,\(^{190}\) but it was not clear whether the petition was untimely filed, because California does not impose a fixed deadline on a habeas petitioner seeking review from an appellate court.\(^{191}\)

Instead, “a
petitioner seeking relief on habeas corpus need only file a petition without substantial delay, or if delayed, adequately explain the delay.”

The Supreme Court remanded the case to the Ninth Circuit to consider whether Saffold’s filing in the California Supreme Court had been timely. The Court did suggest that it might “be appropriate to certify a question to the California Supreme Court for the purpose of seeking clarification in this area of state law.”

In Evans v. Chavis, the Court was again confronted with an individual incarcerated in California state prison, seeking federal habeas relief, and attempting to obtain tolling of AEDPA’s statute of limitations for the time during which he was pursuing state habeas relief. Chavis filed more than one round of habeas petitions in the California state courts, and by the time he filed his petition for writ of habeas corpus in federal district court, more than four years had passed since AEDPA’s one-year statute of limitations had begun to run.

Chavis sought tolling for various periods, including the interval of three years between a decision by the California Court of Appeal and his next filing, in the California Supreme Court. As in Saffold, the California Supreme Court had denied the petition for writ of habeas

corpus in a state trial court, and the state trial court denies the petition, the petitioner seeks review of that denial by filing an original petition for writ of habeas corpus in a higher appellate court, preferably the California Court of Appeal. In re Clark, 855 P.2d at 740 n.7. If the court of appeal denies the petition, the petitioner may file either a new original petition in the California Supreme Court, see In re Reed, 663 P.2d at 216 n.2, or a petition for review in the California Supreme Court, see CAL. PENAL CODE § 1506. There is no fixed deadline to file an original petition for writ of habeas corpus in California. See In re Harris, 855 P.2d at 397 (“[A] petitioner seeking relief on habeas corpus need only file a petition without substantial delay, or if delayed, adequately explain the delay.” (citing In re Clark, 855 P.2d at 751; Ex parte Swain, 209 P.2d at 796)).

In re Harris, 855 P.2d at 397 (citing In re Clark, 855 P.2d at 751; Ex parte Swain, 209 P.2d at 796). As explained supra note 186, this is true when the petition for writ of habeas corpus is an original petition, rather than a petition for review. If the petitioner chooses to file a petition for review in the California Supreme Court, rather than a new original petition for review, then a fixed deadline does exist: a petition for review must be filed within ten days of the date on which the order issued by the court of appeal became final. CAL. R. CT. 8.500(c).

Saffold, 536 U.S. at 225–26 (“It remains to ask whether Saffold delayed ‘unreasonably’ in seeking California Supreme Court review. . . . We leave it to the Court of Appeals to evaluate these and any other relevant considerations in the first instance.”).

I.d. at 226–27.


Chavis, 546 U.S. at 195–96.
corpus, but it had not ruled explicitly on the timeliness question.\(^{197}\) The district court denied Chavis’s federal habeas petition as untimely.\(^{198}\) The Ninth Circuit reversed, giving Chavis the benefit of tolling for the three-year period.\(^{199}\) The Ninth Circuit did not decide for itself whether the California Supreme Court filing was timely as a matter of state law.\(^{200}\) Instead, the Ninth Circuit employed a presumption to reach the conclusion that Chavis’s filing was not untimely under California state law.\(^{201}\) Because the Ninth Circuit tolled the three-year interval between the decision by the California Court of Appeal and Chavis’s filing in the California Supreme Court, the court was able to conclude that Chavis’s federal habeas petition was timely.\(^{202}\)

The Supreme Court held that the Ninth Circuit erred in using its presumption: the California Supreme Court had not indicated whether the filing was timely or not, so the Ninth Circuit should have determined for itself whether Chavis’s filing in the California Supreme Court was timely as a matter of state law.\(^{203}\) The Court itself then analyzed the timeliness of Chavis’s filing, and concluded that it was untimely.\(^{204}\) It is this last aspect of the opinion that is of most interest because the Court’s brief analysis of California law appears to have been informed more by federal interests associated with AEDPA than with a desire to ascertain the contents of California law.

In concluding that a three-and-one-half-year delay was unreasonable as a matter of California law, the Supreme Court failed

\(^{197}\) See id. at 195 ("[T]he California Supreme Court denied the petition in an order stating simply, ‘Petition for writ of habeas corpus [i.e., review in the California Supreme Court] is DENIED.” (second alteration in original)).

\(^{198}\) Garcia, 2001 WL 35939717, at *2 (granting motion to dismiss because the federal habeas petition was filed over three years late).

\(^{199}\) LeMarque, 382 F.3d at 924 ("[W]e hold that Chavis is entitled to tolling for the three-year interval between his first round petitions to the California Court of Appeal and California Supreme Court— an interval during which AEDPA took effect— because the California Supreme Court did not dismiss the petition as untimely but rather decided it on the merits.”).

\(^{200}\) See id. at 925–26 (rejecting the state’s argument that the appellate court should determine whether Chavis’s filing was timely as a matter of state law and asking instead “whether the state court denied the petition as untimely” (citing Saffold v. Carey, 312 F.3d 1031, 1034–36 (9th Cir. 2002))).

\(^{201}\) See id. at 926 (explaining that the California Supreme Court’s denial of Chavis’s petition would be treated as a decision on the merits, which meant that Chavis’s petition was not dismissed as untimely).

\(^{202}\) See id. at 926–27.

\(^{203}\) Evans v. Chavis, 546 U.S. 189, 198 (2006) ("[W]ithout using a merits determination as an ‘absolute bellwether’ (as to timeliness), the federal court must decide whether the filing of the request for state-court appellate review (in state collateral review proceedings) was made within what California would consider a ‘reasonable time.’").

\(^{204}\) Id. at 200–01.
to discuss or even cite any California cases regarding the timeliness of state habeas petitions. The Court did refer to its investigation of California law, and it did say that none of the California cases it had reviewed supported a conclusion that Chavis’s delay was acceptable. But it is difficult to believe that the Court’s legal research really drove its conclusion. Conspicuously absent from its opinion is any mention of the California state-court cases cited in Mr. Chavis’s brief that permitted lengthy periods of delay by pro se litigants. Rather than confront any of these cases, most of the Court’s effort was devoted to an explanation of its assumption that California did not intend to provide significantly more time than other states for the filing of habeas petitions. This assumption was not based on any analysis of state law; indeed, it could not not have been, since no judicial opinions from the California state courts provided any indication that California’s indeterminate standard was intended to function like the fixed deadlines of other states. Rather, the Supreme Court justified its assumption with a line of reasoning that is commonly used to divine legislative intent. The Chavis Court pointed out that it had articulated its assumption—that California does not provide significantly more time to file habeas petitions than do other states—in Saffold, and California had not taken any action to correct that assumption. The reason why the Court used this analysis is clear: the Court was concerned that, if California did in fact allow long delays in the state habeas process, then application of the tolling provision might bring stale federal petitions to the federal courts.

205 See id. at 201 (”We have found no authority suggesting, nor found any convincing reason to believe, that California would consider an unjustified or unexplained 6-month filing delay ‘reasonable.’”).

206 See id. 200–01 (“Six months is far longer than the ‘short period[s] of time,’ 30 to 60 days, that most States provide for filing an appeal to the state supreme court.” (alteration in original) (quoting Carey v. Saffold, 536 U.S. 214, 219 (2002))). The opinion in Evans can be contrasted with the opinion in Walker v. Martin, 131 S. Ct. 1120 (2011), where the Court was required to address the California law of timeliness yet again. In Walker, the Court spent considerably more time examining the California cases in order to justify the conclusion that the state law was not “inadequate” and could constitute an independent and adequate state law ground for denial of the habeas petitioner’s claim. Id. at 1125–26, 1128.

207 See id. at 199–200 (“In doing so, the Circuit must keep in mind that, in Saffold, we held that timely filings in California (as elsewhere) fell within the federal tolling provision on the assumption that California law in this respect did not differ significantly from the laws of other States, i.e., that California’s ‘reasonable time’ standard would not lead to filing delays substantially longer than those in States with determinate timeliness rules. California, of course, remains free to tell us if, in this respect, we were wrong,” (citation omitted)).

208 Cf. Saffold, 536 U.S. at 226 (“And the Ninth Circuit’s apparent willingness to take such words as an absolute bellwether risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts. The Ninth Circuit’s rule consequently threatens to undermine the statutory purpose of encouraging
other words, the Supreme Court’s articulation of California law was based on a federal interest in having timing requirements read strictly. Since Chavis, lower federal courts have similarly failed to look to California opinions in determining whether state petitions were timely filed. Instead, the lower federal courts have cited the Supreme Court’s holding that an unexplained six-month delay is too long to be considered reasonable under California law. The lower federal courts have also focused on the fact that the delays at issue are considerably longer than the thirty to sixty days that other states provide to file a notice of appeal in state habeas proceedings. These are not the considerations that the California courts consider when determining whether a state habeas petitioner has timely filed his or her petition. But such is the risk when federal courts are given unfettered discretion to “interpret” incorporated state law in service of federal law.

CONCLUSION

The Chavis case represents one example of how federal interests may have led a federal court (the Supreme Court of the United States) to apply incorporated state law in a way other than state courts would. The Supreme Court’s interpretation of the California law of timeliness—that it is intended to be similar to the fixed deadlines of other states—is difficult to justify in light of the California precedents in force in 2006. The Supreme Court appears to have been influenced by its perception that a different reading of California law—one that
acknowledged that long delays may in fact be permissible—would undermine AEDPA’s limits on federal habeas petitions. Moreover, the only clearly established state rule was an indeterminate standard, so there was no objectively correct answer to the precise question confronting the Court: whether Reginald Chavis’s filing was timely as a matter of California law. As a result, the Supreme Court had both the motive and the opportunity to skew California law.

Incorporated state law may routinely present such motive and opportunity: federal courts may feel the pressure of uniquely federal interests and if state law is unclear, they may interpret the state law in a way that serves federal objectives, but that is ultimately different than a state court would have. These two conditions can be conceived of as two relevant axes of consideration. Where federal interests may be undermined but state law is clearly established, the federal court may be tempted to misapply state law, but may ultimately feel incapable of doing so. Where federal interests are not strongly opposed to an accurate application of state law, and state law is either clear or ambiguous, a federal court is likely to approach the task of divining state law as it would in cases where state law applies of its own force. But when these conditions both exist, federal courts may find themselves both tempted to apply (and capable of applying) state law in a way that state courts would not. Incorporated state law therefore merits further consideration by scholars and judges.