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Before the Jurisprudential Turn: Corbin and the Mid-Century Opposition to *Erie*

Steven Walt*

INTRODUCTION

Jurisprudential views are sometimes thought to affect case outcomes. Many commentators and some courts believe that *Erie Railroad Co. v. Tompkins*¹ illustrates the point. *Erie* holds that federal courts generally must follow state decisional or statutory law except when inconsistent with constitutional law or federal statute. Legal positivism is a jurisprudential thesis about the nature of law. In its general form, the thesis asserts that law is explained in terms of social facts. Justice Brandeis's majority opinion in *Erie* recites a classical conception of legal positivism, according to which law consists only of the authoritative declarations of a jurisdiction's courts or legislature. It concludes that, subject to constitutional and federal statutory constraints, federal courts must apply state law as declared by state courts. Thus, the opinion itself suggests that this conclusion relies on a particular conception of law: legal positivism. It suggests that jurisprudence matters to *Erie*'s reasoning and outcome.

The suggested connection between legal positivism and *Erie*'s holding represents the "jurisprudential turn"² in

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¹ 304 U.S. 64 (1938).

² The phrase "the jurisprudential turn" refers to the view that the resolution of legal issues requires taking a position on one or more jurisprudential questions. It describes a general methodological position within jurisprudence. The jurisprudential turn in the understanding of *Erie*'s holding that federal courts must apply state law, absent federal constitutional or statutory law, is limited to a specific legal issue. It is the position that *Erie*'s holding requires adopting a particular conception of the nature of law. Obviously it is possible to take the jurisprudential turn in understanding *Erie* without endorsing the "turn" as a general methodological view that the resolution of all important legal issues requires taking jurisprudential positions on one or more matters.

The phrase, "the jurisprudential view," is a variant on the phrase, "the linguistic turn," apparently coined by Gustav Bergman. See GUSTAV BERGMAN,

understanding *Erie*. Courts and commentators tend to read *Erie*'s result as depending on a commitment to a particular conception of the nature of law.³ With or without careful qualification, they frequently understand the case in this way. Consult a civil procedure casebook today and you are likely to find *Erie* described as endorsing a particular conception of the nature of law: legal positivism.⁴ The case is variously described as “reflecting two jurisprudential trends of its era—realism and positivism,”⁵ “represent[ing] . . . a fundamentally different view of the nature of law”⁶ from the view endorsed by *Swift v. Tyson*,⁷ and rejecting nonpositivism as “jurisprudentially bankrupt.”⁸ This jurisprudential turn in reading *Erie* is understandable: Brandeis's approving citation of several of Justice Holmes's dissents, which do invoke legal positivism, suggests this conclusion. Shortly after *Erie* was decided, the Supreme Court described the case as “overruling” a particular way of looking at law.⁹ The Court apparently believed that *Erie*'s result is inconsistent with nonpositivist conceptions of

LOGIC AND REALITY 177 (1964); RICHARD RORTY, *Introduction* to THE LINGUISTIC TURN 9 n.10 (R. Rorty ed. 1967). “The linguistic turn” has come to refer generically to the priority given to language in answering philosophical questions. See, e.g., MICHAEL DUMMETT, THE ORIGINS OF ANALYTICAL PHILOSOPHY 4, 26-27 (1994). The linguistic turn in subject areas of philosophy has nothing to do with the jurisprudential turn described in this paper.

³ See, e.g., Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1655 (2002); Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1789-95 (1997); Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 115-16 (1993); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1391-92 (1989); William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 907-08 (1988); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 1459, 1462 (1997). Two commentators taking the opposite position are Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 709 (1995); and George Rutherglen, *Reconstructing Erie: A Comment on the Perils of Legal Positivism*, 10 CONST. COMMENT. 285 (1993).

⁴ See, e.g., STEPHEN C. YEAZELL, CIVIL PROCEDURE 233 (6th ed. 2004); ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 444 (2003); RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS AND QUESTIONS 597 (3d ed. 2001); LINDA J. SILBERMAN & ALLAN R. STEIN, CIVIL PROCEDURE: THEORY AND PRACTICE 461 (2001).

⁵ FREER & PERDUE, *supra* note 4, at 597.

⁶ SILBERMAN & STEIN, *supra* note 4, at 461.

⁷ 41 U.S. 1 (1842).

⁸ YEAZELL, *supra* note 4, at 233.

⁹ See *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945); see also *infra* notes 106-108 and accompanying text.

law. Many commentators take the jurisprudential turn more carefully. Positivism sometimes is described merely as a factor in *Erie*'s result.¹⁰ Closely connected is the biographical view that Brandeis's commitment to positivism made the result more likely. The case also is said to rely on a narrow version of positivism.¹¹ Alternatively, *Erie*'s holding is found to depend on a view about allocations of law making powers between federal and state courts, and the latter in turn to rely on positivism.¹² These different positions, in different ways, all find that *Erie*'s result relies on jurisprudential premises about the nature of law.

I think the jurisprudential turn in understanding *Erie* is a mistake. *Erie*'s result has nothing to do with jurisprudential positions about the nature of law. It does not rely in any way on legal positivism. *Erie*'s result instead turns only on constitutional matters, such as separation of powers or the constraints of federalism set by the U.S. Constitution. The Federal Constitution, supplemented by state constitutional provisions, alone requires federal courts generally to follow state court determinations of state law. Correct jurisprudential positions about the nature of law have nothing to do with this requirement. Although Brandeis's opinion recites a classical version of positivism, positivism is irrelevant to the court's conclusion in the case.

There are two ways to demonstrate legal positivism's irrelevance to *Erie*. One is by a general argument that shows that *Erie*'s result is independent of positivism. The argument is conceptual and relies on the limited claim made by positivism. It demonstrates that doctrines about the nature of law are neither necessary nor sufficient to justify allocations of a lawmaking power between federal and state courts. They are insufficient, because claims about the nature of law by themselves cannot justify *Erie*'s requirement that federal courts defer to state court determinations of state law. Positivism also is unnecessary, because such deference can be justified by constitutional requirements alone, without any claims about the nature of law. *Erie*'s result therefore is independent of jurisprudential

¹⁰ See TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 121-22 (1981) (change in jurisprudential thought was an implicit factor in debate over the *Swift* doctrine).

¹¹ See EDWARD A. PURCELL JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 181-82 (2000).

¹² See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1478-79, 1481-82 (1997).

commitments about the nature of law.¹³ The second argument is historical. It shows that positivism is irrelevant to *Erie*'s result by describing legal theorists working in the interwar years who were committed to positivism (appropriately specified) but found *Erie* objectionable. The position of positivist legal theorists who reject *Erie* suggests that *Erie* does not depend on positivism. Of course, such biographical data do not conclusively show positivism's irrelevance to *Erie*: legal theorists simply could have been wrong about the consequences of their jurisprudential commitments for case law. However, the data suggest the irrelevance of positivism to *Erie*'s result.

This article presents an historical case against the jurisprudential turn in understanding *Erie*. It does so by focusing on Arthur Corbin's opposition to *Erie* over a significant portion of his long academic life. Today Corbin is remembered primarily for his work in contract law, principally as the author of the multi-volume treatise *Corbin on Contracts*¹⁴ and the engineer of the *Restatement (First) of Contract*'s recognition of promissory estoppel as a basis of contract enforcement.¹⁵ Corbin's writings on contract law sometimes still figure in the debate over their inclusion among the legal realist scholarship of the 1920s and 1930s.¹⁶ His work in federal courts is almost forgotten, perhaps

¹³ See Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998).

¹⁴ ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* (8 vols. 1950).

¹⁵ See Jay Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 683 (1984); GRANT GILMORE, *THE DEATH OF CONTRACT* 62-65 (1974). For Corbin's own views of his participation in Section 90's drafting, see Letter from Arthur L. Corbin to Robert Braucher, January 27, 1961, reprinted in Joseph M Perillo, *Twelve Letters from Arthur L. Corbin to Robert Braucher Annotated*, 50 WASH. & LEE L. REV. 755, 768-69 (1993) (Section 90 is in "exactly the form in which he [Williston] first submitted it").

¹⁶ Compare Robert W. Gordon, *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, in *HISTORY OF THE YALE LAW SCHOOL* 99 (Anthony T. Kronman ed., 2004); LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* 25 (1986); WILLIAM L. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 27 (1973) (Corbin a legal realist); NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 140 n.363 (1995) (referring to Corbin's "realist predilections"); see also John Henry Schlegel & David M. Trubek, *Charles E. Clark and the Reform of Legal Education*, in *JUDGE CHARLES EDWARD CLARK* 81, 105 (Peninah Petruck ed., 1992); Friedrich Kessler, *Arthur Linton Corbin*, 78 YALE L. J. 517, 519 (1974) (not a legal realist). For Corbin's own disavowal of the association, see Letter from Arthur L. Corbin to Karl Llewellyn (Dec. 1, 1960, R/13/15) in *LLEWELLYN PAPERS* (on file with the University of Chicago Law School Library) ("I never wanted to belong to the 'Realist School' (or any other 'School,' except perhaps the Yale

because *Erie*'s result is accepted and its applications understood reasonably well. However, Corbin's consistent and long-held opposition to *Erie* is articulated at points throughout his long working life, particularly between 1938 and 1964, when he stopped writing. It is anticipated in 1929, nine years before *Erie* was decided, in his criticism of Holmes's dissent in *Black & White Taxi & T. Co. v. Brown & Yellow Taxi & T. Co.*¹⁷ In articles in 1938 and 1941, Corbin questioned *Erie*'s constitutional basis and found objectionable consequences in federal court deference to state court determinations of state law. *Corbin on Contracts* and Supplements to the treatise up to 1964 continued to question *Erie*'s result. Finally, in a 1953 book review, later approvingly cited in supplements to *Corbin on Contracts*, Corbin called for *Erie*'s overruling. In work outside of contract law between 1921 and 1964, Corbin endorsed views about the nature of law that fairly can be described as a version of legal positivism. Taken as a whole, Corbin's work represents the position of a legal positivist at mid-century who opposed *Erie*'s result on constitutional and practical grounds. It provides historical evidence that *Erie*'s result does not depend on a jurisprudential commitment to positivism.

This article is structured as follows. Part I documents the jurisprudential turn in understanding *Erie* by analyzing some of Holmes's famous dissents invoked in the opinion. It argues that Holmes's epigrams about the nature of law in these dissents are deceptive: they either wrongly attribute to the majority jurisprudential views it need not hold or take a jurisprudential position unnecessary to the dissent's view. Either way, Holmes's legal positivism is irrelevant to his own dissents. Parts II-V together make the historical case for viewing Corbin as a legal positivist who objected to *Erie*'s result constitutional and practical grounds. Part II identifies a precise and plausible notion of legal positivism, and finds Corbin's compact, but repeated, statements about law to be positivist. Part III describes and distinguishes Corbin's practical and constitutional objections to *Erie*'s result. Part IV shows, contrary to the predominant view of his position, that Corbin's objection to *Erie* is not only based on what he took to be its practical consequences in requiring federal court deference to state court determinations of state law. Corbin's objection is more serious, based on vaguely specified constitutional constraints

Law School)."). Leiter presents a concise description of legal realism. See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997).

¹⁷276 U.S. 518, 532 (1927).

controlling the exercise of judicial power by federal courts. Part V speculates about the precise constitutional basis of Corbin's opposition to *Erie*. A conclusion (Part VI) describes the relevance of Corbin's example for the historical case against the jurisprudential turn in understanding *Erie*.

As a preliminary note, I need to clarify what I mean by *Erie* and its "holding" or "result." As I use them, the terms are interchangeable and refer to two propositions announced by the case: (1) that absent controlling federal constitutional or statutory law, federal courts must apply state law; and (2) that federal courts must defer to interpretations of state law articulated by that state's highest court. The second proposition reaffirms a precedent at least as old as *Green v. Lessee of Neal*,¹⁸ decided in 1832. *Erie* can stand for other propositions, such as that federal courts cannot declare state law, or, of less continuing relevance, that Congress cannot authorize federal courts to make general substantive law displacing state law. Closely associated with *Erie* is the rule, established by cases decided after *Erie*, requiring "*Erie* predictions" when state law is otherwise unresolved. In such cases federal courts must predict the likely interpretation of state law by the state's highest court and defer to that prediction. None of these other propositions are automatic consequences of the two propositions identified above. By *Erie*'s "holding" or "result" I refer only to the two propositions identified.

I. HOLMES'S DECEPTIVE DICTA

The view that the distribution of lawmaking power between federal and state courts depends on jurisprudential positions predates *Erie*. It is Holmes's view, stated in his dissents in *Kuhn v. Fairmont Coal Co.*¹⁹ and *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, and invoked in Brandeis's opinion. There Holmes adopts the classical positivist position that law's authority derives only from the declarations of a sovereign. He also characterizes views rejecting this position as conceiving of law as a "transcendental body of law outside of any particular State..."²⁰ In other places, Holmes famously describes these views epigrammatically as conceiving of law as a "brooding omnipresence in the sky."²¹

¹⁸ 31 U.S. (6 Pet.) 291 (1832); see *infra* notes 109-13 and accompanying text.

¹⁹ 215 U.S. 349, 370 (1909).

²⁰ *Black & White Taxi Co.*, 276 U.S. at 533.

²¹ See *id.* at 533; Letter from Holmes to Pollock (Feb. 17, 1928) in 2 HOLMES-POLLOCK LETTERS 215 (Mark DeWolf Howe ed., 1961); see also *Kuhn*, 215

Because Holmes's jurisprudential observations appear as part of his dissents, presumably he takes them to be relevant to the majority opinions from which he is dissenting. He therefore must have thought that the result reached by the majority in the respective cases (a) takes a jurisprudential position about the nature of law, (b) rejects legal positivism, and (c) conceives of law as a "brooding omnipresence in the sky." Holmes is wrong here, however. A close look at the majority opinions in *Kuhn* and *Black & White Taxicab Co.* shows that either the majority could have shared Holmes's positivist commitments or need not take any jurisprudential position at all on the nature of law. Holmes's dissents invoked in *Erie* therefore do not depend on jurisprudential views stated in them. These views are instead deceptive dicta. Rather, Holmes's disagreement with the majority in fact is about the constitutional or federal allocations of lawmaking power between the federal and state governments.

To see this, consider first one of Holmes's famous dissents not cited in *Erie*: *Southern Pacific Co. v. Jensen*.²² The Court had to decide there whether the federal common law of admiralty preempts a state statute. The majority, relying on Article III's grant of admiralty and maritime jurisdiction to federal courts and the Judiciary Act of 1789, found that state law cannot prejudice the uniformity of maritime law.²³ It also found that this federal admiralty law was binding on state courts.²⁴ Holmes disagrees. His dissent makes the same sort of argument made in his *Kuhn* and *Black & White* dissents. That is, it makes two assertions: one about positivism and the other about state's power to make common law. The assertion about positivism appears in his famous epigram: "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified"²⁵ The claim about state law appears in

U.S. at 372 (1909) (Holmes, J., dissenting) ("The law of a State does not become something outside of the state court, and independent of it, by being called the common law."); *cf.* *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1916) (Holmes, J., dissenting) ("The only authority available is the common law or statutes of a state.")

²² 244 U.S. 205 (1916).

²³ *See id.* at 216.

²⁴ *See id.* at 215.

²⁵ *Id.* at 222. For an earlier use of the same metaphor to express the position, see William M. Meigs, *Decisions of the Federal Courts on Questions of State Law*, 45 AM. L. REV. 47, 56 (1911) ("There did not exist in [Marshall's] day a general commercial law, apart from a sovereignty to create it, floating in the air, intangible."). Maine invokes the same metaphor to similarly criticize a notion of

Holmes's statement that "[i]f admiralty adopts common-law rules without an act of Congress it cannot extend the maritime law as understood by the Constitution. It must take the rights of the parties from a different authority The only authority available is the common law or statutes of a State."²⁶

Holmes's assertion of positivism is superfluous to the dissent; his disagreement with the majority turns only on the assertion about state law. This is because the majority's position is consistent with positivist commitments. After all, the majority finds the uniformity of maritime law that preempts inconsistent state law in federal constitutional (Article III, Section 2) and statutory provisions (Section 9 of the Judiciary Act of 1789). Thus, the majority could agree with Holmes that admiralty law is not a "brooding omnipresence in the sky."²⁷ Its contours instead are derived from enactments, or implications from enactments, of a federal sovereign. In fact, the majority finds just this, as it makes clear when it finds the contours of federal common admiralty law based on "these constitutional provisions and the federal act"²⁸ In other words, *Jensen's* majority concludes that a federal

the common law. See HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 38 (10th ed. 1884) [hereinafter MAINE, *ANCIENT LAW*] ("Probably it will found that originally it was the received doctrine that somewhere, *in nubibus* or *in gremio magistratuum*, there existed a complete, coherent, symmetrical body of English law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances."). Both Holmes and Meigs had edited the *American Law Review* (Holmes between 1870 and 1873), in which Meigs's article later appeared. Holmes therefore might have been familiar with the article before his dissent in *Jensen*. He was familiar with Maine's *Ancient Law* as early as 1888 and probably before publishing *THE COMMON LAW* in 1881. See Letter from Oliver Wendell Holmes to Frederick Pollock, March 4, 1888, in 1 HOLMES-POLLOCK LETTERS, *supra* note 15, at 31; Letter from Oliver Wendell Holmes to Harold Laski, June 1, 1922, in 1 HOLMES-LASKI LETTERS 1916-1935 429-30 (Mark De Wolfe Howe ed., 1953).

²⁶ *Jensen*, 244 U.S. at 221.

²⁷ Robertson characterizes the consequence of *Jensen* as follows: "Until *Jensen* . . . the maritime law of the United States was a code of jurisdiction, procedure, and remedies. After [*Jensen*], it was a brooding omnipresence over the sea." DAVID W. ROBERTSON, *ADMIRALTY AND FEDERALISM* 193 (1970). An alternative understanding is possible. The majority opinion in *Jensen* instead could be understood to maintain that Article III's admiralty clause, together with Section 9 of the Judiciary Act of 1789, authorize federal courts to create federal admiralty law, preempting inconsistent state common law. Because the authority to create admiralty law derives from a constitutional or statutory source, it is not a "brooding omnipresence over the sea."

²⁸ *Jensen*, 244 U.S. at 216.

sovereign authorizes the declaration of maritime law by a state sovereign, except when the state sovereign's declarations undermine the uniformity of maritime law. Holmes's disagreement with the majority therefore does not rest on endorsing or denying positivism.²⁹ Instead, it relies on the state's authority to articulate common law that can affect admiralty law.

In admiralty cases, Section 9 of the Judiciary Act of 1789 reserves to litigants "common law remedies." Holmes believes that the provision allows a state court to announce state common law remedies in exercising admiralty jurisdiction. As he put the point in correspondence summarizing his dissent, states have the power to articulate applicable state law remedies.³⁰ *Jensen's* majority denies that their power to do so is unrestricted when state law affects admiralty law. Thus, Holmes's disagreement is over the preemptive effect of admiralty law. *Jensen's* majority finds that the federal common law of admiralty constrains state law. Holmes finds that state common law applies, not a federal common law of admiralty. The dispute therefore is over the distribution of common lawmaking powers between federal and state courts, not over legal positivism.

Holmes's dissent in *Kuhn v. Fairmont Coal Co.*³¹ fits the same pattern. It too combines an endorsement of positivism with a statement about the distribution of common lawmaking powers between federal and state courts. Here again Holmes's

²⁹ Cf. Jonathan M. Gutoff, *Federal Common Law and Congressional Delegation: A Reconceptualization of Admiralty*, 61 U. PITT. L. REV. 367, 398 (2000) (both federal and state sovereigns could articulate law affecting maritime law, and that therefore the dispute between *Jensen's* majority and Holmes is not one over the truth of legal positivism). I agree with Gutoff's conclusion that *Jensen's* result does not turn on positivism but understand the dispute between *Jensen's* majority and Holmes differently. The majority, as I read it, finds a constitutional and statutory authorization allowing states to create law that can affect maritime law, as long as the state law created does not undermine its uniformity. Holmes regards Section 9 of the 1789 Judiciary Act as authorizing states to articulate common law remedies without this restriction. Thus, the dispute is over the scope of congressional authorization to state to create common law remedies in cases subject to admiralty jurisdiction. Put another way, the disagreement is over the authorization given the state sovereign by the federal sovereign. Gutoff understands the disagreement as one over the capacity of a state sovereign to create law independently of a federal sovereign, not over the authorization to do so.

³⁰ See Letter from Oliver Wendell Holmes to Frederick Pollock, June 1, 1917, in 1 HOLMES-POLLOCK LETTERS, *supra* note 21, at 246 ("Four of us dissented [in *Jensen*] in favor of the state's power, and I can't understand the decision . . .").

³¹ 215 U.S. 349 (1910).

disagreement with the majority turns only on the latter. In *Kuhn* the question certified to the Court was whether a federal court must apply state law concerning real estate title declared after title is conveyed. Relying on *Burgess v. Seligman*,³² the majority concluded that federal courts are not bound to do so in the circumstances: they can exercise their independent judgment about state law at the time title was conveyed. Holmes disagrees. His disagreement, however, depends only on his finding of the respective limits of federal and state lawmaking powers. The law concerning real estate title is “local” and therefore is governed by state law, according to Holmes. He concludes that federal courts are bound to follow state law governing these matters. As he stated the argument: “Whence does that law issue? Certainly not from us. But it does issue . . . from the state courts as well from the state legislatures. When we know what the source of the law has said that it shall be, our authority is at an end.”³³ Federal courts therefore do not have the authority to make independent determinations of state law.

This conclusion is based only on a finding about the allocation of lawmaking powers between federal and state courts. Holmes believes that allowing federal courts to make an independent determination of state law interferes with the state’s authority to declare common law. This belief, together with the view that states have the authority to make common law, is enough to bar federal courts from independently determining state common law. Jurisprudential positions on the nature of law are unnecessary to reach Holmes’s conclusion. The disagreement with *Kuhn*’s majority is only over a federal court’s authority to declare state law, not over the status of law. The majority agrees that the federal court is bound to apply state law in the circumstances; it does not deny that the source of law is state law. It simply allows the court to an independent judgment about that law when a state court has not declared a rule governing the passage of real estate title. Holmes finds that allowing such an independent determination improperly allocates state lawmaking power to federal courts when it properly belongs with state courts. The disagreement therefore is a substantive one about the allocation of lawmaking power, not a conceptual dispute about the nature of law.

³² 107 U.S. 20 (1882).

³³ *Kuhn*, 215 U.S. at 372 (Holmes, J., dissenting).

Immediately after the passage just quoted, Holmes made a conceptual claim about law: “The law of a State does not become something outside of the state court and independent of it by being called the common law. Whatever it is called it is the law as declared by the state judges and nothing else.”³⁴ The passage endorses positivism. If the law of a jurisdiction is only what is declared by its officials, then law cannot exist “independent” of such declarations: law cannot be an “omnipresence in the sky.” *Kuhn*’s majority could agree. This is because its position is that, whatever the nature of state law, federal courts in some circumstances have the authority to independently determine the content of state law.³⁵ Thus, the majority’s conclusion does not depend on denying (or asserting) the truth of positivism. As in *Jensen*, Holmes’s jurisprudential dicta therefore are irrelevant to his dissent in *Kuhn*.

Holmes’s dissent in *Black & White Taxicab Co.*³⁶ again both endorses positivism and makes an assertion about the allocation of federal and state lawmaking powers of courts. Unlike the other dissents, it contains a specific basis for the requirement that federal courts respect state common law as declared by state courts. As in *Kuhn*, in *Black & White Taxicab Co.* Holmes associates his positivism with his assertion about the allocation of lawmaking powers. The association makes it appear as if both were necessary to the dissent:

If there were . . . a transcendental body of law outside of any particular State but obligatory within it . . . , the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law [L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it

If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain.³⁷

³⁴ *Id.*

³⁵ See *supra* note 32 and accompanying text.

³⁶ 276 U.S. 518, 532 (1927) (Holmes, J., dissenting).

³⁷ *Id.* at 532-34.

Holmes added a rule of interpretation of sorts for finding that a state constitution allows its highest court to establish state law: “[b]ut when the constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words”³⁸ His conclusion was that “[t]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own should utter the last word.”³⁹ Thus, Holmes’s argument is that the federal constitution requires federal courts to follow state law as declared by state actors authorized by the state, and that by establishing the highest state court the state constitution implicitly authorize their highest courts to declare state law. Brandeis’s opinion in *Erie* follows Holmes’s reasoning in *Black & White Taxicab Co.* (concurring in by Brandeis). It reproduces approvingly the part of first passage dealing with the nature of law and the passage on the state’s authority just quoted.⁴⁰ Brandeis’s opinion concludes, as does Holmes’s dissent, that the failure of federal courts to respect state common lawmaking impermissibly interferes with state authority.

Holmes’s dissent in *Black & White Taxicab Co.* again shows a gap between its rhetoric and reasoning. It suggests that considerations about the source of law require deference to state law. In fact, Holmes’s argument proceeds on an exclusively constitutional basis. Nothing in it depends on commitments, positivist or otherwise, about the nature of law. The demand that federal courts respect state law as declared by authorized state officials is, if true, a constitutional requirement. The allocation of lawmaking authority by a state constitution to its highest court obviously is a matter of state constitutional law. Of course, Holmes’s rule of interpretation for finding an implicit authorization to the state’s highest court is not constitutional in nature. It is a rule of interpretation that sets a default principle for inferring lawmaking authority. However, it is not a rule essential to law or lawmaking. The details of Holmes’s argument are controversial, particularly his rule of interpretation for finding the implicit authorization of state courts to make law. His rule is justified if most state constitutions were enacted with an understanding to that effect. Historically, this assumption is probably false. The drafters of most state constitutions likely thought that state courts do not

³⁸ *Id.* at 534.

³⁹ *Id.* at 535.

⁴⁰ *Erie*, 304 U.S. at 79.

make law; only legislatures do. After all, it is anachronistic to suppose that these drafters were working legal realists. More important here, Holmes's rule of interpretation could be sound whatever view is adopted about the nature of law. For example, suppose a norm can be law without being derived from any social facts, such as by being enacted by authorized officials. A state's constitution still could allocate to its highest court the authority to determine the content of these norms. And Holmes's interpretive rule still could apply, treating the state constitution's establishment of a state supreme court as an implicit authorization of the supreme court's authority to declare law.

Read closely, Holmes's dissents upon which Brandeis's opinion relies in *Erie* do not support the view that the common lawmaking powers of federal and state courts depends on jurisprudential positions about the nature of law. Holmes's dicta to the contrary are deceptive. Whether Holmes himself believed that his jurisprudential remarks were integral to his dissents is another matter. Holmes was fond of inserting epigrams first produced in correspondence or scholarly publications into his opinions, and vice versa.⁴¹ He might not have thought that the inserted epigrams were always essential to the opinions. This might have been the case with his endorsement of positivism. Further, as a dialectical strategy, the insertions about positivism could be effective even if not strictly relevant to the ongoing dissent. After all, it is one thing to assert that constitutionally mandated allocations of federal and state common lawmaking powers bind federal courts to follow state court determinations of state law. An opponent can disagree, producing a constitutional argument in response. Potentially more effective is the charge that allowing federal courts not to be bound by state court determinations of state law presupposes that law is a "brooding omnipresence in the sky."⁴² The opponent understandably wants to avoid taking a position said to presuppose a silly view. By making the charge, the proponent avoids the need to produce constitutional considerations in favor of her own

⁴¹ See, e.g., *supra* note 18 and accompanying text; Letter from Oliver Wendell Holmes to Harold Laski, February 1, 1919, in 1 HOLMES-LASKI LETTERS 1916-1935, *supra* note 22, at 183 ("judges made law (interstitially, as I explained in the [*Jensen*] case) . . ."); Letter from Holmes to Laski, January 29, 1926, *id.* at 822-23 ("[I]t is that [error] that I have aimed at when I have said that the Common Law is not a brooding omnipresence in the sky and that the U.S. is not subject to some mystic overlaw that it is bound to obey.").

⁴² Cf. *Jensen*, 244 U.S. at 222. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1916) (Holmes, dissenting).

assertion.⁴³

II. LEGAL POSITIVISM AND CORBIN

Corbin did not hinge his opposition to *Erie* on views about the nature of law. Although he took jurisprudential positions on the matter, these positions do not figure in his rejection of *Erie*'s result. Corbin's jurisprudential views, fairly described, endorse positivism. However, his rejection of *Erie* does not rely on his commitment to positivism. Instead, it depends on what he takes to be the objectionable practical and constitutional implications of the case. Corbin's positivism reflects views developed before he considered the power of federal courts to articulate federal common law, principally in work published between 1914 and 1922. In these publications Corbin describes and endorses Wesley Hohfeld's analysis of the logic of legal rights, and applied it to legal doctrines not discussed by Hohfeld. Hohfeld's analysis only describes the logical relations between basic legal notions, and there is no connection between an analysis of the logic of legal notions and views about the nature of law. The latter is part of an interpretation or application of these legal notions; the former is neutral between such interpretations. Nonetheless, in these publications Corbin interprets Hohfeld's analysis of a legal right in a positivistic manner and makes general claims about the nature of law. This Part briefly rehearses the core claims of positivism and shows Corbin's commitment to them, principally in articles published between 1914 and 1922. Parts IV and V identify Corbin's nonjurisprudential criticisms of *Erie*'s result: Part IV describes his practical objections, and Part V the constitutional objections to the case.

⁴³ Holmes uses a similar dialectical strategy in his dissent in *Lochner v. New York* 198 U.S. 45 (1905). In charging the majority with imposing its own economic views on the interpretation of the due process clause of the Fourteenth Amendment, Holmes warns that "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." *Id.* at 75 (Holmes, dissenting). By attributing to the majority a controversial nonconstitutional view, he avoids having to address the constitutional considerations supporting the majority's interpretation of the due process clause. Holmes in fact joined a number of opinions that invoked substantive due process to invalidate economic regulations. See Michael J. Phillips, *How Many Times Was Lochner-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1083 (1997).

A. Legal Positivism: Core Claims

Legal positivism is a theory about the nature of law. It identifies what is distinctive about legal norms and gives them their status as law. Central to positivism is the claim that law is explained by social facts of a particular sort, although positivists disagree about which facts these are as well as how they explain law.⁴⁴ For classical positivism, the particular social facts are the commands of a sovereign.⁴⁵ Contemporary positivists focus on different social facts. For Hart, the social fact identified is a social practice among officials: a convention by which they validate norms using specified criteria.⁴⁶ Positivists also disagree as to whether the social facts explaining law restrict the content of legal norms in any way. “Soft” (or “inclusive”) positivists hold that facts in a given society specify the criteria for a norm being a law.⁴⁷ That criteria in turn may be of any sort and allow for legal norms to have any content (consistent with the criteria). “Hard” (or “exclusive”) positivists limit the content of legal norms by restricting the criteria of validity to particular sorts of facts, such as the enactment of a norm or the identity of the official enacting it.⁴⁸ Behind the divide between “soft” and “hard” positivism is the shared commitment to accounting for law in terms of social facts.

The other claim frequently taken to be central to positivism is the position that legal norms are separable from moral norms.⁴⁹

⁴⁴ See, e.g., Kenneth E. Himma, *Inclusive Legal Positivism*, in JURISPRUDENCE AND PHILOSOPHY OF LAW 125, 126 (Jules Coleman & Scott Shapiro eds., 2002); JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 77 (2001); Alf Ross, *Validity and Conflict Between Positivism and Natural Law*, 4 REVISTA JURIDICA DE BUENOS AIRES 46, 48 (1961).

⁴⁵ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 31 (Wilfrid E. Rumble ed., 1995); Jeremy Bentham, *What a Law Is*, in BENTHAM'S POLITICAL THOUGHT 149 (Bihku Parekh ed., 1973); JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 330 (1988); THOMAS HOBBS, *LEVIATHAN* 312 (C.B. MacPherson ed., 1968); see also Gerald J. Postema, *Law as Command: The Model of Command in Modern Jurisprudence*, 11 PHIL. ISSUES 470, 470 (2001); 2 F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 45 (1976).

⁴⁶ See H.L.A. HART, *THE CONCEPT OF LAW* 115-16, 255 (2d ed. 1994) [hereinafter HART, *CONCEPT OF LAW*].

⁴⁷ See Stephen R. Perry, *Method and Principle in Legal Theory*, 111 YALE L.J. 1757, 1787-94 (2002); WIL J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994); HART, *CONCEPT OF LAW*, *supra* note 42, at 250-51; Tony Honore, *Herbert Lionel Adolphus Hart 1907-1992*, 84 BRIT. ACAD. 295, 315 (1994).

⁴⁸ Scott J. Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY 469 (1998); Joseph Raz, *Authority, Law, and Morality*, in JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 210-38 (1994).

⁴⁹ See MATTHEW H. KRAMER, *IN DEFENSE OF LEGAL POSITIVISM* 114 (1999);

Legal and moral norms may coincide, depending on the criteria of legality adopted in a particular society. Their coincidence is an empirical matter, perhaps even an invariable coincidence. The positivist's position is merely that the two sorts of norms need not coincide: it is possible that they can diverge.⁵⁰ Thus, the frequently observed connection between some legal and moral norms does not show that the connection is necessary in any recognizable sense. The association of positivism's claim about separability with its account of law is close. If law is explained by particular sorts of social facts, then a legal norm's existence depends on these facts obtaining. The validity of at least some moral norms, however, depends on their content alone. Because legal and moral norms can have different bases, they therefore can diverge.

Strictly, positivism's claim about separability is not central to its position. This is because the contention does not distinguish positivism from its rival theories about the nature of law.⁵¹ Although Hart and, most famously, Austin take the claim of separability to be at the core of positivism,⁵² nonpositivists need not deny its truth. For example, a natural law theorist might contend that an adequate theory of law must describe a rational standard for conduct.⁵³ Legal norms that are immoral fail to satisfy these standards of practical rationality. The theorist therefore could agree that legal and moral norms can and often do diverge. At the same time, according to the natural law theorist's implicit theory of law, the failure to satisfy moral norms makes these legal norms defective as legal norms. The standard of rationality provides a measure for evaluating the way in which legal norms are defective. This position does not deny that law depends only on social facts or that legal and moral norms can diverge. It only insists that a adequate theory of law include a normative component for evaluating the morality of legal norms. The divide between

HART, CONCEPT OF LAW, *supra* note 46 at 185-86; Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982).

⁵⁰ See KRAMER, *supra* note 49, at 114; Frederick Schauer, *Positivism as Pariah*, in THE AUTONOMY OF LAW 31, 36 (Robert P. George ed., 1996).

⁵¹ See Coleman, *supra* note 49, at 153; Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, in THE AUTONOMY OF LAW, *supra* note 41, at 1-29 (most natural law theories are consistent with weak forms of positivism).

⁵² See *supra* note 49.

⁵³ See Mark C. Murphy, *Natural Law Jurisprudence*, 9 LEGAL THEORY 241, 244 (2003); John Finnis, *Law and What I Truly Should Decide*, 48 AMER. J. JURIS. 107, 112-13 (2003); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 9-11, 26-27, 363-64 (1980).

positivists and their opponents therefore turns on what makes a theory of law adequate, not on the denial or endorsement of the separability claim. Nonetheless, the claim, although not distinctive of positivism, historically has been associated with it.⁵⁴

B. Drift in Designation

Use of the designation “legal positivism” has not always been confined to the claims just described. Its use has been less disciplined. Other claims also have been labeled as “positivist,” presumably because a legal theorist identified as a positivist also makes them. Thus, between the early nineteenth and mid-twentieth century, positivism variously has been identified with the following contentions: (1) that law consists of commands of authorized officials; (2) that law and morality are separable; (3) that analysis of the meanings of legal terms is important; and (4) that legal decisions can be deduced from a coherent set of legal norms.⁵⁵ The first contention commits positivists to a particular set of social facts (commands) constituting law. Contentions (3) and (4) have nothing to do with a theory of law. Advocating the importance of terminological analysis of legal language is a methodological position compatible any theory of law. Contention (4) is an assertion, questionable on its own terms, about the nature of legal reasoning, not about the status of legal norms.

The drift in positivism’s designation over time is understandable. For one thing, the term “legal positivism” seems not have appeared in Anglo-American jurisprudence until 1940.⁵⁶ Previously, the position was described by the broad term “analytical jurisprudence,” a label probably coined by Henry Sumner Maine.⁵⁷ The lack of a precise term for the position might have contributed to the different sorts of contentions associated with it over time. A consequence of the terminological drift is misunderstanding: criticisms sometimes understood as criticisms of positivism in fact are objections to disposable contentions unrelated to the position. One example is the then-contemporary

⁵⁴ See *supra* notes 49, 55 and accompanying text.

⁵⁵ The list contains contentions appearing in part of Hart’s short survey of the then-contemporary use of the term. See HART, CONCEPT OF LAW, *supra* note 42, at 302 (Note to pg. 185); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 601 n.26 (1958) [hereinafter Hart, *Positivism*].

⁵⁶ See ANTHONY J. SEBOK, LEGAL POSITIVISM AND AMERICAN JURISPRUDENCE 32 (1998).

⁵⁷ See Wilfrid Rumble, *John Austin and His Nineteenth Century Critics: The Case of Sir Henry Sumner Maine*, 39 N. IRE. LEGAL QUART. 119, 119 (1988).

criticism of the place Bentham reserved in jurisprudence for the moral evaluation of legal norms.⁵⁸ The taxonomic objection was that normative evaluations were not the job of jurisprudence; they were the concern of substantive morality. To modern readers, the criticism seems ridiculous because the division of intellectual labor between jurisprudence and moral theory is so unimportant. But even if policing the proper scope of jurisprudence were important, the taxonomic objection does not affect positivism. This is because positivism, even if identified with one of the contentions above, does not evaluate legal norms.

A more important consequence follows from the restricted way in which positivism's theory of law was understood. Between the early nineteenth century and mid-twentieth century, that theory was the command theory of law. According to it, law consists in the commands of a sovereign to do or forebear from specified acts.⁵⁹ For positivists and their opponents, Austin's command theory was taken to be the most prominent expression of the general view.⁶⁰ Positivism for them meant the command theory of

⁵⁸ See Philip Schofield, *Jeremy Bentham and Nineteenth-Century English Jurisprudence*, 12 J. LEGAL HIST. 58, 65 (1991). Maine and Pollock later made the same criticism of Austin; see HENRY SUMNER MAINE, LECTURES ON THE EARLY HISTORY OF INSTITUTIONS 370 (7th ed. 1914) [hereinafter MAINE, LECTURES] (Austin's discussion of moral laws does not belong philosophy of law but to the philosophy of legislation); FREDERICK POLLOCK, OXFORD LECTURES AND OTHER DISCOURSES 17 (1890) [hereinafter, POLLOCK, OXFORD LECTURES] ("Austin's second, third and fourth lectures [in Lectures on Jurisprudence] appear to me to have no business where they are. They are not jurisprudence at all, but ethics out of place."). For evidence of prominence of this criticism, see generally Richard A. Cosgrove, *The Reception of Analytic Jurisprudence: The Victorian Debate on the Separation of Law and Morality, 1860-1900*, 74 DURHAM U. J. 47 (1981) [hereinafter Cosgrove, *The Reception of Analytic Jurisprudence*]. A more modern insistence on the same division of labor appears in HANS KELSEN, THE PURE THEORY OF LAW 68 (2d ed. 1967) (The "task of the science of law is not to approve or disapprove of its subject, but to know and describe it.").

⁵⁹ See Postema, *supra* note 45; see also *supra* note 45.

⁶⁰ See, e.g., Albert Kocourek, *The Century of Analytic Jurisprudence Since John Austin*, in 2 LAW: A CENTURY OF PROGRESS—1835-1935 201 (1935); MAINE, LECTURES *supra* note 58, at 371; THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 42, 53-54 (11th ed. 1910); Charles Malcolm Platt, *The Character and Scope of Analytical Jurisprudence*, 24 AMER. L. REV. 603, 605 (1899); Letter from Oliver Wendall Holmes to Harold Laski, September 15, 1916, in 1 HOLMES-LASKI LETTERS 1916-1935, *supra* note 18, at 21 ("The scope of state sovereignty is a question of fact. It asserts itself as omnipotent in the sense that it asserts that what it sees fit to order it will make you obey Law also as well as sovereignty is a fact."); Oliver Wendall Holmes, *Codes, and the Arrangement of the Law*, 5 AMER. L. REV. 4-5 (1870); see also Neil Duxbury,

law. This also meant that then-contemporary critics of positivism, such as Gray, Maine, Salmond, and Pollock, directed their objections against Austin's notion of law as commands.⁶¹ They concluded that their objections against command theories of law showed that positivism was defective. Later positivists abandon the command theory. Most prominently, Hart concedes the force of objections against command theories and proposes an alternative theory of law. His theory avoids the objections by understanding law to consist not in commands but in a particular social practice among officials: a convention by which they validate norms by using specific criteria. The theory remains positivist because it still relies on social facts—a social practice among officials. The next section argues that Corbin does the same thing: while denying that law consists only in commands, he too insists that law consists of social facts of a specific sort. In this way Corbin remains committed to positivism.

C. Corbin's Positivism

Corbin's views about the nature of law appear at points in publications between 1914 and 1964, principally in articles that appeared between 1921 and 1929. These views endorse positivism.

English Jurisprudence Between Austin and Hart, 91 VA. L. REV. 1, 22-24 (2005); William Twining, *General and Particular Jurisprudence—Three Chapters in a Story*, in POSITIVISM TODAY 119, 124-25 (Stephen Guest ed., 1996). Even Maine endorsed Austin's version of positivism before changing his mind; see Henry Sumner Maine, *The Conception of Sovereignty, and its Importance in International Law*, in 1 PAPERS JURIDICAL SOC. 26, 26 (1855) (“[T]he ultimate analysis of every positive law inevitably resolves into a command of a particular nature, addressed by political superiors, or *sovereigns*, to political inferiors, or *subjects*.”) (emphases in original).

⁶¹ See JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 55-56 (David Campbell & Philip Thomas eds., 1997); MAINE, *ANCIENT LAW*, *supra* note 25, at 6, 7, MAINE, *LECTURES*, *supra* note 58, at 382-83; FREDERICK POLLOCK, *A FIRST BOOK OF JURISPRUDENCE* 27-29 (1929) [hereinafter POLLOCK, *FIRST BOOK*]; JOHN W. SALMOND, *JURISPRUDENCE AND THE THEORY OF THE LAW* 50-52 (3d ed. 1910). For the identification of positivism with the command theory of law, see, for example, POLLOCK, *FIRST BOOK*, *supra* at vii (“[T]he philosophy of the English or ‘analytical’ school is not mine”); *supra* notes 52, 56, 57 and accompanying text. For a description of the common themes of the criticisms, see Cosgrove, *The Reception of Analytic Jurisprudence*, *supra* note 58. Sugarman gives an interesting account of the centrality of Austin's writings to late nineteenth century English legal education. See David Sugarman, *Legal Theory, the Common Law Mind and the Making of the Textbook Tradition*, in LEGAL THEORY AND COMMON LAW 26, 35-36 (William Twining ed., 1986). For a contemporary criticism of positivism that identifies it with command theories, see HAYEK, *supra* note 45, at 50-52.

Corbin nowhere uses the label “legal positivism” or even “analytic jurisprudence” to describe them. The omission is not surprising. The designation “legal positivism” had no currency before 1940, and the label “analytic jurisprudence” is not specific enough to designate views about the nature of law.⁶² Near the end of his life Corbin reported that he had never read Austin, and this might misleadingly suggest that he did not endorse positivism.⁶³ Nonetheless, in his early articles he makes the core claims comprising positivism. At the same time they show that Corbin rejects only Austinian positivism.⁶⁴

For Corbin, law exists in the context of a particular sort of social fact: the regular actions of those authorized to create rules governing conduct. Corbin made the point repeatedly in articles published in 1919 and throughout the 1920s. In *Legal Analysis and Terminology*, he stated that “law is a rule concerning human conduct, established by those agents of an organized society who have legislative power” and includes judicial powers among legislative powers.⁶⁵ Corbin took the same position in *Jural Relations and Their Classification*: “[w]e speak of the law and of

⁶² See Sebok, *supra* note 56, at 23 (positivism “overlapped partially” with analytic jurisprudence).

⁶³ See TWING, *supra* note 16, at 394 n.8. Twining accepts Corbin’s autobiographical statement as true; *see id.* at 29. However, the statement should not be credited; the detail of Corbin’s citation practice shows that he probably had read Austin. *See, e.g.*, Arthur L. Corbin, *The Dead Hand of the Common Law*, 27 YALE L. J. 668, 669 n.3, 671 n.18, 672 ns. 15 & 16 (1918) [hereinafter Corbin, *Dead Hand*]; Arthur L. Corbin, *Law in the Making*, 38 YALE L.J. 270, 272 (1929) (book review); *see also* WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT 9, 27 n.1 (Arthur L. Corbin ed., 3d Amer. ed. 1919) (references to Austin in Anson’s text and Corbin’s editorial notes).

⁶⁴ LaPiana finds Corbin’s commitment to positivism in his use of the case method of instruction. *See* WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 146 (1994) (referring to the “positivistic impulses” of the case method). *Cf.* Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VANDER. L. REV. 1387, 1426 (1997) (positivist approach of Langellians to legal study “closely correlated” with case method of teaching). I am unable to see that a theory of law has any pedagogic consequences for the way in which law is taught, and LaPiana does not suggest any. A theory of law and the case method seem to me to be separate matters. *Cf.* A.W.B. Simpson, *The Rise and Fall of the Legal Treatise*, 48 U. CHI. L. REV. 632, 677 (1981) (Langdell’s method of legal research and his case method of teaching separate “achievements;” case method had no effect on production of treatises.). The argument in the text below finds Corbin’s commitment to positivism in his views about law, not about legal education.

⁶⁵ Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L. J. 163, 164 (1921) [hereinafter Corbin, *Legal Analysis*].

legal relations . . . merely because the physical consequences involve some conduct on the part of the agents of society and because there are rules expressing a degree of uniformity in their action, enabling us to predict with some confidence what that action will be.”⁶⁶ In *Conditional Rights and the Functions of An Arbitrator* Corbin connects the predictability of authoritative behavior with its uniformity when he stated that “we cannot predict [a result] as a probability unless there is a rule of societal action, unless there has been a uniformity of executive and judicial action in the past or a legislative declaration applicable to the future. Such a uniformity or such a legislative declaration constitutes a rule of law.”⁶⁷ The same article concludes that “a highly acceptable and useful definition of ‘law’ would be: a rule of uniformity of societal action by which we can predict with some degree of certainty what will be the conduct of societal agents under specified sets of circumstances.”⁶⁸ He made very similar statements in a book review and other articles published in the 1920s.⁶⁹

Two features of Corbin’s position are worth noticing. First, the position identifies legal norms by their source or pedigree. That is, a norm is a legal norm because it is created by the regular acts of those legislative or judicial officials authorized to do so. Its content is fixed by the regular behavior of these officials in creating norms. The norms created by officials therefore can have any sort of content (consistent with their authorization). Thus, Corbin endorses positivism’s core claim to the effect that law consists in social facts. For Corbin, the particular social facts selected are norms created by regularities in the behavior of authorized officials. Richard Posner recently has taken a similar position, urging that law consists in the activities of authorized officials.⁷⁰ Second, Corbin’s identifies law with regularities in

⁶⁶ Arthur L. Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226, 230 (1921) [hereinafter Corbin, *Jural Relations*].

⁶⁷ Arthur L. Corbin, *Conditional Rights and the Functions of an Arbitrator*, 44 L. QUART. REV. 24, 25 (1928) [hereinafter Corbin, *Conditional Rights*]; see also *id.* (“To say that you have a Right that I shall not cut your tree is to predict that you can get societal aid to prevent or punish me.”).

⁶⁸ *Id.* at 28.

⁶⁹ See, e.g., Arthur L. Corbin, *The Restatement of the Law of Contracts*, 14 AMER. BAR ASS. J. 602, 603 (1928); Arthur L. Corbin, *What is a Legal Relation?*, 5 IL. L. QUART. 50, 50 (1922); Corbin, *Law in the Making*, *supra* note 59; for a later statement, see Arthur L. Corbin, *The Laws of the Several States*, 50 YALE L. J. 762, 765 (1941) [hereinafter Corbin, *Several States*].

⁷⁰ See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 225 (1990); see also RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 81, 257

officials' behavior, not in single instances of such conduct. According to him, law consists in "uniformity of action" among officials. Here Corbin tends to run together the evidence for well-founded predictions of official behavior (uniformity in behavior) with the target of the prediction itself (instances of official behavior), as the above passages illustrate.⁷¹ The apparent thought is that, other things being equal, the more uniform the behavior, the better confirmed the prediction of instances of that behavior. The requirement of uniformity in behavior thereby allows Corbin to distinguish idiosyncratic official behavior from predominant official behavior. In this way the degree of frequency in judicial behavior allows him to distinguish the "minority rule" from the "the rule" controlling in a jurisdiction.

Corbin's position rejects command theories of law. If law consists in norms created by the uniform acts of authorized officials, these acts can be of any sort. The acts need not only take the form of commands; they also can be permissions or exercises or delegations of powers. Thus, to be consistent, Corbin must reject Austin's conception of law as consisting only of commands. He does so in several papers in the 1920s that describe and advocate Hohfeld's classification of legal rights. Hohfeld found the notion of a legal right ambiguous and the terminology designating it inadequate to accurately express common legal notions. To clarify the notion of a legal right, he did not characterize its components or otherwise analyse it. Instead Hohfeld describes the relations between legal notions, all commonly referred to as legalrights.⁷² His description identifies eight legal "positions" and four pairs of logical relations between them, as in this table:

(2003).

⁷¹ See also Corbin, *Conditional Rights*, *supra* note 67, at 28 ("To say that you have a Right . . . is to predict that you can get societal aid to prevent or punish me."). For the same conflation of evidence and the target of evidence, see JEROME FRANK, *COURTS ON TRIAL* 10 (1949); KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 3 (1960). For Llewellyn's later qualifications, see *Acknowledgments*, *id.* at ix.

⁷² See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 23 *YALE L. J.* 16 (1913), 26 *YALE L. J.* 710 (1917). For a general description, see Matthew H. Kramer, *Rights Without Trimmings*, in *A DEBATE ABOUT RIGHTS* 7 (Matthew H. Kramer et al. eds., 1998). Two other presentations are L.W. SUMNER, *THE MORAL FOUNDATION OF RIGHTS* 18-31 (1987); and Alan D. Cullison, *Logical Analysis of Legal Doctrine: The Normative Structure of Positive Law*, 53 *IOWA L. REV.* 1209 (1968). A useful critical application of Hohfeld's analysis appears in John Finnis, *Some Professional Fallacies About Rights*, 4 *ADELAIDE L. REV.* 377 (1972).

Right	Privilege	Power	Immunity
Duty	No-right	Liability	Disability

Corbin follows Hohfeld in taking each legal notion (“fundamental legal conception”) to describe a relation between two persons (A and B).⁷³ The relation defines the person’s legal position with respect to the other person. Because a legal relation holds between two persons, it can be defined from either person’s legal position. Thus, by focusing on either persons’ position with respect to the other, the same legal relation can be described in different but logically equivalent ways. Hohfeld called these positions “correlatives”: mutual entailments between legal positions. Correlatives are synonyms and each correlate is a synonym for its correlate. Correlatives therefore are logical entailments with the persons holding the entailed legal positions reversed. Further, each legal position is incompatible with another particular legal position. Accordingly, each legal position negates another particular legal position. Hohfeld calls these positions and their negations “opposites;” they are logically contradictory legal positions held by the same person. (In fact, in a handwritten annotation to his copy of *Legal Analysis and Terminology*, Corbin describes the opposite legal position as “contradictory.”⁷⁴)

In the above table, the legal positions in the columns, as identified by Hohfeld, are “correlatives” of each other and the legal positions in the diagonals are “opposites” of each other. For example, if A has a right against B that B do x, the correlative of A’s right against B is B’s duty to A to do x. A’s right can be described either from A’s position or from B’s position, its correlative. Also, A’s right that B do x is the negation (“opposite”) of A’s no-right that B do x. Likewise, if B has a duty to A to do x, B does not have the privilege (liberty) of doing x. B’s privilege to do x is the negative (“opposite”) of B’s duty to do x. By identifying the legal positions and logical relations of mutual entailment and logical contradiction between them, Hohfeld and Corbin hoped to improve the description of legal concepts and judicial reasoning.⁷⁵

⁷³ Corbin, *Jural Relations* *supra* note 66, at 165 (“The term ‘legal relation’ should always be used with reference to two persons, neither more nor less.”).

⁷⁴ Corbin, *Jural Relations*, *supra* note 66, at 166 (annotation in Corbin’s copy deposited in Yale Law Library).

⁷⁵ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 23 YALE L.J. 16, 22, 30 (1913); Wesley Newcomb

Corbin's articles in the 1920s discussing Hohfeld's work mainly describe and advocate its results. But in places his advocacy extends beyond Hohfeld in two important respects. First, Hohfeld described the legal notions he identified as "fundamental legal conceptions" and "*sui generis*," thereby suggesting that all were logical primitives: all necessary to express the logical relations holding between legal positions. In *Jural Relations and Their Classification*, Corbin disagrees with the suggestion. He thinks that the logical relations Hohfeld identified can be described using only two legal notions: duty and power.⁷⁶ Although he does not further elaborate on the point, Corbin is correct here. In fact, Hohfeld's logical relations can be described selecting as logical primitives any two notions, one from the right/duty/liberty/no-right array and the other from the power/liability/immunity/disability array.⁷⁷ Second, Corbin goes beyond Hohfeld in specifying the nature of the legal positions identified by Hohfeld. Hohfeld's work was limited to the identification of legal conceptions and their logical relations. Corbin went beyond Hohfeld in specifying the nature of law and legal positions. As Corbin later stated in unpublished correspondence, Hohfeld was interested only in the "logical" and "analytic," while he was concerned with the "sociological" aspects of law.⁷⁸ Part of Corbin's "sociological"

Hohfeld, *A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?*, 1914 PROC. AMER. ASSOC. L. SCH. 76, 96 (1914); see also Corbin, *What is a Legal Relation?*, *supra* note 69, at 51; Arthur L. Corbin, *Foreword*, WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* xiv (Walter Wheeler Cook ed., 1964).

⁷⁶ Corbin, *Legal Analysis*, *supra* note 65, at 230.

⁷⁷ See Kevin W. Saunders, *A Formal Analysis of Hohfeldian Relations*, 23 AKRON L. REV. 465, 471 (1990). Essentially the technique works by using the relations of logical entailment and negation of a logical entailment. For instance, "right" and "duty" entail each other; "no right" and "privilege" are negations of "right" and "duty," respectively. Thus, because "right" and "duty" are paired by entailment, so too must their respective negations, "no-right" and "privilege." "Right" therefore can be defined in terms of "duty," "privilege" in terms of "no-right," and "no-right" as the negation of "duty." Similarly, "power" and "liability" are mutually entailing, and therefore their respective negations, "disability" and "immunity" are paired. "Liability" therefore can be defined in terms of "power," and "disability" as the negation of "power." See ALF ROSS, *DIRECTIVES AND NORMS* 119-120 (1968).

⁷⁸ Letter from Arthur Corbin to Eugene Rostow, August 10, 1957, *quoted in* N.E.H. HULL, *ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE* 106 (1997); see also Corbin, *Foreword*, *supra* note 75, at xiv.

concern was to specify the nature of law and legal relations.

Corbin's specification rejects the command theory of law. Such a theory sees all legal relations as directly or indirectly involving commands.⁷⁹ Corbin dismissed this view in *Jural Relations and Their Classification* in the course of presenting and endorsing Hohfeld's account of legal relations:

Must a rule of law always be a societal *command* backed by force? It is perilous to try to state the juristic ideas of another man, it is so easy to misunderstand and misstate. But one who thinks that there can be no rule of law and no jural relation between men without societal constraint seem to insist that law does nothing but *command*. There is no doubt that the command element is of the utmost importance; and according to Hohfeld's classification this element is the factor that defines rights and duties. But it seems to some of us that society not only commands, but also *permits* and *enables* and *disables* And this is true whether there is any societal command or constraint then existing or not. It is difficult to see any element of societal constraint in the concept of permission or of enabling or disabling.⁸⁰

He is making the now-familiar observation here that legal rules that create the power to alter legal relations are not properly describable as commands.⁸¹ Corbin makes the same point elsewhere as well.⁸² In the above passage, he clearly has in mind

⁷⁹ See AUSTIN, *supra* note 45, at 29.

⁸⁰ Corbin, *Jural Relations*, *supra* note 66, at 237.

⁸¹ Cf. JOSEPH RAZ, PRACTICAL REASON AND NORMS 49-58, 98-106 (1990); George Henrik von Wright, *On the Logic and Ontology of Norms*, in PHILOSOPHICAL LOGIC 89, 97-100 (J.W. Davis et al. eds., 1969); HART, CONCEPT OF LAW, *supra* note 43, at 27-28 (all distinguishing between power-conferring and duty-imposing rules).

⁸² See Corbin, *Several States*, *supra* note 69, at 52; Corbin, *Law in the Making*, *supra* note 63, at 272. This seems to reflect a change in Corbin's position, at least with respect to concept of powers ("enabling"). Corbin included an editorial note in his 1919 edition of Anson's textbook on contract law suggesting that the correlative of a power, a liability, can be defined in terms of a command: "The term 'liability' is one of at least double signification In a second sense, the term 'liability' is the correlative of *power* In this case society is not commanding performance, but it will so command if the possessor of the power does some operative act." ANSON, *supra* note 63, at 9 n.3. Because

Austin's command theory as a target. Corbin's attribution of a command theory to Hohfeld's work on legal relations ("Hohfeld's classification") is inaccurate. Because the work only identifies legal positions and describes logical relations between them, it does not specify the nature of legal positions.⁸³ In fact, the logical relations Hohfeld identifies hold whatever the nature of legal positions turns out to be. Contrary to Corbin, in *Fundamental Legal Conceptions* Hohfeld does not consider the command element to define a legal right or duty, because he takes these notions to be "sui generis"⁸⁴—and therefore undefined.⁸⁵ Corbin's attribution ignores the limited purpose of Hohfeld's work. However, more important here is Corbin's own assessment of command theories of law: he rejects these theories while still holding that legal relations consist in particular social facts (uniformities in authorized official behavior).

Corbin's position is not eccentric. It is the same position often taken by prominent nineteenth and early twentieth century critics of Austin. They too rejected Austin's command theory of law while still insisting that law consists in social facts other than the commands of a sovereign. Gray and Pollock, for instance, both deny that law can be understood as commands.⁸⁶ At the same time Gray also holds that only the rules established by courts in deciding cases are law.⁸⁷ Rules announced by judicial decisions are particular social facts. Although less clear, Pollock views law as a

correlatives are synonyms and a liability is the correlative of a power, the passage allows powers to be defined by the commands that society will issue if certain operative acts are performed.

⁸³ See *supra* note 78 and accompanying text. As a biographical matter Hohfeld probably interpreted the legal positions and their relations in an Austinian manner. See TWINING, *supra* note 16, at 395 n.8 (Corbin's comment that "Hohfeld started with Austin"); G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 L. & HIST. REV. 1, 27 (1997) (Hohfeld "devotee" of Austin). However, Hohfeld's analytic work itself does not require this interpretation, and Hohfeld himself does not provide the interpretation in the work. See Hohfeld, *A Vital School*, *supra* note 75, at 99 (restricted scope of analytical jurisprudence). I therefore disagree with White that Hohfeld's analysis "strongly suggested" legal rules in the form of commands backed by a sanction. See White, *supra* at 28.

⁸⁴ See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *supra* note 75, at 30.

⁸⁵ See *id* at 36.

⁸⁶ See GRAY, *supra* note 61; POLLOCK, *FIRST BOOK*, *supra* note 61, at 28; FREDERICK POLLOCK, *ESSAYS IN JURISPRUDENCE AND ETHICS* 50 (1882) [hereinafter POLLOCK, *ESSAYS IN JURISPRUDENCE*]; *Law and Command*, 1 L. MAG. & REV. (New Series) 189 (1872).

⁸⁷ See GRAY, *supra* note 61, at 65, 205.

set of rules derived from formal enactments or custom that are recognized as binding.⁸⁸ The recognition of enactments or custom also is a matter of social fact. (Pollock does not restrict the recognition to the judicial adoption of operative rules.) Thus, although Grey and Pollock understood their criticisms of the command theory of law as criticisms of positivism, in fact they accept positivism's central commitment to explaining law by social facts. Their objection is only to a particular version of positivism: Austinian positivism.⁸⁹ This is Corbin's considered position too.

Corbin also appears to endorse positivism's claim that legal and moral norms are separable. Although it is anachronistic to read Corbin as concerned with the question of the relation of law and morality, he says enough to justify finding that he probably endorses the separability claim. In *Legal Analysis and Terminology* and other articles, Corbin understands a legal rule merely as statement about the regularity in officials' behavior. A legal rule, for him, is a statement of the uniform response of officials to certain facts. (Corbin apparently is not concerned with the prescriptive nature of rules.) Correspondingly, a nonlegal rule is a statement of the uniform response of nonofficials to certain facts. Because the responses of officials and nonofficials to certain facts can differ, legal and nonlegal rules can differ too. Corbin draws this conclusion in *What is a Legal Relation?* when he writes that "[a] person needs to know both how this combination of facts will affect the conduct of societal agents [i.e., officials] and how it will affect the conduct of private individuals. As to the first, he is in the field of what we call legal relations; as to the second, he is in the field of *morality*, fashion or whatnot"⁹⁰ Because the behavioral responses of officials and nonofficials can differ, legal and "moral" rules can differ too. The two therefore are separable because they can diverge.

More generally, Corbin's views on the development of legal rules supports the same conclusion. Focusing on judicially

⁸⁸ See POLLOCK, FIRST BOOK, *supra* note 61; *cf.* POLLOCK, OXFORD LECTURES, *supra* note 58, at 9 (positive law as law actually existing and operative).

⁸⁹ Twining also counts Gray and Pollock among legal positivists based on their commitment to the separability of law and morality. See Twining, *supra* note 60, at 128. Gray and Pollock both shared this commitment; see GRAY, *supra* note 61, at 205; POLLOCK, ESSAYS IN JURISPRUDENCE, *supra* note 86, at 299. Because nonpositivists can share the commitment too, it cannot be used to identify positivist positions; see *supra* notes 51-54 and accompanying text. Gray and Pollock are legal positivists because in different ways they hold that law is explainable only in terms of particular social facts.

⁹⁰ Corbin, *What is a Legal Relation?*, *supra* note 69, at 52 (emphasis added).

created rules, he believes that legal rules change in response to changes in social mores and customs.⁹¹ In his view, they are subject to a pattern of evolution in which variant rules compete with each other for adoption in a jurisdiction. Although Corbin does not specify the mechanism by which rules are selected, he repeatedly draws an analogy to adaptation by natural selection.⁹² The observation that legal rules or institutions evolve was not novel at the time Corbin wrote.⁹³ However, the selection among competing rules within a jurisdiction makes Corbin's view distinctive.⁹⁴ It also allows for the possibility that moral and legal norms having different content may be adopted. Legal and moral norms may be adopted in response to changes in different factors, at different rates. Because the selection of legal and moral norms need not be subject to the same selective pressures, and the truth of

⁹¹ See Arthur L. Corbin, *A Creative Process*, 6 YALE L. REP. 2, 14 (1959); see also Arthur L. Corbin, *Preface*, CASES ON THE LAW OF CONTRACTS vii (3d ed. 1947); *The Law and the Judges*, 3 YALE REV. 234 (1914). Corbin's observation was shared by Walter Wheeler Cook. See Walter Wheeler Cook, *Hohfeld's Contributions to the Science of Law*, 28 YALE L.J. 721, 738 (1919). For Corbin's likely influence on Cook's views about legal change, see JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 56-57 (1995).

⁹² See Corbin, *The Law and the Judges*, supra note 91, at 238, 249; see also Corbin, *Conditional Rights*, supra note 67, at 25; Arthur L. Corbin, *The Common Law of the United States*, 47 YALE L. J. 1351, 1352 (1938); Corbin, *Dead Hand*, supra note 63, at 670-71; ARTHUR L. CORBIN, *Preface*, 1 CORBIN ON CONTRACTS v (1950) [hereinafter CORBIN, *Preface*]; ANSON, supra note 60, at 408 n.3 (all rights dependent on prevailing mores, changing as mores change in the course of evolutionary development); Corbin, supra note 66, at vii; Arthur L. Corbin, *Judicial Process*, 33 CONN. BAR J. 281, 285-86 (1959); Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 KANS. L. REV. 183, 186 (1964).

⁹³ The idea that law evolves over time obviously predates Corbin; cf. Albert Altschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 37 (1996) (Holmes and the realists did not invent the notion that law and legal institutions evolve or adapt to new circumstances); PETER STEIN, LEGAL EVOLUTION 72-98 (1980) (survey of nineteenth century views of legal evolution in which legal change occurs according to predetermined stages); see generally J.W. BURROW, EVOLUTION AND SOCIETY (1966). Pollock explicitly compares Maine's historical work to Darwin's account of evolution; see POLLOCK, OXFORD LECTURES, supra note 58, at 41 ("The doctrine of evolution [referring to Charles Darwin's "philosophy of natural history"] is nothing else than the historical method applied to the facts of nature; the historical method is nothing else than the doctrine of evolution applied to human societies and institutions.").

⁹⁴ See E. Donald Elliot, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 57-58 (1985); CORBIN, *Preface*, supra note 87, at v ("A judge selects and words a rule, puts it to work on the litigants before him, and submits it for use in other cases, if lawyers and judges believe that it is a good working rule for them.").

a moral norm turns on its content not its adoption, the two sets of adopted norms need not coincide. Thus, Corbin's views about the evolution of legal rules allows for legal and moral norms to diverge. This is enough to justify the view that the two sorts of norms are separable.

III. CORBIN'S NONJURISPRUDENTIAL OPPOSITION TO *Erie*

Corbin's opposition to *Erie*'s result has nothing to do with his commitment to legal positivism. In fact, it has nothing to do with his jurisprudential views generally. Whatever else *Erie* stands for, the case establishes two propositions: (1) that absent controlling federal constitutional or statutory law, federal courts must apply state law, and (2) that federal courts must defer to interpretations of state law articulated by that state's highest court.⁹⁵ Opposition to *Erie* therefore must deny either or both of these propositions. In turn, for such denials to depend on an endorsement of positivism, positivism must provide a reason for rejecting one or both of *Erie*'s two propositions. (Correspondingly, for endorsement of *Erie* to depend on positivism, positivism must be a reason for endorsing both propositions.) Corbin accepts proposition (1) but rejects the federal court deference that proposition (2) requires. Against (2), he believed that federal courts have the authority to determine state law independently of interpretations of state law by that state's highest court. He based his objections to *Erie*'s requirement of federal court deference on practical and constitutional considerations, not jurisprudential ones.

A. "Brooding Omnipresence" Over Iowa and Pennsylvania

Corbin repeatedly makes it very clear that the basis of his objection to *Erie* is not jurisprudential. He does so by accepting Holmes's perjorative characterization of antipositivism as the view that law is a "brooding omnipresence in the sky," recited approvingly in Brandeis's opinion in *Erie*, while still rejecting *Erie*'s result. Holmes's characterization presents the opponent of positivism with only two alternatives: either law consists in the declarations of authorized officials, including federal or state courts, or consists in matters entirely unrelated to social facts of any sort. The latter alternative is telegraphed as the view that law is

⁹⁵ See *supra* text at p. 7.

a “brooding omnipresence in the sky.”⁹⁶ If Corbin’s opposition to *Erie* rested on jurisprudential positions, he would have had to do two things. First, he would have had to endorse one of the alternative views of law or argue for another alternative. Second, he would have had to argue that the alternative he endorses justifies the rejection of *Erie*. Corbin did not take the second step. Instead, he agreed with Holmes’s rejection of antipositivism but argued that opposition to *Erie* is justified on nonjurisprudential grounds.

Corbin signaled the nonjurisprudential basis of his opposition to *Erie* even before the case was decided. In a 1929 article promoting the American Law Institute’s project of restating case law, he assessed Holmes’s then-recent dissent in *Black & White Taxicab Co.* Corbin recited the dissent’s two principal points: that there is no “August corpus” or “transcendental body of law” outside the law created by the decisions of state courts and that the Constitution prohibits federal courts from creating federal common law. His assessment of these points is significant: “[t]he present writer is quite in agreement with Mr. Justice Holmes if he means that an August corpus of universal and unchangeable rules; but he is no more able to find such an ‘August corpus’ within the confines of the state of Iowa than in all of the United States put together; and he believes that the federal courts are just as fully authorized to declare and build up common law in the cases properly arising before them, as are the courts of a single state.”⁹⁷ The assessment explicitly separates Holmes’s view of the nature of common law from his view about the constitutionality of federal courts creating a separate body of common law. Corbin agrees with Holmes that common law is created by the decisions of state courts, as he repeats in a later article.⁹⁸ However, he denies that the Constitution prohibits federal courts from articulating common law independently of these decisions. Federal courts are “just as fully authorized” to declare common law as state courts. Thus, Corbin agrees with Holmes’s jurisprudential views about the nature of law

⁹⁶ Austin also presented opponents with the same two alternatives: either common law is created by the decisions of courts or it is a “miraculous something made by nobody, existing, I suppose, from eternity and merely declared from time to time by judges.” JOHN AUSTIN, 2 LECTURES ON JURISPRUDENCE 655 (5th ed. 1855).

⁹⁷ Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19, 25 (1929) [hereinafter Corbin, *Restatement of the Common Law*].

⁹⁸ See *id.* at 25.

expressed in his *Black & White Taxicab Co.* dissent while disputing the constitutional conclusion Holmes reaches there. Corbin's assessment therefore signals that his constitutional assessment of the power of federal courts to declare common law are unrelated to his jurisprudential views.

His response to *Erie* takes the same form. In a note on *Erie* published a few months after the decision, Corbin agrees with *Erie*'s proposition that there is no general federal common law. He construed this to mean that is "no system of universal general rules and principles, no 'brooding omnipresence in the sky.'"⁹⁹ The note then asks Socratically whether under *Erie* a federal court judge is barred constitutionally from looking beyond the opinions of the Pennsylvania Supreme Court to determine Pennsylvania law. Corbin goes on to find the limitation objectionable, as inconsistent with a "judge's work."¹⁰⁰ However, he does not attribute the objectionable limitation to *Erie*. Instead, the note puts the criticism conditionally: if *Erie* requires following the judicial opinions of the state supreme court, then the result is objectionable. In *The Law of the Several States* Corbin criticizes *Erie*'s implementation without adding the earlier qualification.¹⁰¹ However, as in the 1938 note, he praised Holmes's dictum, quoted in Brandeis's opinion, that the common law is not a "brooding omnipresence in the sky": "[T]his is true without regard to the territorial acreage over which an omnipresence broods But in every case alike [common law rules] . . . are man-made, they are not omnipresent, and they are not in the sky."¹⁰² He then asks whether *Erie* demands that a federal court abide by an inferior state court's interpretation of state law when unresolved by the state's supreme court.¹⁰³ Thus, as in his note on *Erie*, Corbin's criticism of *Erie*'s implementation continues to have nothing to do with Holmes and Brandeis's views about the nature of law.

Corbin was not alone in finding jurisprudential views irrelevant to *Erie*'s result. Other contemporary assessments of the case noticed this too. Walter Wheeler Cook, for instance, observed that *Swift*, overruled by *Erie*, did not depend on assuming the existence of the "August corpus" of common law designated by Holmes: a "brooding omnipresence in the sky." It was enough, he noted, to believe that federal courts have the authority to articulate

⁹⁹ See Corbin, *The Common Law of the United States*, supra note 92, at 1351.

¹⁰⁰ See *id.* at 1352.

¹⁰¹ See Corbin, *Several States*, supra note 69, at 764.

¹⁰² See *id.* at 765.

¹⁰³ See *id.*

common law when a matter is not governed by state statute.¹⁰⁴ Charles Clark, Corbin's former colleague, recited Corbin's question "Is there an omnipresence brooding over the state of Pennsylvania?" and found that this is not the question that divides *Swift* and *Erie*. For Clark, the question "really at issue" is where common law is to operate.¹⁰⁵ Clark concludes that this is a question to be decided by "policy" (without specifying the "policy" that is to do the work). Working jurists noticed the irrelevance of jurisprudential to *Erie* too. Justice Rutledge's dissent in *Guarantee Trust Co. v. York* denies that the question whether a federal court in an action in equity must apply the state statute of limitations turns on views about the nature of law.¹⁰⁶ Rather, Rutledge sees the issue as one of congressional authorization allowing federal courts to apply their own statutes of limitation in actions in equity. *York* holds that a state statute of limitations is a matter of substance that must be applied by a federal court adjudicating an equitable claim. Rutledge disagrees, finding that the Rules of Decision Act implicitly authorizes federal courts in such cases to fashion their own statute of limitations.¹⁰⁷ He denies that his position depends on a "different jurisprudential climate or a kind of 'brooding omnipresence in the sky.'"¹⁰⁸ Because Rutledge considers the position to be consistent with *Erie*'s result, he must consider *Erie*'s result also to depend on statutory restrictions on lawmaking by federal courts, not on jurisprudential views about the nature of law.

B. The Rejection of Deference: Judicial Opinions and Binding Law

Corbin believed that federal court judges properly may make a judgment about state law independent of state court interpretations of that law. He rejects *Erie* because it requires federal courts to defer to state supreme court interpretations of state law. Corbin's position was not unusual. The scholarly commentary of the 1940s and early 1950s also was critical of *Erie*'s requirement of federal court deference.¹⁰⁹ It too generally

¹⁰⁴ See Walter Wheeler Cook, *Federal Courts and the Conflict of Laws*, 36 ILL. L. REV. 493, 520 (1942), reprinted in WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 142-43 (1942).

¹⁰⁵ See Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L. J. 267, 275 (1946).

¹⁰⁶ *York*, 326 U.S. at 113 (Rutledge, J., dissenting).

¹⁰⁷ *Id.* at 114.

¹⁰⁸ *Id.*

¹⁰⁹ See, e.g., 2 CROSSKEY, *infra* note 161, at 835-937, esp. 903 (1953); *infra* notes 161-63 and accompanying text; HENRY M. HART, JR. & HERBERT

questioned an unconditional deference to inferior state court interpretations of state law. Corbin goes further and denies that federal courts are bound even by state supreme court pronouncements of state law. His views formed the basis for a critical consensus on the matter. Critics who questioned *Erie's* requirement of deference to state court interpretations of state law often relied on Corbin to support their position.¹¹⁰

As noted above, Corbin accepts *Erie's* holding that, absent an applicable federal constitutional provision or statute, federal courts in diversity cases must apply state law. He only denies the case's conclusion that federal courts are bound by the state supreme court's articulation of state law. In his 1938 note describing *Erie*, Corbin asks rhetorically whether it is "unconstitutional" for a federal court to "go outside the opinion of the judges in the Supreme Court of Pennsylvania."¹¹¹ In *The Law of the Several States*, he concluded that a federal court is not bound by state court opinions on a state law matter.¹¹² The opinions instead are merely one sort of data the federal court must use in interpreting state law: "The federal court, like a state court, must determine what the state law is by the use of 'all the available data.' . . . They include the state constitution and statutes, former opinions of the state courts of *every rank*, opinions of the courts of other states . . . [and] the mores and practices of the community."¹¹³ (*Corbin on Contracts* contains a statement to the same effect.¹¹⁴) Thus, federal courts, using this data, must make an

WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 628 (1953) [hereinafter HART & WECHSLER, *THE FEDERAL COURTS*] ("Should the federal court entertain an argument that a prior decision of the highest state court should be overruled?"); Note, *Recent Cases—Federal Jurisdiction*, 100 U. PA. L. REV. 1065, 1067 (1952) ("A nicer balance between the desire for uniformity and the exercise of a federal judge's broad magisterial function ought to be striven for."); James W. Moore & Robert Stephan Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 TEX. L. REV. 514, 519 (1943) (describing *Erie's* requirement of federal court deference as "rigid"); 1 JAMES W. MOORE, *MOORE'S FEDERAL PRACTICE* § 1.15, 245 (Cum. Supp. 1944) ("Blind adherence to a particular state decision . . . without evaluating it in the light of other relevant data as to what state law is, will result in injustice and a perversion of the state law which the federal court sets out to apply.").

¹¹⁰ See, e.g., HART & WECHSLER, *THE FEDERAL COURTS*, *supra* note 103, at 630; Clark, *supra* note 105, at 270 n.14 (both relying on Corbin's *The Laws of the Several States*).

¹¹¹ Corbin, *The Common Law of the United States*, *supra* note 92, at 1352.

¹¹² See Corbin, *Several States*, *supra* note 69, at 772.

¹¹³ *Id.* at 771 (emphasis added).

¹¹⁴ ARTHUR L. CORBIN, 4 *CORBIN ON CONTRACTS* § 830 at 332 (1950). An

independent judgment about the content of state law. They therefore are not bound by state supreme court interpretations of state law.

Corbin's view of the authoritative nature of judicial expositions of state law rejects not only *Erie* but entrenched precedent preceding it. Early nineteenth century case law had established that state supreme courts were authoritative expositors of state law. Federal courts were bound to follow well-established and clear statements of state law articulated by them. For example, in *Jackson v. Chew*,¹¹⁵ decided in 1827, the Supreme Court adopted state court decisions as authoritative because they settled state law. In *Green v. Lessee of Neal*, the Court found that state judicial decisions, when settled by a series of decisions by state courts, "have always governed this Court."¹¹⁶ The precise rule being declared is not always clear. In *Green* the Court apparently relies in part on the correctness of the state judicial interpretation,¹¹⁷ making it uncertain whether the authoritative nature of a state decision depends on its persuasiveness. Also unclear was whether a settled pattern of lower state court decisions bound federal courts or whether only state supreme court decisions did.¹¹⁸ Federal courts also differed as to when state law was settled and whether a matter was considered governed by state law.¹¹⁹

accompanying note adds that the statement was written before *Erie* overruled *Swift*. *Id.* at 332 n.9.

¹¹⁵ 25 U.S. (12 Wheat.) 153 (1827).

¹¹⁶ 31 U.S. (6 Pet.) at 127; see also Daniel H. Chamberlain, *The State Judiciary—Its Place in the American Constitutional System*, in CONSTITUTIONAL HISTORY OF THE UNITED STATES AS SEEN IN THE DEVELOPMENT OF AMERICAN LAW 239, 261-62, 265-66 (1889) (*Green* requires federal court deference only when state judicial interpretation is settled.).

¹¹⁷ See *id.* ("In Tennessee, the question arising in this cause, after considerable discussion, seems to have been finally settled on principles *which are thought entirely correct.*") (emphasis added); but see *D'Wolf v. Rabaud*, 26 U.S. (1 Pet.) 476, 502 (1828) (state law rule admitting parol evidence is binding on federal courts whether or not is it a "reasonable doctrine").

¹¹⁸ See, e.g., *Jackson*, 25 U.S. (12 Wheat.) at 162 (rule uniformly followed by the Supreme Court requires following rules of real property "settled in the State Courts"); see also *infra* note 120.

¹¹⁹ See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Maritime Insurance*, 97 HARV. L. REV. 1513, 1536-37 (1984). Areas considered "local" were governed by state law; "general" areas were not always treated that way. See *infra* note 192. For the difficulty of identifying the category of "local" law, see George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925, 933-34 (2003) (describing how category of local custom was narrowed to geographically

However, precedent was understood to require federal court deference to established state judicial expositions of state law.¹²⁰ In requiring federal courts to follow state supreme court articulations of state law, *Erie* simply honored established precedent.

Corbin's view rejects it. Even if state supreme court decisions are settled, they still are only "persuasive data," not authoritative statements of state law. Other sources can supply even better evidence of that law. For instance, Corbin's list of sources of state law includes even the case law of other jurisdictions. Thus, it is possible that a state's supreme court has announced a particular rule of state law in deciding a pattern of cases; at the same time, the trend among jurisdictions might be contrary to this rule. For example, suppose a state supreme court's established, but old, precedent requires privity for a manufacturer to be liable to a third parties for injuries caused them by its products. The pronounced trend in case law in other jurisdictions does not require privity in these circumstances. Corbin would allow that in principle because this trend could better evidence state law than the state's settled decisions. A federal court, taking account of the trend, could conclude properly that the state supreme court opinions did not accurately reflect state law.

On the facts of the example, the First Circuit in *Mason v. American Emery Wheel Works*¹²¹ reached the same conclusion. The *Mason* court found that the Mississippi Supreme Court's old rule requiring privity did not reflect current Mississippi law. According to the court, "it is not necessary that a case be explicitly overruled in order to lose its persuasive force as an indication of what the law is."¹²² Other considerations may show that an earlier decision no longer has binding force. The clear trend among jurisdictions eliminating the requirement of privity, along with the Mississippi Supreme Court's favorable reference to this trend, convinced the *Mason* court that Mississippi law no longer required

limited practices).

¹²⁰ See, e.g., *Hinde v. Lessee of Vattier*, 30 U.S. (5 Pet.) 398, 401 (1831); *United States v. Morrison*, 29 U.S. (4 Pet.) 124, 137 (1830) (federal courts bound to follow settled state supreme court decisions on state law); *Beach v. Viles*, 27 U.S. (2 Pet.) 675, 678 (1829); *Gardner v. Collins*, 27 U.S. (2 Pet.) 58, 85 (1829); 26 U.S. (1 Pet.) 604, 613 (1828); *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159 (1825) (bound to follow settled state judicial decisions on state law).

¹²¹ 241 F.2d 906 (1st Cir. 1957).

¹²² *Id.* at 909; cf. *Carlton v. Worcester*, 923 F.2d 1, 3 n.8 (1st Cir. 1991); *In re Air Crash Disaster at Boston, Mass.*, July 31, 1973, 399 F. Supp. 1106, 1109 (D. Mass. 1975) (explicit overruling unnecessary).

privity. Thus, the Mississippi Supreme Court's earlier decision, although not overruled, did not accurately describe current state law. The *Mason* court predicted that the Mississippi Supreme Court, when given the opportunity, would revise its rule.¹²³ However, the prediction is based on its determination of current Mississippi law: the Mississippi Supreme Court will revise its former rule because Mississippi law no longer requires privity. The *Mason* court therefore did not determine current Mississippi law concerning privity based on its prediction about the rule that the Mississippi Supreme Court would adopt.

Corbin rejects federal court deference based partly on his understanding of the common law. In his view a state's common law is the product of a series of judicial decisions made over time. The decisions are accompanied by written judicial opinions formulating rules or doctrines that explain the decisions. The rules or doctrines themselves are distilled from prior opinions and decisions; Corbin describes them variously as "generalizations," "tentative generalizations" and "tentative working rules"¹²⁴ from cases. For Corbin, these general propositions rationalize case outcomes but do not bind subsequent courts.¹²⁵ Over time, common law rules and doctrine change to reflect changes in case outcomes and their accompanying opinions. General propositions stated in a judicial opinion therefore may not continue to accurately rationalize subsequent case outcomes.

This description of state common law contains two different observations. One is that a court's statement of the operative rule or doctrine is fallible. If common law rules are "generalizations" distilled from previous cases, a state court's formulation of the operative rule can be mistaken. As a "tentative" generalization, a court's statement explaining its decision might rationalize the result incorrectly. Thus, reliance on other sources, such as the opinions of other state courts and "mores and practices of the community," can produce a more accurate statement of the operative rule or doctrine. The second observation concerns the change in rules and doctrines. If case outcomes and accompanying opinions change over time, even initially accurate state court statements of state common law can inaccurately describe subsequent law. Fallibility in stating the operative common law and the evolution of common law rules together makes federal

¹²³ *Mason*, 241 F.2d at 910.

¹²⁴ See 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS 5 (1950); 6 CORBIN ON CONTRACTS 358 (1950).

¹²⁵ See Corbin, *Several States*, *supra* note 69, at 772.

court deference to state supreme court interpretations of state law inappropriate.

There are competing conceptions of the common law, and Corbin's description relies on one of them. One view understands the common law to include the judicial opinions deciding cases or at least the general propositions recited in them that rationalize decisions. It considers the rules or doctrines expressed in opinions as authoritative and therefore binding on subsequent courts. The view thereby gives judicial opinions or parts of them the status of law, similar in effect to legislative enactments. A competing conception of the common law considers judicial opinions accompanying decisions merely as explanations of the decisions, not themselves part of the common law. It therefore denies that the general propositions recited in opinions are authoritative for subsequent courts. Emphasizing the absence of a canonical formulation of common law rules, the view rejects the notion that judicial opinions are part of the common law.¹²⁶

Corbin's description of the common law employs the latter conception. Rules expressed in opinions are "tentative generalizations" that are fallible explanations of decisions and do not bind subsequent courts. An opinion's rationalizations of a decision "are not legislative enactments, general in application. They are merely 'persuasive data.'"¹²⁷ General propositions in an opinion can be merely persuasive, not authoritative, only if judicial opinions are not themselves part of the common law. The text of an opinion is in this respect unlike the products of legislative enactments, which are part of statutory law. Corbin's working notion of state common law makes sense of some otherwise puzzling questions posed in his 1938 note on *Erie*. The note asks whether the result in *Erie* means that there is "an omnipresence brooding over the state of Pennsylvania."¹²⁸ It goes on to ask Socratically whether *Erie* permits a federal court judge applying Pennsylvania law to go outside the opinions of the Pennsylvania

¹²⁶ Cf. Corbin, *Sixty-Eight Years at Law*, *supra* note 92, at 190. For descriptions of these two competing conceptions of the common law, see Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, in PRECEDENT IN LAW 183, 184-85 (Laurence Goldstein ed., 1987); A.W.B. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE (Second Series) 77, 88-89 (A.W.B. Simpson ed., 1973). For the implication of these two conceptions for executive branch obligations to defer to judicial interpretations of law, see Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993).

¹²⁷ Corbin, *Several States*, *supra* note 69, at 772.

¹²⁸ See Corbin, *The Common Law of the United States*, *supra* note 92, at 1352.

Supreme Court.¹²⁹ Given Brandeis's explicit denial of the "brooding" status of law, Corbin's questions appear puzzling. They are understandable if *Erie* regards the text of judicial opinions as part of a state's common law. If Pennsylvania's common law includes these texts, Pennsylvania state law is given a canonical expression that may not accurately rationalize the rules at work in cases applying Pennsylvania law or reflect their evolution. As a canonical expression of state common law, judicial opinions are "an omnipresence brooding" over the law of Pennsylvania. Thus, if *Erie* requires a federal court applying Pennsylvania law to follow interpretations of Pennsylvania law contained in Pennsylvania Supreme Court opinions, the court in effect treats part of state common law (judicial opinions) as "an omnipresence brooding" over Pennsylvania. If so, the 1938 note concludes, *Erie*'s requirement is a "direction to substitute an omnipresence brooding over Pennsylvania alone, in place of the roc-like bird whose wings have been believed to overspread forty-eight states" ¹³⁰ In other words, it is a mistake to include as part of state common law judicial opinions (the "omnipresence") accompanying decisions. The common law instead consists only of general propositions that explain a series of decisions (the "roc-like bird").

A conception of the common law does not by itself compel a conclusion about federal court deference to state supreme court opinions. This is because federal courts may be bound by these opinions whether or not judicial opinions are part of state common law. For instance, Brandeis's opinion in *Erie* accepts Holmes's conclusion in *Black & White Taxicab* that respect for state allocations of law-declaring authority requires federal courts to follow state supreme court opinions.¹³¹ Although their conclusion is easily justified if a state court's opinions are considered part of state common law, the same conclusion still can be justified relying on a competing conception of common law. After all, respect for state allocations of law-declaring authority can require respecting a state court's statement of state law. A state court's statement of state law need not itself be regarded as part of the law of that state. Thus, a federal court may be bound by state supreme court opinions as authoritative interpretations of state law, even if those interpretations are not themselves part of that law. The rejection of federal court deference therefore requires more than just a

¹²⁹ *Id.*

¹³⁰ *Id.* at 1353.

¹³¹ *See Erie*, 304 U.S. at 79.

conception of the common law. Some reason for finding the exercise of independent judgment about state law appropriate must be supplied.

Corbin's case against federal court deference does not rely only on a conception of the common law. It also relies on two different sorts of considerations that Corbin finds makes the exercise of independent judgment of state law appropriate. One sort is practical objections to *Erie*'s requirement of federal court deference based on the requirement's consequences for judicial reasoning. The other consideration finds the exercise of independent judgment of state law by federal courts to be constitutionally permissible. The next Part describes Corbin's practical objections and Part V his constitutional considerations.

IV. THE PRACTICAL CONSEQUENCES OF FEDERAL COURT DEFERENCE

Corbin takes *Erie*'s requirement of federal court deference to apply generally. It not only demands that a federal court in a diversity case follow the state supreme court's interpretation of state law. He reads the case also to demand that the court follow inferior state court interpretations of state law that are authoritative within that state. The principal purpose of *The Laws of the Several States* is to assess the Supreme Court's application of "the doctrine expressed in *Erie Railroad v. Tompkins*" to cases in which state law had been interpreted only by inferior state courts.¹³² A 1953 book review in which Corbin called for *Erie*'s overruling refers to the case's "insufferable progeny," clearly intending the reference to include the same cases.¹³³ And a later article describes *Erie* as telling federal courts that "they must accept the rules laid down by a State Court, even though enunciated by a single Vice-Chancellor whom no other State judge is bound to follow."¹³⁴ Corbin assesses *Erie* understanding the case to bind federal courts to authoritative interpretations of state law by all state courts.

He rejects *Erie* based in part on consequences of federal court deference he finds objectionable. *Erie*'s general requirement

¹³² See Corbin, *The Laws of the Several States*, *supra* note 69, at 766.

¹³³ Arthur L. Corbin, *Politics and the Constitution in the History of the United States*, 62 *YALE L.J.* 1137, 1144 (1953) (book review) [hereinafter Corbin, *1953 Book Review*].

¹³⁴ Corbin, *A Creative Process*, *supra* note 91, at 14, 15. Corbin's description of *Erie* here is based on his interpretation of *Fidelity Union Trust Co. v. Field*. See *infra* note 136 and accompanying text.

of deference creates an asymmetry in the way in which federal and state courts determine state law applicable to the same sort of case. As Corbin understands the case, federal courts must follow the interpretation of state law announced by state courts. The state supreme courts, however, and sometimes coequal inferior state courts, are not bound by their own interpretations of state law. Unlike federal courts, they can treat their prior interpretations of state law merely as persuasive data. This difference in authoritative sources of state law can produce a lack of uniformity in case outcomes between federal and state courts. For Corbin, this result is objectionable when both courts are determining the same applicable state law in relevantly similar cases.

Before *Erie* overruled *Swift*, Corbin believed that the pressure for uniformity induced federal courts to articulate general common law in a way consistent with state court construals of the same law.¹³⁵ He initially thought that *Erie* would not affect this tendency toward uniformity in interpreting state law. By 1941, Corbin noticed a divergence in the interpretation of state law between federal and state courts that he believed resulted from *Erie*'s requirement of federal court deference. To avoid the consequence, he rejected *Erie*'s requirement of deference. The federal court instead "must use its judicial brains, not a pair of scissors and a paste pot."¹³⁶ It must determine applicable state law in the same way state courts do so, using the same sources of law available to state courts. By 1953, Corbin apparently found that *Erie*'s requirement of federal court deference produced this divergence in a sufficient number of cases to call for *Erie*'s overruling.¹³⁷

¹³⁵ See 4 CORBIN ON CONTRACTS § 830, at 332 (1950); Corbin, *The Common Law of the United States*, *supra* note 92, at 1352.

¹³⁶ Corbin, *Several States*, *supra* note 69, at 775.

¹³⁷ See Corbin, *1953 Book Review*, *supra* note 133, at 1144 (referring to "harmful results" of the *Erie* decision). Corbin nowhere explains why, or how, *Erie*'s requirement of deference to state court interpretations produced less uniformity in interpretation than under *Swift*. He simply asserts it. There is an initial question as to the degree of divergence *Swift* produced in the first place. Earlier assessments of *Swift*'s effects on uniformity in interpretation reached divergent conclusions. Frankfurter found a lack of uniformity between federal and state courts, based on a small sample of cases; See Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. Q. 499, 529 n.150 (1928). Brandeis's opinion in *Erie* relies on Frankfurter's finding. See *Erie*, 304 U.S. at 73 n.6. Others concluded that *Swift* produced significant uniformity eventually. See Arthur John Keeffe et al., *Weary Erie*, 34 CORNELL L. Q. 494, 504 (1949) (uniformity eventual; effect not immediate). Yet another conclusion found uniformity between federal and state court interpretations

The proximate cause of Corbin's rejection of *Erie* was a group of four cases decided by the Supreme Court during its 1940 term.¹³⁸ All of the cases involved questions of state law. In three of them, the relevant law had been interpreted by state intermediate courts. In the fourth case, two trial courts had interpreted the applicable state law. None of the respective state supreme courts had construed the relevant state law. The Supreme Court had to decide in each case whether *Erie* required a federal court in a diversity case to follow the interpretations of state law expressed by lower state courts.

Corbin understands the Court's opinions in the group of cases to require federal court deference in these circumstances. For instance, he concludes that the result in *Fidelity Union Trust Co. v. Field* binds a federal court "to accept a statement of state law, upon the basis of which a decision is made, even if it is made by a single judge in an inferior state court"¹³⁹ *West v. American Telephone & Telegraph Co.*'s formulation of the federal court's obligation supports this conclusion.¹⁴⁰ However, Corbin's reading

under *Swift* when the Supreme Court interpreted state law; see *Cole v. Pennsylvania R.R. Co.*, 43 F.2d 953, 956-67 (2d Cir. 1930); FELIX FRANKFURTER & WILBER G. KATZ, *CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE* 166 n.1 (1931) (citing *Cole* approvingly). The findings are based on informal surveys of case law, and may involve biased samplings of cases. See Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 881 n.23 (1931). Corbin apparently believed that *Erie*'s application produced less uniform interpretations than under *Swift*. The question is why. Crosskey thought that federal courts under *Swift* interpreted federal common law uniformly. *Erie* eliminated that uniformity. See 2 CROSSKEY, *infra* note 616, at 917-18. Because Corbin rejects federal common law (see Corbin, *The Common Law of the United States*, *supra* note 92, at 1351), the elimination of uniformity among federal courts in interpreting federal common law cannot be among the "harmful results" of *Erie* Corbin refers to in his book review of Crosskey's, *Politics and the Constitution in the History of the United States*. See Corbin, *1953 Book Review*, *supra* note 133, at 1144. A source of divergence in interpretation might be produced by *Erie*, as Corbin understood the case. If *Erie* requires federal courts to defer to inferior state court interpretations of state law, while state law does not treat those interpretations as having precedential effect, then a federal court could be bound to interpret state law in a way that does not bind inferior state courts. In such instances divergent interpretations of state law could be produced.

¹³⁸ See *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940); *Six Cos. v. Joint Highway Dist. No. 13*, 311 U.S. 180 (1940); *West v. AT&T Co.*, 311 U.S. 223 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940).

¹³⁹ Corbin, *Several States*, *supra* note 69, at 767.

¹⁴⁰ See *West*, 311 U.S. at 236, 238 ("A state is not without law save as its highest

ignores language in *Field*, which he quoted, to the effect that deference to the interpretations of lower state courts is required “in the absence of more convincing evidence of what the state law is.”¹⁴¹ This qualifying language, with comparable phrases in the other cases,¹⁴² creates only a rebuttable presumption in favor of the lower state court interpretations of state law. Interpretations by lower state courts are not binding on federal courts, unlike construals of state law articulated by state supreme courts. By ignoring the qualification, Corbin transforms a rebuttable presumption into a requirement of unqualified deference to lower state court construals of state law.¹⁴³ So transformed, the requirement serves as a foil for Corbin’s proposal that state court opinions are merely “persuasive data” and that federal courts still must use their “judicial brains.” In fact, Corbin’s proposal treats state court interpretations as having no presumptive effect. Federal courts, according to it, are to use the same sources to determine state law as are available to state courts.¹⁴⁴ A more charitable understanding of the set of cases might therefore see the dispute as one over the wisdom of the presumption set by the Court. These cases set a presumption in favor of lower state court construals of state law; Corbin’s proposal gives state court opinions no presumptive effect. Corbin does not see the dispute this way because he understands *Erie* to require federal court deference to inferior state court interpretations of state law.

Nothing in Corbin’s subsequent references to his assessment of the group of 1940 cases suggests that he changed his view of them. He continued to cite the assessment approvingly in later articles and in *Corbin on Contracts*. A 1959 article still

court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court has never passed upon them In the meantime the state law applicable to these parties and in this case has been authoritatively declared by the highest state court in which a decision could be had.”)

¹⁴¹ *Field*, 311 U.S. at 178; Corbin, *Several States*, *supra* note 69, at 767. Oddly, Corbin quotes *Field*’s qualifying language (*Field*, 311 U.S. at 771) but still understands the case as requiring deference to all authoritative state court interpretations of state law.

¹⁴² See *West*, 311 U.S. at 237 (“unless it is convinced by other persuasive data”); *Six Companies*, 311 U.S. at 188 (“no convincing evidence that the law of the State is otherwise”); *Stoner*, 311 U.S. at 468 (no indication that the “Missouri Supreme Court would decide this case differently”).

¹⁴³ For the same move, see Clark, *supra* note 105, at 267; 2 CROSSKEY, *infra* note 161, at 919-920.

¹⁴⁴ See 6 CORBIN, *supra* note 124, at § 831 (p. 332); Corbin, *Several States*, *supra* note 69, at 774.

describes *Erie* as requiring federal court deference to state trial court construal of state law.¹⁴⁵ There also is indirect evidence suggesting that he maintained his understanding of *Erie*. *King v. Order of United Commercial Travelers of America*¹⁴⁶ held that federal courts in diversity cases did not have to follow the interpretations of inferior state trial courts when the decisions of those courts did not have precedential effect under state law. *King* explicitly left undisturbed the “general rule” that federal courts must follow the interpretations of state law made by state courts.¹⁴⁷ The case was decided in 1947, after *The Laws of the Several States* appeared in the Yale Law Journal. Corbin’s practice was to annotate in his bound copies of the Journal the articles he published there,¹⁴⁸ usually adding citations to relevant cases decided after the articles appeared. His annotations to *The Laws of the Several States* contain references to cases decided up to 1951 but not to *King*. *King* clearly is relevant to Corbin’s article, and Corbin’s apparent thoroughness in surveying case law makes it unlikely that he was unfamiliar with the decision.¹⁴⁹ A fair inference from *King*’s omission from Corbin’s annotations is that Corbin did not think the case jeopardized his understanding of the group of cases discussed in *The Law of the Several States*. He probably continued to believe that *Erie* required a general deference to state court interpretations of state law and that such deference had objectionable consequences.¹⁵⁰

¹⁴⁵ See Corbin, *A Creative Process*, *supra* note 86, at 15; see also Corbin, *supra* note 126, at 1140-41 (Court has told federal judges that they must accept “the words of a Vice-Chancellor or of a trial judge in a county court, even though no other court in the United States is bound to do so.”). Corbin’s contemporaries shared his view of *Erie*’s implications for federal court deference. See, e.g., Moore & Oglebay, *supra* note 109, at 525 (“Now, in light of the *Tompkins* case on a non-federal matter, the federal courts must follow state law, whether statutory or case-made.”).

¹⁴⁶ 333 U.S. 153 (1947).

¹⁴⁷ *Id.* at 162. Other commentators understood the opinion in this way. See, e.g., Philip B. Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L. J. 187, 210 (1957) (*King* concludes that high court and intermediary state courts decisions regularly binding on federal courts). *But cf.* PURCELL, *supra* note 11, at 215 (*King* “modified” while still reaffirming *Field*’s rule requiring federal court deference.).

¹⁴⁸ See Michael C. Dorf, *Bibliography of the Published Writings of Arthur Linton Corbin*, 74 YALE L. J. 312, 314 (1964).

¹⁴⁹ See *Restatement of the Common Law*, *supra* note 97, at 187-188. Crosskey critically discusses *King* in a work reviewed by Corbin; see Corbin, *supra* note 126 (Crosskey’s discussion occurs in 2 CROSSKEY, *infra* note 161, at 926-27).

¹⁵⁰ Corbin usually is thought to have misunderstood *Erie*’s implication for inferior state judicial opinions on state law. See, e.g., Henry J. Friendly, *In*

Corbin's understanding of *Erie's* implications must be separated from his objection to the case. This is because his objection remains even if the case does not have the implications

Praise of Erie—And of the New Federal Common Law, 39 N.Y.U. L. REV. 383, 400 (1964); Dorf, *supra* note 3, at 698; but see Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 510 (1954) [hereinafter Hart, *Relations*] (describing Supreme Court's holding in the group of 1940 cases as requiring deference to "an obviously unsound decision" of a state trial court of state-wide jurisdiction). It is not so clear that he misunderstood its implication. The case has come to stand for the proposition that federal courts must follow state supreme court expositions of state law. *Erie's* facts included an interpretation of Pennsylvania law by the Pennsylvania Supreme Court, so that the Supreme Court had to decide whether the federal district court was bound by the Pennsylvania Supreme Court's interpretation of Pennsylvania law. See *Erie*, 304 U.S. at 80. But the logic of Brandeis's reasoning arguably extends to the authoritative interpretations of state law by any state court. It requires federal court deference to these authoritative interpretations. Brandeis relies on Holmes's view in *Black & White Taxicab Co.* that federal courts must respect state allocations of lawmaking power and that state constitutions are assumed to authorize their supreme courts to make law. See *supra* text accompanying notes 35-37. (Brandeis's opinion does not refer to Holmes's assumption.) Inferior state courts make state law according to both Holmes and Brandeis because, for them, *all* judicial decisions make law. Holmes's assumption of an authorization to make law does not apply to inferior state courts. However, federal courts must respect inferior state judicial interpretations where states otherwise authorize their inferior courts to make law. It is just that the inference to authorization is not available based on Holmes's assumption. Thus, *Erie* requires federal court deference to inferior state judicial interpretations of state law when evidence of state authorization is available. Deference is not automatic, but *Erie* requires it in this case. *Erie's* facts happen to describe an instance in which deference is automatic because the Pennsylvania Supreme Court had interpreted Pennsylvania law. Deference still is required in cases in which authoritative judicial statements of state law exist. Corbin could have though (reasonably) that states authorize at least some of their inferior courts to make law, as evidenced by the precedential effect given the opinions of these courts, legislative, and executive respect for the contents of the their judicial opinions, and the like. He therefore could conclude that *Erie* required federal court deference in the group of 1940 cases.

In fact, in *King* the Supreme Court acknowledges that states consider some inferior state courts' decisions as authoritative of state law. See *supra* 139 and accompanying text; see also Kurland, *supra* note 140. In that case the Court suggested in dicta that federal courts are bound by the interpretations state law articulated by these courts. See *King*, 333 U.S. at 162. In *Commission v. Estate of Bosch*, 387 U.S. 456, 465 (1967), the Court later announced that *Erie* only requires federal courts to defer to a state supreme court's interpretation of its law. This arguably reflects an altered understanding, not a "clarification," of *Erie's* implication with respect to inferior state court interpretations of state law. Thus, Corbin might have been right about *Erie's* unaltered implication.

Corbin finds. The Supreme Court, in cases decided after Corbin's death, has explained that federal courts are required to follow only state supreme court articulations of state law.¹⁵¹ State lower court interpretations at most are presumptive guides to state law and do not bind federal courts. The Court's clarification of *Erie*'s requirement therefore removes the basis for Corbin's criticism of the group of cases decided in the Court's 1940 term. However, Corbin's objection to *Erie* remains unaffected by this later clarification. *Erie* requires federal courts to defer to state supreme court interpretations of state law, and this requirement produces the asymmetry in judicial reasoning Corbin finds objectionable. Federal courts and state supreme courts still must determine applicable state law differently: the federal court are bound by state supreme court interpretations while the state supreme court is not itself bound by its own prior pronouncements.

This difference in turn can produce differences in outcomes between federal courts and state supreme courts in otherwise relevantly similar cases. Although *Erie*'s required deference, as clarified by the Court, produces potentially fewer occasions in which divergent outcomes occur, because federal courts are not required to reason about state law differently from lower state courts. The divergence in judicial reasoning, however, still exists between federal courts and state supreme courts, and therefore Corbin's objection remains. Corbin was concerned about this divergence, not just a divergence in interpretations between federal courts and lower state courts. His 1938 note asks whether *Erie* prohibited a federal court judge in Pennsylvania from going "outside the opinions of the judges of the Supreme Court of Pennsylvania."¹⁵² The contention of *The Laws of the Several States* is that a federal court in any diversity case must use the same "persuasive data" to determine state law as state courts,¹⁵³ and Corbin later goes on to deny that state supreme court opinions bind federal courts.¹⁵⁴

The response to Corbin's objection is curious. Courts and commentators accept the approach Corbin proposes federal courts should take to determine state law while ignoring the objection upon which the proposal is based. In doing so, they ignore the full implications of Corbin's proposal for the interpretation of state law in diversity cases. Corbin proposes that federal courts construe all

¹⁵¹ See *Bosch*, 387 U.S. at 465.

¹⁵² Corbin, *The Common Law of the United States*, *supra* note 92, at 1352.

¹⁵³ Corbin, *Several States*, *supra* note 69, at 771.

¹⁵⁴ *Id.* at 772.

state court interpretations of state law merely as “persuasive data” because he finds that federal court deference has objectionable consequences for judicial reasoning about state law. Commentators and courts see the proposal as consistent with *Erie*’s required deference. Henry Friendly, for instance, finds “[n]othing in the *Erie* opinion [that] gives the slightest basis for thinking Brandeis would have disagreed with Professor Corbin’s comment that it could not have been intended that the federal judges were ‘being directed to act differently from the Pennsylvania judges themselves.’”¹⁵⁵ Friendly qualifies his finding in a note conceding that *Erie* requires deference in the case of state supreme court opinions. The qualification is fatal to Friendly’s view that *Erie*’s required deference is consistent with Corbin’s proposal.¹⁵⁶ A more recent variant of the same view is expressed by Michael Dorf, who finds that *Erie* requires deference to lower state court opinions because they provide reliable guides for predicting how state supreme courts will rule.¹⁵⁷ In this way *Erie* requires federal courts to treat state court interpretations as authoritative in the same that state courts must treat them. Dorf’s view is implausible because Corbin’s recommendation denies that any “juristic data” have presumptive effect or that the “data” be used to predict how the state supreme court will rule. A presumption in favor of state court interpretations creates the asymmetry in judicial reasoning between state and federal courts that Corbin rejects. Corbin’s proposal denies, while *Erie* requires, deference to state supreme court interpretations of state law. Federal courts avoid the inconsistency by endorsing Corbin’s proposal while not applying it to state supreme court opinions.¹⁵⁸

V. CORBIN’S CONSTITUTIONAL CASE FOR OVERRULING *Erie*

Corbin does not just think that the deference *Erie* requires has objectionable consequences for judicial reasoning about state law. He also rejects *Erie*’s requirement on constitutional grounds.

¹⁵⁵ See Friendly, *supra* note 150, at 400 (quoting Corbin, *The Common Law of the United States*, *supra* note 87, at 1352).

¹⁵⁶ Friendly, *supra* note 150, at 400 n.76.

¹⁵⁷ See Dorf, *supra* note 3, at 698. Dorf makes the suggestion based on the Court’s later understanding of *Erie*. See *supra* note 144 and accompanying text.

¹⁵⁸ For favorable judicial reception of Corbin’s proposal, see, for example, *White v. United States*, 680 F.2d 1156, 1161 n.9 (7th Cir. 1982); *Young v. Ethyl Corp.*, 521 F.2d 771, 773 n.4 (8th Cir. 1975); *In re E. & S. Dists. Asbestos Litig.*, 772 F.Supp. 1380, 1389 (E.D.N.Y. 1991).

Erie concludes that federal courts are constitutionally barred from making judgments about state law independent of state supreme court interpretations of that law. Corbin denies this; he thinks federal courts have the constitutional power to do so.¹⁵⁹ Unlike his practical objections to *Erie*'s requirement of federal court deference, Corbin's constitutional objections to the case developed gradually and are never stated in detail. The 1938 note simply asserts that federal courts have the same "constitutional power" as state courts to determine state law. *The Laws of the Several States* repeats the assertion, but neither piece argues that *Erie* should be overruled. Corbin called for *Erie*'s "prompt overruling" in a 1953 book review of William Crosskey's, *Politics and the Constitution in the History of the United States*. Supplements to Corbin on Contracts referred to Crosskey's "convincing arguments" against *Erie*'s constitutionality and quoted approvingly (with insignificant change) Crosskey's conclusion that *Erie* was "the most colossal error ever committed by the U.S. Supreme Court."¹⁶⁰

A. Corbin and Crosskey

In 1953, Crosskey published *Politics and the Constitution in the History of the United States*.¹⁶¹ The book's approach to constitutional interpretation is originalist: the Constitution should be understood and enforced consistent with the way linguistically competent and well-informed people understood its contents when the document was adopted.¹⁶² According to Crosskey, the

¹⁵⁹ Corbin, *The Common Law of the United States*, *supra* note 92, at 1353.

¹⁶⁰ See 1964 Pocket Part, 4 CORBIN, *supra* note 114, at § 830 (p. 104). See 2 CROSSKEY, *infra* note 161, at 907 (*Erie* as "the most colossal error the Supreme Court has ever made"). Corbin authored the 1964 Supplement. See Letter from Arthur Corbin to Robert Braucher, January 28, 1966, *reprinted in* Perillo, *supra* note 15, at 776-777.

¹⁶¹ WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953) (two vols.).

¹⁶² See, e.g., 1 CROSSKEY, *supra* note 161, at vii, 13. Crosskey's version of originalism, as applied, also required fidelity to the intention of the framers in adopting particular constitutional provisions. See, e.g., *id.* at 1000 (judicial review not intended or provided for in the Constitution). More recent versions of originalism have distinguished between the original intent of the framers in adopting particular constitutional provisions and the original meaning attached to the language in those provisions by linguistically competent speakers. Within original meaning, a distinction in turn can be made between the meaning the framers attached to provisions from the meaning competent contemporaries attached to them. For a brief history of originalism, see Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L. J. 1113, 1134-48 (2003); cf. Randy E. Barnett, *An*

Constitution was understood to describe a national government with strong central powers and strict separations of powers allocated between the institutions of that government. *Politics and the Constitution in the United States* argued for four main conclusions: (1) Congress has the general power to regulate all commerce, including purely intrastate commercial activity; (2) Congress had plenary legislative power not limited to powers enumerated in Article 1, Section 8 of the Constitution or by powers retained by the states; (3) the Supreme Court had power to review Congressional acts only when they raise issues of due process or interfere with the exercise of the Court's own constitutional powers; and (4) the Court has supremacy over both federal and state courts, including on matters of state law, in cases in which the Court has jurisdiction.¹⁶³ The last conclusion meant that the Court has final authority over matters of both federal and state law in all cases in which it has appellate jurisdiction. Thus, in diversity cases in both federal and state courts, the Court ultimately could declare state law independently of its determination by the state's courts. Lower federal court created by Congress therefore had the same power.

Today Crosskey's conclusions generally are rejected and his views considered idiosyncratic. The contemporary response to his book was similarly negative. Most of the prominent book reviews of *Politics and the Constitution in the United States* were highly critical, taking issue with one or more of Crosskey's theses.¹⁶⁴ Of the very few favorable reviews,¹⁶⁵ Corbin's is by the far the most enthusiastic.¹⁶⁶ Most of Corbin's short review is

Originalism for Nonoriginalists, 45 LOY. L. REV. 611, 620-23 (1999). Originalism, as characterized in the text, only requires fidelity to the original meaning attached to words by linguistically competent speakers.

¹⁶³ See 1 CROSSKEY, *supra* note 161, at 77, 117 ((1)); 393f ((2)); 2 CROSSKEY, *supra* note 161, at 1000, 1004-05 ((3)); 655-659 ((4)).

¹⁶⁴ See Ernest J. Brown, Book Review, 67 HARV. L. REV. 1439 (1954); Julius Goebel, Jr., *Ex Parte Clio*, 54 COLUM. L. REV. 459 (1954); Henry M. Hart, Jr., *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456 (1954). See also Hart, *Relations*, *supra* note 150, at 500-504; HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 168 n.1 (1994; org. tent. ed. 1958) (Crosskey's view of Constitution as describing a unitary system of government giving plenary power to Congress "unorthodox" and "wholly untenable.").

¹⁶⁵ See Charles E. Clark, *Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins*, 21 U. CHI. L. REV. 24 (1953); Malcolm Sharp, Book Review, 54 COLUM. L. REV. 439 (1954); Walton H. Hamilton, *The Constitution—Apropos of Crosskey*, 21 U. CHI. L. REV. 79 (1953).

¹⁶⁶ See Corbin, *1953 Book Review*, *supra* note 133. Corbin later described Crosskey's book as "remarkable." See 4 CORBIN, *supra* note 135, at 118 (1964

concerned with Crosskey's discussion of *Erie*, which it describes as "destroy[ing] the supposed constitutional basis for the decision."¹⁶⁷ Without discussing Crosskey's criticisms of *Erie*, the review concludes that "it will be impossible to show any material error" in Crosskey's demonstration of *Erie*'s harmful results and that no other writer has presented "so convincing a criticism of . . . 'one of the most grossly unconstitutional governmental acts in the nation's entire history.'"¹⁶⁸ The review ends by supporting Crosskey's call for *Erie* to be overruled and defending Crosskey against anticipated (unspecified) criticisms.

The perfunctory character of the book review makes it a poor source for determining Corbin's constitutional objections to *Erie*. The review does not disclose the constitutional basis for his objections. Clearly the review's call for *Erie*'s overruling reaffirms Corbin's view, earlier expressed in *The Laws of the Several States* and intimated in his 1938 note, that federal courts have the authority to make independent judgments about state law. It just makes explicit what Corbin's previous criticisms of *Erie* signaled but left implicit. But it cannot be assumed that Corbin's approval of Crosskey's conclusion about *Erie*'s constitutionality extended to Crosskey's constitutional grounds for this conclusion. Corbin probably did not share Crosskey's constitutional criticisms of *Erie*. There are too many differences in the positions taken by the two to safely attribute all of Crosskey's criticisms to him.

For one thing, Corbin does not share Crosskey's approach to constitutional interpretation. He rejects originalism. His 1938 note doubts that a historical understanding of either the 1789 Judiciary Act or the constitutional powers of federal powers is either knowable or necessary.¹⁶⁹ The one point on which Corbin's very favorable book review disagrees with Crosskey is over constitutional interpretation. For Corbin, contract interpretation requires ascertaining the meaning the contracting parties attach to the contract's terms.¹⁷⁰ Constitutional interpretation, for him, must be made in changed circumstances and is "the continuous function

Supp.).

¹⁶⁷ *Id.* at 1140.

¹⁶⁸ *Id.* at 1141 (the critical description of *Erie* Corbin quotes approvingly is Crosskey's; see 2 CROSSKEY, *supra* note 161, at 916).

¹⁶⁹ Corbin, *The Common Law of the United States*, *supra* note 92, at 1353.

¹⁷⁰ Corbin adopts a subjective standard of contract interpretation; see 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS, § 542 (1950); Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. REV. 161, 189 (1965).

of men living in those later times, particularly judges.”¹⁷¹ Neither sort of interpretation aims at ascertaining the historical meaning attached to constitutional provisions, as Crosskey’s originalism requires. This is why Corbin finds it unnecessary to ascertain the normal understanding of the Constitution’s provisions by readers at the time of its enactment or by the framers.

Another difference concerns an implication of Crosskey’s position which Corbin rejects. Relying on the “vesting” clause’s reference to a “supreme” court in Article III, Section 1 of the Constitution, Crosskey concludes that the Supreme Court controlled a national judicial system of both federal and state courts. The Court’s appellate jurisdiction cases allows it to resolve questions of both federal and state law that arose in diversity cases appealed to it or in any case in which it had jurisdiction. According to Crosskey, the judicial “supremacy” of the Court means that in these cases it is not bound by interpretations of state law enunciated by state courts.¹⁷² The Court’s “supremacy” for him also means that its resolution of legal issues is authoritative: once articulated, state courts must follow the Court’s interpretation of law, including state law. Corbin rejects this last implication. State courts properly may determine state law independently of federal court determinations of that law, just as federal courts’ determination of state law may do so independently of state court determination of state law. *The Law of the Several States* finds that even a state law rule established by a state supreme court is not binding on other courts.¹⁷³ The rule does not compel a result beyond the case in which it was announced. Unlike a statute, it serves as merely “persuasive data” of state law for other courts.¹⁷⁴ Because the Supreme Court’s interpretation of state law also is not a statutory enactment, it too can serve merely as “persuasive data” for state courts. Thus, for Corbin, the Court’s interpretations of state law cannot be authoritative for state courts. Corbin therefore cannot recognize the judicial supremacy Crosskey gives the Supreme Court.

A final disagreement between Crosskey and Corbin concerns the common law. Crosskey views the common law, understood historically, as a single system of law received from England and adapted by the American colonies.¹⁷⁵ As a single

¹⁷¹ Corbin, *1953 Book Review*, supra note 133, at 1144.

¹⁷² 1 CROSSKEY, supra note 161, at 655.

¹⁷³ See Corbin, *The Laws of the Several States*, supra note 69, at 762.

¹⁷⁴ See *id.* at 762.

¹⁷⁵ See 1 CROSSKEY, supra note 161, at 584-85; 607-09.

system of law, it is included among the “laws of the United States” in Article III, Section 2 of the Constitution. He concludes that the Supreme Court and lower federal courts can authoritatively determine the common law in cases within their jurisdiction. This includes the authority to independently determine the content of common law and bind state courts to these determinations. For Crosskey, Supreme Court precedent preceding *Swift* wrongly required state courts to follow federal court determinations of state law.¹⁷⁶ He faults *Swift* for not going further to bind state courts to a federal court’s interpretation of common law.¹⁷⁷ Thus, he would extend *Swift*, not overrule it. Corbin explicitly denies that there is a single system of common law.¹⁷⁸ He agrees with *Erie*’s holding that there is no federal common law and that *Swift* was appropriately overruled. However, he also believes that federal courts properly can make independent—though not binding—determinations of state law. He therefore rejects *Erie*’s requirement that federal courts defer to state supreme court determinations of state law.¹⁷⁹ As he stated, “no judge . . . can force a rule upon the judges and litigants in other cases by stating it in his written opinion.”¹⁸⁰ At the same time, unlike Crosskey, he denies that state

¹⁷⁶ Cf. Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 444-45 (1958). Crosskey faults *Green v. Lessee of Neal*, 31 U.S. (6 Pet.) 291 (1832), for eliminating the authoritativeness of Supreme Court precedents on state law for state courts he found recognized in earlier cases, principally *Huidekoper’s Lessee v. Douglass*, 7 U.S. (3 Cranch) 1 (1805). *Green* held that federal courts were bound to follow settled state judicial articulations of state law. According to Crosskey, *Swift* preserved the independence of federal court determinations of state law without disturbing *Green*. See 2 CROSSKEY, *supra* note 161, at 863. Crosskey’s reading of *Huidekoper’s Lessee* is controversial. Fletcher construes its holding more narrowly than Crosskey, as requiring federal court deference to state judicial interpretations only when the interpretations are well settled. He also understands the case to say nothing about the authoritativeness of the Supreme Court’s interpretation of state law for state courts. See Fletcher, *supra* note 119, at 1533-34. Fletcher describes Crosskey as being “alone” in his view of the authoritativeness of Supreme Court interpretations of state law for state courts. See *id.* at 1560 n.224. For a critical assessment of the significance Crosskey attaches to *Huidekoper’s Lessee*, see Hart, *Relations*, *supra* note 150, at 502 n.33.

¹⁷⁷ See, e.g., 2 CROSSKEY, *supra* note 161, at 904-09, 1365 n.79.

¹⁷⁸ See Corbin, *The Common Law of the United States*, *supra* note 92, at 1351; Corbin, *Several States*, *supra* note 69, at 774 (“[*Swift*’s doctrine that there exists a federal system of common law] well deserved to be overruled.”).

¹⁷⁹ See Corbin, *Several States*, *supra* note 69, at 771 (contention of article that federal court has “sworn duty” to determine state law using same “persuasive data” as state court).

¹⁸⁰ *Id.* at 775.

courts are constitutionally bound to follow federal court interpretations of state law. For all of the reasons above, Corbin's differences with Crosskey make it unlikely that he shared Crosskey's principal criticisms of *Erie*.

B. Jurisdiction, Judicial Power and Judicial Independence

Corbin rejects *Erie* because he believes that federal courts have the constitutional power to make independent determinations of state law. The basis of this power, for him, is Article III's grant of jurisdiction to federal courts. Article III, Section 2 of the Constitution extends the judicial power of federal courts to diversity cases. In articles predating his book review of Crosskey's *Politics and the Constitution*, Corbin finds their authority to independently determine state law in Article III's "judicial power" clause. Article III's grant of jurisdiction to federal courts in diversity cases therefore allows federal courts to ignore state judicial interpretations of state law.

Corbin took this position even before *Erie* was decided. In an article published in 1929, the year after *Black & White Taxicab Co.* was decided, Corbin responded to Holmes's dissent in the case.¹⁸¹ Corbin's description of the dissent identifies two assertions it makes: that only state common law exists, not federal common law, and that it is "an unconstitutional assumption of powers" for a federal court to refuse to follow a state's judicial interpretation of state law.¹⁸² His response accepts the first assertion while denying the second. A state's common law is determined by "the great multitude of adjudications in all the courts that have jurisdiction of such citizens and transactions."¹⁸³ Against Holmes, he "believes that the federal courts are just as fully authorized to declare and build up common law in the cases properly arising before them, as are the courts of a single state."¹⁸⁴ Clearly Corbin here is supposing that Article III is the source the federal court's authority. Thus, his response is that Article III's jurisdictional grant to federal courts does not require them to defer to state court interpretations of state common law. It gives them the authority to independently determine state law. Corbin later rejects *Erie* for the same reason he rejects Holmes's dissent in *Black & White Taxicab Co.*: its requirement of federal court deference denies federal courts power that Article III gives them.

¹⁸¹ See Corbin, *Restatement of the Common Law*, *supra* note 97.

¹⁸² See *id.* at 25.

¹⁸³ *Id.*

¹⁸⁴ *Id.* (footnote omitted).

Why does Corbin think that Article III's jurisdictional grant carries with it the power to independently determine applicable state law? There are two possibilities. Corbin might believe that any grant of jurisdiction inherently carries with it the authority to make law. Alternatively, he might believe that the authority to make law derives from certain rights of litigants. The latter possibility is more likely. Although he does not elaborate on the basis of the authority of federal courts to make law, Corbin argues that it derives from the right of litigants to have the law applied to their case not depend on the forum in which their case is brought.

1. The Inference to Judicial Lawmaking: Traditional and Modern Views

Traditionally, the power to independently determine law is viewed as incident to a grant of jurisdiction.¹⁸⁵ According to this view, a grant of jurisdiction to a court also gives it the authority to select law needed to resolve the case before the court, unless the applicable law is selected by a competent authority other than the court. The authority to decide cases and the authority to determine law are distinct sorts of authority. Jurisdiction and judicial power need not go together. However, the traditional view is that, unless restricted, once a court has jurisdiction it has the power to select law. The justification for finding judicial power incident to jurisdiction is necessity.¹⁸⁶ When a competent authority has not otherwise selected applicable law, a court exercising jurisdiction cannot decide the case before it unless it selects law. Deciding the case therefore requires the power to select law needed to reach a decision.

Today the traditional view of the connection between jurisdiction and judicial power would be put in different terms. The view sets a default rule of interpretation allowing an inference of the court's authority to select law from the grant to it of jurisdiction, unless law is selected by an authority other than the

¹⁸⁵ For a description of the traditional view, see Hill, *supra* note 176, at 439. See also *infra* notes 186, 189.

¹⁸⁶ See, e.g., Robert von Moschzisker, *The Common Law and Our Federal Jurisprudence*, 74 U. PA. L. REV. 109, 117 (1925); Frank J. Goodnow, *Social Reform and the Constitution 183-84* (1911). Cf. Arthur G. Powell, *The Constitutional Convention and Swift v. Tyson*, 24 A.B.A. L. J. 862, 862-63 (1938) ("No accepted definition of the 'judicial power' has ever excluded the notion that the judge is to ascertain, declare and construe and apply the applicable law. A judge without these powers lacks much of being a judge in any fair sense.").

court. Likewise, contemporary descriptions of the judicial power depict the capacity as the judicial power to make law by selecting it. Early nineteenth century courts described the power differently, as the capacity to find or determine law.¹⁸⁷ Correspondingly, they debated the existence or extent of judicial power as one about the authority of courts to declare common law.¹⁸⁸ However described, the traditional view was held by early nineteenth courts and continued to be the view of some early twentieth century commentators.¹⁸⁹ It is evident in the Supreme Court's interpretation of Article III's admiralty clause, when the Court states that "[w]ith admiralty jurisdiction . . . comes the application of substantive admiralty law. Absent a relevant statute, the general maritime law, as developed by the judiciary, applies."¹⁹⁰ The view implicitly also is at work in the Court's conclusion, based on Article III's grant of jurisdiction to federal courts, that Congress has lawmaking power in admiralty matters.¹⁹¹

The more modern view of the connection between jurisdiction and lawmaking authority relies on history. Unlike the traditional view, the more modern view therefore does not infer lawmaking authority from jurisdiction. It instead determines the judicial power of federal courts by the historical purposes for which jurisdiction was granted.¹⁹² Applied to Article III, the view finds the judicial authority to make law in the purpose for which the framers of the Constitution gave federal courts jurisdiction over a particular matter. Thus, for example, the framers' apparently

¹⁸⁷ See G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835* 118 (1988).

¹⁸⁸ *Id.*

¹⁸⁹ See *id.* at 138-39, 142-43; see also Cook, *Federal Courts and the Conflict of Laws*, *supra* note 104, at 520, reprinted in *THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS*, *supra* note 104, at 142-43 (both describing Marshall court's view); von Moschzisker, *supra* note 186, at 117; Goodnow, *supra* note 176, at 183-184; Henry Schofield, *Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts*, 4 *IL. L. REV.* 533, 538 (1910). Cf. Keeffe et al., *supra* note 137, at 497 ("Given jurisdiction, it would logically follow that a federal court would have the constitutional power to determine the controversy by any reasonable method.").

¹⁹⁰ See *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986); see also White, *supra* note 166, at 445; see generally Ernest Young, *Preemption at Sea*, 67 *GEO. WASH. L. REV.* 273, 279-84 (1999).

¹⁹¹ See *Panama R.R. v. Johnson*, 264 U.S. 375, 385 (1924); cf. *Butler v. Boston S.S.*, 130 U.S. 527, 557 (1888).

¹⁹² See, e.g., John Hart Ely, *The Irrepressible Myth of Erie*, 87 *HARV. L. REV.* 693, 703-04 (1974); David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 *SUP. CT. REV.* 158, 163.

intended to develop a uniform admiralty law by establishing admiralty jurisdiction. It justifies an inference of judicial lawmaking authority from the Article III's grant of admiralty jurisdiction.¹⁹³ On the other hand, the framers' apparent reason for creating diversity jurisdiction was only to avoid local bias against nonresident litigants. This purpose is not served by giving federal courts the authority to make independent determinations of state law. Because lawmaking authority is set by intent, the more modern view rejects an inference of lawmaking authority just from Article III's jurisdictional grants. The framers' different purposes in granting jurisdiction under Article III have been disputed. Crosskey thinks that they created diversity jurisdiction in order to allow for the creation of a body of uniform law in diversity cases.¹⁹⁴ Justice Pitney, dissenting in *Jensen*, thinks the framers established admiralty jurisdiction to avoid local prejudice against nonresident litigants. While disputing the intended purpose behind the respective jurisdictional grants, both share the more modern view that lawmaking authority is based on this intent.

Case law does not divide neatly between the traditional and more modern views, and it does not show a historical progression in views. Although in determining lawmaking authority in admiralty courts, rely mostly on historical purpose, and opinions often mix both views.¹⁹⁵ The apparent intent of framers to create a uniform admiralty law, the absence of state law addressing a matter, and the presence of admiralty jurisdiction are different considerations that all favor the authority of federal courts to create admiralty law. Further, courts do not consistently invoke one of the views across Article III's heads of jurisdiction. For example, in determining judicial lawmaking authority when jurisdiction is founded on "[c]ontroversies between two or more States,"¹⁹⁶ the Supreme Court has not relied on historical purpose. Rather, it infers the authority to make federal common law from the grant of jurisdiction.¹⁹⁷ The same inference is made when the same issue

¹⁹³ See *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 158 (1920); *The Lottawanna*, 88 U.S. 558, 564 (1875). In *Jensen*, Justice Pitney in dissent shares the majority's more modern view of the lawmaking power of federal courts while disputing the purpose the intent attributed to the framers by the majority. See *Jensen*, 244 U.S. at 234 (Pitney, J., dissenting). For the Court's recent endorsement of the view that admiralty jurisdiction gives lawmaking power, see *Norfolk S. Ry. Co. v. James N. Kirby*, 543 U.S. 14, 23 (2004).

¹⁹⁴ See 1 CROSSKEY, *supra* note 161, at 646.

¹⁹⁵ See Hart, *Relations*, *supra* note 150, at 531.

¹⁹⁶ U.S. CONST. art. III, § 2.

¹⁹⁷ See, e.g., *Texas v. New Jersey*, 379 U.S. 674, 677 (1961); *Hinderlider v.*

arises from Article III's establishment of jurisdiction based on controversies to which the federal government is a party.¹⁹⁸ Finally, sometimes it not even clear that judicial lawmaking is based on Article III's jurisdictional grant or merely on a Congressional statute. Only in the former case is the issue of the judicial authority to make federal common law controversial. Nonetheless, even acknowledging these complications, the traditional and more modern views identify recognizable inferences in the case law.

2. The Right to Forum-Neutral Law

Corbin sometimes merely asserts that federal courts have lawmaking authority without identifying the source of that authority.¹⁹⁹ At other points Corbin finds the authority in Article III. In *The Laws of the Several States*, he does so in arguing that federal courts in diversity cases have a duty to independently determine applicable law.²⁰⁰ The argument is: Article III's jurisdictional grant allows federal courts to decide diversity cases but specifies neither the law applicable to them nor the sources they must use to determine that law. Litigants are entitled to have their rights not depend on the forum in which they are established.²⁰¹ Because federal courts must decide diversity cases before them and the litigants have this entitlement, Article III's jurisdictional grant authorizes federal courts to independently determine the law applicable to these cases. The litigants' rights not to have their entitlements turn on the choice of forum require federal courts to independently determine applicable law. Thus, when the applicable law is state law, federal courts must use "all the juristic data that are available to the state court."²⁰² Article III's jurisdictional grant gives federal courts the constitutional power to determine applicable law in diversity cases without deference to state court interpretations of state law. Their duty to exercise this jurisdiction by independently determining applicable law derives from litigants' rights not to have their entitlements turn on the

LaPlata River & Cherry Creek, 304 U.S. 92, 110 (1938); *see also Hill*, *supra* note 168, at 439 (describing the relevant decisional law generally).

¹⁹⁸ *See Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

¹⁹⁹ *See, e.g., Corbin, The Common Law of the United States, supra* note 92, at 1353.

²⁰⁰ *See Corbin, Several States, supra* note 69, at 774-75.

²⁰¹ *Id.* at 771 (federal court's "sworn duty to administer justice as it would be administered in the state court . . ."); *id.* at 775 (precluding federal courts from deciding state law based on all sources available to state courts is a "denial of justice to those for whom a court exists.").

²⁰² *Id.* at 774. The argument in the text appears in *id.* at 773.

choice of forum.

This argument infers the authority to make law from a jurisdictional grant. Nothing in it turns on finding the historical purpose behind Article III's grant of diversity jurisdiction. The inference to the authority to independently determine applicable law follows directly from a grant of jurisdiction (the duty to exercise judicial authority to select law without being bound by state court determinations turns on litigants' rights—another nonhistorical fact). Thus, the argument adopts the traditional view of jurisdiction and judicial power. Corbin's reliance on the traditional view is consistent with his rejection of originalism as a method of constitutional interpretation, noted above.²⁰³ If constitutional interpretation should not be guided by the meaning either the framers or contemporary readers attached to constitutional provisions, inferences drawn from Article III's jurisdictional grant also should not be similarly guided. Further, the argument makes the authority to independently determine law turn on particular types of law. Jurisdiction gives the federal court this authority, whether the applicable law is federal or state. Corbin therefore rejects both *Swift's* and *Erie's* results. *Swift* permits federal courts to determine matters of "general" commercial law without deference to state court interpretations of them.²⁰⁴ Subsequent case law relying on *Swift* does not require deference when general principles of law or matters deemed "general" and not "local" were at issue.²⁰⁵ *Swift* and subsequent cases require federal courts to follow the decisions of state courts where "nongeneral" state law matters were concerned. *Erie* requires that federal courts follow state supreme court interpretations of state law, whether "general" or "local." Corbin's argument authorizes federal courts to independently determine applicable law whenever they have jurisdiction in a diversity case. Whether the applicable law is state or federal does not affect their authority to determine it.

Corbin uses the argument to respond to Holmes and Brandeis's charge that his position involves an "unconstitutional

²⁰³ See *supra* notes 169-71 and accompanying text.

²⁰⁴ See *Swift* at, 18 (matters of law merchant not controlled by local statute or "ancient local usage").

²⁰⁵ See Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1301 (2000); Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1026-27 (1953) (rationale of cases to the effect that "general law" is state law); Charles A. Heckman, *Uniform Commercial Law in the Nineteenth Century Federal Courts: The Decline and Abuse of the Swift Doctrine*, 27 EMORY L. J. 45, 48 (1978).

assumption of power.”²⁰⁶ Although neither makes explicit the basis of the charge, their likely criticism is that the refusal to defer to state supreme court determinations of state law does not respect the state’s allocation of lawmaking authority to its supreme court.²⁰⁷ In independently determining state law, federal courts unconstitutionally exercise the state supreme court’s lawmaking power. Corbin’s response is in two parts. First, he concedes that in reaching decisions federal courts make law but points out that the same is true whatever result they reach.²⁰⁸ His apparent thought is that the fact that they make law therefore cannot constitutionally restrict the federal courts’ exercise of jurisdiction. Second, Article III’s jurisdictional grant gives federal courts the authority to independently determine state law. Thus, even if a state’s constitution allows its highest court to make state law, federal courts have constitutional power to determine state law without being bound to a state court’s interpretation of state law. Corbin’s reasoning here is worth quoting: “[i]t is very difficult to see any ‘unconstitutional assumption of power’ when the federal court decides a case over which the Constitution expressly gives it jurisdiction and determines as best it may, from such sources as it can find, what the ‘law’ is by which the rights of the litigant are determined.”²⁰⁹ This can fairly be read to say that federal courts have the constitutional power to independently determine the law applicable in cases in which Article III gives them jurisdiction. The reasoning infers the authority to independently determine law from Article III’s jurisdictional grant. In his 1938 note on *Erie*, Corbin asserted the conclusion of this reasoning: “[i]n the cases that are rightly before them, the federal courts have the same constitutional power, as have the Pennsylvania courts, of determining the law that is applicable to the instant case.”²¹⁰

My purpose in noticing Corbin’s response is biographical, not critical. The response does not deny the charge that exercising such authority might interfere with a state’s allocation of lawmaking powers to its courts. Corbin does not even try to argue

²⁰⁶ Corbin, *Several States*, *supra* note 69, at 773; *Black & White Taxicab Co.*, 276 U.S. at 533 (Holmes); *Erie*, 304 U.S. at 79 (Brandeis).

²⁰⁷ See *supra* note 39 and accompanying text. Cf. Hart, *Relations*, *supra* note 150, at 512; Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1685 (1974).

²⁰⁸ Corbin, *The Demise of Swift v. Tyson*, *supra* note 87, at 1353; Corbin, *Several States*, *supra* note 69, at 773.

²⁰⁹ Corbin, *Several States*, *supra* note 69, at 773.

²¹⁰ Corbin, *The Common Law of the United States*, *supra* note 92, at 1353.

that no interference occurs when a federal court refuses to follow a state supreme court's opinion on state law. He considers it enough to argue that Article III's jurisdictional grant gives federal court the authority to independently determine applicable law. The response shows that he takes the inference from jurisdiction to lawmaking authority to be self-evident—as it is on the traditional view described above. *Swift*'s defenders sometimes found in Article III's jurisdictional grant the authority of federal courts to independently determine general law.²¹¹ On matters of local law, however, they conceded that federal courts were bound to state judicial expositions of state law. Corbin's view is different. While holding that Article III's jurisdictional grant authorizes federal courts to independently determine applicable law, he denies that general law exists.²¹² Corbin therefore finds that the jurisdictional grant authorizes federal courts to exercise independent judgment with respect to both federal and state law. He simply infers the authority to independently determine state law from a grant of jurisdiction.

A further question is whether Corbin has available better responses to Holmes and Brandeis's charge. For instance, Corbin could have argued that litigants have an (unspecified) constitutional right to have a court decide their entitlements in a manner unaffected by the forum in which the case is brought. This right, he could have concluded, is more important than the constitutional demand that federal courts respect state lawmaking functions. Alternatively, Corbin could have disputed the assumption that an independent determination of state law fails to respect a state's allocation of lawmaking powers. Respect, instead, only requires that a federal court use the same sources as state courts use to reach decisions in similar cases. Corbin believes that state courts have available to them the range of sources from state states and state court opinions, legal commentary and even the conventional local practices. In light of these sources, state law precedent, binding on both state and federal courts, does not compel a result in subsequent cases.²¹³ Use of these to determine state law sources—what Corbin called “persuasive data”—does not prevent a federal court from concluding that a state court interpretation of state law does not accurately reflect state law. Again, my biographical point is that Corbin thinks his response

²¹¹ See, e.g., von Moscheisker, *supra* note 176, at 117; Chamberlain, *supra* note 109, at 277; Lawrence Earl Broh-Kahn, *Amendment by Decision—More on the Erie Case*, 30 KY. L. REV. 3, 18 (1941).

²¹² See *supra* notes 96, 97 and accompanying text.

²¹³ See Corbin, *Several States*, *supra* note 69, at 771-72.

answers the charge that his position involves an “unconstitutional assumption of powers.” He does not feel the need to argue that rejecting federal court deference refuses to respect a state’s allocation of lawmaking authority. Because the response infers the constitutional authority to independently determine law from a jurisdictional grant, Corbin must therefore have found the inference decisive. He therefore thinks that Article III’s grant of jurisdiction ultimately gives federal courts the constitutional power not to follow state supreme court opinions.²¹⁴

CONCLUSION

The understanding of *Erie* in the 1940s and 1950s was very different from today’s description of the case’s rationale. Today the case is taken to rest, at least in part, on jurisprudential grounds about the nature of law: a commitment to legal positivism.²¹⁵ Contemporary commentators and courts could not have disagreed more. They dismissed *Erie*’s reliance on jurisprudential considerations.²¹⁶ Instead, the case was defended and attacked on constitutional grounds. This assessment was consistent with earlier defenses of *Swift*, which also rested on constitutional grounds, not jurisprudential ones.²¹⁷ Corbin’s opposition to *Erie*, based only on practical and constitutional considerations, therefore is typical, not idiosyncratic.

Justice Frankfurter’s description of *Erie* in *York*, decided in 1945, appears to have been one of the first attempts to rest *Erie*’s result on a particular conception of a law.²¹⁸ But even the dissent in

²¹⁴ The inference is not idiosyncratic; for the same inference, see Powell, *supra* note 165, at 862-63. Robert Jackson, then Solicitor General, in an article published four months after *Erie* was decided, recognized the plausibility of the inference: “[i]f the constitutional issue had been argued [in *Erie*], the Court would have had to consider the interesting question whether its decision undermines the foundations of the rule of uniformity in maritime law, which also depends on a simple grant of jurisdiction to the Federal Courts in the Constitution.” Robert H. Jackson, *The Rise and Fall of Swift v. Tyson*, 24 AMER. BAR ASSOC. L. J. 609, 644 (1938) (footnote omitted).

²¹⁵ See *supra* notes 3-12 and accompanying text.

²¹⁶ See *supra* note 185; Broh-Kahn, *supra* note 211, at 18.

²¹⁷ See *supra* note 196; Chamberlain, *supra* note 116, at 274-82; FREYER, *supra* note 10, at 46, 53-56, 71-74.

²¹⁸ See *supra* note 10 and accompanying text; for a closely contemporary criticism of *Erie* sharing Frankfurter’s assumption that the case rests on a conception of law, see John J. Parker, *Erie v. Tompkins in Retrospect: An Analysis of Its Proper Area and Limits*, 35 A.B.A. J. 19, 21 (1949). Frankfurter’s views seem to have changed between *Erie* and *York*. In the term before *Erie* was decided, he set as a final examination question for his federal courts course the

York denied *Erie*'s jurisprudential commitments.²¹⁹ Taken as a whole, the evidence suggests that Frankfurter's understanding of *Erie* in 1945 was novel and did not predominate. It suggests that both contemporary supporters and critics of the decision understood the case in broadly constitutional terms, not jurisprudential ones bearing on the nature of law. Do the various drafts of Article III's "judicial power" clause considered by the 1787 Constitutional Convention suggest that the framers intended to give federal courts the authority to independently determine state law? Is the phrase "laws of the several states" in the Section 34 of the 1789 Judiciary Act equivalent in meaning to the phrase "Statute law of the several states . . . and their unwritten or common law" that appeared in an earlier draft of the Section? Will *Erie*'s requirement of federal court deference impair the supposed tendency of federal court interpretations of common law to spur uniformity in state law? These questions engaged commentators, not questions about the nature of law.

A good measure of the contemporary understanding of *Erie* is the analysis of the case given in predominant mid-twentieth century casebooks on federal courts. Casebooks whose authors described *Erie* focused on constitutional considerations, to the exclusion of jurisprudential concerns. To be sure, the authors of contemporary casebooks generally did not say a lot about the cases they reprinted. Federal courts casebooks of the time adopted a hands-off editorial style and did not analyze the cases they reproduced, which typically included *Swift* and *Erie*.²²⁰ Editorial intervention was minimal, usually limited to a string citation of secondary literature in footnotes added to the reprinted cases. However, the first edition of Hart's and Wechsler's *The Federal Courts and the Federal System*,²²¹ published in 1953, is a notable

task of criticizing *Swift* based on "historical, juristic, and functional considerations." Quoted in Mary Brigit McManamon, *Felix Frankfurter: The Architect of "Our Federalism,"* 27 GA. L. REV. 697, 754-55 (1993). Significantly, Frankfurter did not ask about the jurisprudential basis of *Swift*. The omission suggests that he did not consider the case to rest on a conception of law rejected by *Erie*—the position he takes in *York*.

²¹⁹ See *supra* notes 106-08 and accompanying text.

²²⁰ See, e.g., CHARLES T. MCCORMICK & JAMES H. CHADBOURN, CASES AND MATERIALS ON FEDERAL COURTS (2d ed. 1950); RAY FORRESTER, DOBIE AND LADD, CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE (2d ed. (1950).

²²¹ HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953) [hereinafter, HART & WECHSLER, THE FEDERAL

and influential exception. It contains a series of notes and questions appearing immediately before *Erie* is reprinted. Hart and Wechsler there present the “principle” of *Swift* and reproduce Holmes’s criticism of the case in his dissent in *Black & White Taxicab Co.*²²² In the excerpt, Holmes attributes to *Swift* the view that the common law is something independent of the decisions of state courts—“outside” of them.²²³ Hart and Wechsler follow the excerpt with three questions: “Does this go to the jugular of the problem? Is it necessary to accept this theory of law to justify a rejection of *Swift v. Tyson*? Is it likely that state provisions adopting the common law were premised on this theory?”²²⁴ The questions easily invite negative answers and reveal the authors’ view that *Swift* can be rejected without adopting a particular view about the nature of law. Adopting a theory about the nature of law does not address the “jugular” of the problem, according to the answer Hart and Wechsler’s first question invites. Rather, according to questions in their earlier notes, *Swift* violates an (unspecified) constitutional requirement that applicable law not vary with the forum in which litigation proceeds.²²⁵ In the oblique pedagogical style of mid-century casebooks, Hart and Wechsler intimate their understanding of *Swift* and *Erie* by questions, not assertions or arguments. However, their questions obviously suggest that *Swift* and its overruling by *Erie* are grounded in constitutional, not jurisprudential, concerns.²²⁶

A final historical question is whether jurisprudential views about the nature of law somehow predisposed Brandeis and like-minded courts to reach *Erie*’s result. Did a belief in legal positivism incline courts to find that federal courts generally must defer to the determinations of state law as found by the state’s highest court? Because a commitment to natural law, which conditions legal norms on morality or rationality,²²⁷ could have the same effect, the question must be whether courts committed to legal positivism would be more likely to demand federal court

COURTS]. For an example of the very favorable assessment of the casebook on its publication, see Philip Kurland, *Book Review*, 67 HARV. L. REV. 906, 907 (1954) (at time of writing the “definitive text on the subject”).

²²² HART & WECHSLER, *THE FEDERAL COURTS*, at 619-20.

²²³ *Id.* at 620; see *supra* notes 37, 96 and accompanying text.

²²⁴ *Id.* at 620.

²²⁵ *Id.* at 616.

²²⁶ Hart and Wechsler therefore do not share the dedicatee of the first edition of their casebook and author of *York*’s understanding of *Erie*.

²²⁷ See *supra* note 53 and accompanying text.

deference than courts committed to natural law.²²⁸ It is hard to see why. For endorsement of legal positivism to influence a court's beliefs about deference, two things must be true: views about the nature of law must require federal court deference to state court determinations of state law, and legal positivism and natural law must require different degrees of deference. Without the former condition, legal positivism has nothing to say about federal court deference. Without the latter condition, competing conceptions of law may demand the same degree of deference as positivism demands.

Neither condition seems likely to be met. Because conceptions of law by themselves say nothing about what constitutes state law, legal positivism does not dictate whether articulations of state law by the state's highest court constitutes state law. The status of state decisional law is itself a matter of state law, not settled by jurisprudential considerations about the nature of law. States could consider state legislation to be state law and judicial interpretations of such legislation merely evidence of state law.²²⁹ In that case federal courts would not be compelled to defer to determinations of state law by state courts. Further, the appropriate degree of deference federal courts must show state courts is a matter of constitutional law, broadly understood. It is not dictated by a view about whether state decisional law constitutes state law. Even if legal positivism somehow required particular deference to state decisional law, nothing prevents its jurisprudential competitors such as natural law from requiring the same degree of deference. Thus, only psychological or cultural factors unrelated to jurisprudential considerations may have predisposed courts to endorse *Erie*'s result.

²²⁸ For a similar question about the propensity of conceptions of law to influence judicial responses to the demands of evil regimes, see Liam Murphy, *The Political Question of the Concept of Law*, in HART'S POSTSCRIPT 371 (Jules L. Coleman ed. 2001); David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991); Hart, *Positivism*, *supra* note 55, at 593.

²²⁹ See *supra* note 40 and accompanying text.