Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents

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Scholars, judges, and lawyers have fought for decades over originalism, textualism, and "living" interpretation as though such questions arose exclusively with respect to statutes and constitutions. That is wrong. Some judicial decisions have meanings that change over time, much like statutory and constitutional provisions, and sometimes interpreting a case requires more than reading an opinion's text. Legal actors constantly fight over what precedents mean, and those disputes require an understanding of what such cases meant in the past—whether at the initial time of decision, or in their subsequent applications. As with statutes and the Constitution, links to a historical past can be important evidence that precedential interpreters are applying extant legal authority, rather than making it up. This Article offers a system for interpreting judicial precedents that clarifies how current fights unfold and identifies techniques for future use.

I consider four methods of interpreting precedents that rely on different categories of historical materials and can generate different interpretive results: (i) an opinion's text, which indicates a decision's declared meaning; (ii) adjudicative context, reflecting its implied meaning; (iii) reception by contemporary analysts, depicting its understood meaning; and (iv) subsequent doctrinal applications, which identify its developmental meaning. These categories–much like the textualism, originalism, and dynamism that are familiar in other legal contexts–yield interpretive options

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for lawyers defending clients, courts explaining decisions, and intellectuals pursuing truth.

This Article illustrates how the foregoing methods work, and also what they produce, by considering important precedents from the nineteenth, twentieth, and twenty-first centuries. Two examples, Swift v. Tyson *and* Erie v. Tompkins*, are among the most widely studied cases in American law, yet the application of different interpretive techniques reveals new historical materials that in turn support new interpretations.*

By comparison, the Supreme Court's recent decisions in United States v. Windsor *and* Obergefell v. Hodges *are uncharted territory, with only scant historical evidence at hand. In the latter context, methods of precedential interpretation sketch a range of options by which legal actors may influence and solidify such decisions' meanings. Whether interpretive methodologies are used for revisionist purposes or for explicitly creative ones, they can be powerful tools for analyzing any judicial decision that is deemed important enough to merit the effort—just as occurs with statutory and constitutional provisions.*

No interpretive system can produce simple doctrinal solutions to hard legal problems; indeed, that impenetrability is what makes hard problems hard. Understanding interpretive methodologies can nevertheless identify techniques that legal actors use to manipulate precedents' legal power. It can also offer fresh intellectual perspective on how law operates, and why law's history is so hard to escape.

INTRODUCTION

All first-year law students are told that they must learn how to "read cases," and every trained lawyer claims to be skilled in doing so. Yet methodological questions of how to interpret judicial decisions are widely ignored.[1] To introduce the obvious-but-strange subject of interpreting precedents, one might begin with a contrast to the well-known fields of statutory and constitutional interpretation.

1. *See* Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625, 1626 (2013) (describing current inattention to precedential interpretation as "astonishing"); *see also* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 183 (2014) ("Perspectives on the scope of precedent are . . . intertwined with deeper principles of interpretation and adjudication."); *cf.* Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1188 (2007) ("In the United States . . . the common law is embarking on a path towards becoming increasingly textual, just as statutes have been for hundreds of years. . . . As a consequence, legal reasoning is gradually being supplanted by close reading."). Important scholarly debates about dicta, and about standards for overruling cases, have not addressed the interpretation of entities that do qualify as binding judicial decisions. *E.g.*, MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 3–8 (2008) (discussing ideologies that affect decisions to overrule prior cases); Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1044–75 (2005) (analyzing schemes for identifying dicta and holdings).

Lawyers have debated for decades which methods and sources to use in interpreting statutes and constitutions.[2] Labels such as textualism, original intent, original meaning, and "living" dynamism are almost clichés in these contexts, as they represent theoretical positions that are familiar and powerful.[3] Although modern interpreters seldom commit to one mode of constitutional or statutory interpretation as universally correct, debates over interpretive methodologies have framed a generation of legal thought.[4] For example, litigation about the Voting Rights Act or constitutional privacy cannot be altogether limited to narrow substantive topics; interpretive methodologies connect such disputes to broader concepts of legal authority and judicial power.[5] Can old statutes have new meanings, and if so, how? Is the Constitution's meaning fixed, and if so, by what? These systematic inquiries are rare when it comes to interpreting judicial decisions.[6] Vague and authoritative precedents, however, often require every bit as much interpretation as vague and

2. *E.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 9 (1994); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 9–15 (1997).

3. *See* JACK M. BALKIN, LIVING ORIGINALISM 3 (2011); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012). For political consequences of interpretive methodologies, compare STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008), with JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE (2006).

4. *See* John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 4, 8–48 (2014) (discussing prevalent and longstanding attention to interpretive methodology with respect to statutes and the Constitution). In practice, even insistent originalists sometimes derive their conclusions from modern sociology more than framing-era history. *E.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 772–82 (2007) (Thomas, J., concurring) (advocating a "colorblind Constitution" under the Fourteenth Amendment of 1868 without citing any supportive authority older than *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), and relying instead upon nonoriginalist precedents from the middle- and late-twentieth century).

5. *E.g.*, William N. Eskridge, Jr., Hardwick *and Historiography*, 1999 U. ILL. L. REV. 631, 665–66 (discussing connections between the Court's privacy decisions and "conceptual difficulties with originalism as a constitutional methodology"); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 54–56 (1998) (analyzing voting rights cases, among others, to "confound the familiar interpretive dichotomies between textualism and intentionalism, originalism and the common law mode").

6. Future research might explore *why* questions of interpretive methodology have been important for statutes and constitutions, but not for precedents. *Cf.* Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009) (describing twentieth-century debates over judicial role).

authoritative statutes or constitutional provisions. In all three contexts, the need for advanced interpretive techniques arises whenever a legal authority is doctrinally powerful, yet is simulaneously unclear with respect to some question of great importance.[7]

This Article explores how sophisticated lawyers interpret iconic precedents and illustrates why those methods are important.[8] The term "iconic precedents" is intended as a rough placeholder to identify decisions that are so important that special techniques are required to grasp their meaning. American principles of stare decisis purport to treat most cases equally, as decisions are published in the same reporters and databases, with supposedly comparable power to bind future judgments.[9] In practice, however, that equality is merely formal. A few cases—one may call them "iconic"—tower in significance while the rest go mainly unnoticed.[10] At different points

7. For example, extensive interpretive efforts will be deemed unnecessary if a legal authority is trivially important, or if it unambiguously resolves appurtenant doctrinal questions. We shall see, as a practical matter, that advanced interpretative techniques are applied to only some precedents, statutes, and constitutional provisions. *See infra* notes 8, 10, 13.

8. "Sophisticated lawyer" is a necessarily imprecise term that denotes all judges, academics, and practitioners who are able to self-consciously navigate matters of interpretive methodology. In some areas of legal practice, time and resource constraints will affect whether that category is small or large in number.

9. Tiersma, *supra* note 1, at 1278.

10. The term "iconic case" identifies decisions that represent fundamental aspects of a legal system and whose meaning necessarily extends beyond the adjudicator's explanatory opinion. The *Oxford English Dictionary* defines "iconic" as "[d]esignating a person or thing regarded as representative of a culture or movement; important or influential in a particular (cultural) context." OXFORD ENGLISH DICTIONARY (2006), http://www.oed.com/view/Entry/90882?redirectedFrom=iconic#eid [https://perma.cc/QL2F-GG7W?type=image]. Particular determinations about which cases qualify as iconic raise debatable issues of legal culture that change over time, just as is the case with debates over a specific precedent's meaning. Readers must not allow historical variety among iconic cases—much less quibbles over borderline examples—to distract from the thesis that some cases are different from others with respect to (a) their power and (b) their corresponding interpretive techniques. If some readers wished to advocate a third category of "semi-iconic cases," or to array cases along an "iconic spectrum," that would have no large effect on my approach. This Article is less concerned with identifying iconic cases on a list, or drawing clear lines around the set, than with analyzing fundamental relationships between precedential power and interpretive technique. *Cf.* DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 16 (1987) ("These are at best exemplars of the ways in which a certain, powerful class of words have functioned in our political culture. . . . [T]here is something to be said for a serious look . . . at a few of the most potent tools and expansive political metaphors we have possessed. . . . The words we use . . . have been made, remade, repudiated, fought over. . . . The keywords, the metaphors, the self-evident truths of our politics have mattered too deeply for us to use them in any but contested ways.").

in time, iconic cases such as *New York Times v. Sullivan*, *Brown*, *Korematsu*, *Lochner*, *Dred Scott*, and *Marbury* have been authoritative, controversial, or reviled, but their persistent cultural potency explains why they produce ongoing interpretive struggles.[11] By comparison, the noniconic decisions that were published immediately before and after *Marbury* or *Brown* are doctrinally unimportant and forgotten—along with the overwhelming majority of other judicial rulings.[12] If thousands of ordinary decisions were erased from research databases, hardly anyone but specialists would care or even notice.[13]

Readers may notice a parallel between this account of iconic cases and the interpretation of comparably "iconic" statutory or constitutional provisions. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001). Methodological disputes about statutory and constitutional interpretation do not analyze simple, clear, and unimportant legal authorities. *See supra* note 7. No sensible person would fight over originalism or dynamism in trying to understand "two Senators," U.S. CONST. art. I, § 3, or "the State of Arizona," 25 U.S.C. § 463c (2012). Statutory and constitutional methodologies become salient only with respect to vague phrases like "due process" or "employment discrimination," which themselves are sufficiently important to justify interpretive struggle. The same is true with respect to interpretive methodologies concerning precedents. Perhaps obviously, "vagueness" in any form of legal authority must be defined in operation rather than the abstract, as it depends entirely on context and the legal questions under dispute. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2489–92 (2015) (discussing whether the ostensibly unambiguous clause "established by the State" was vague as applied to insurance exchanges under the Affordable Care Act).

11. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Korematsu v. United States, 319 U.S. 432 (1943); Lochner v. New York, 198 U.S. 45 (1905); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Modern disputes over what these landmark cases signify for current legal problems are too many for adequate citation. *E.g.*, Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 528–33 (2015) (introducing a "nascent rebirth of mainstream conservative support for judicial protection of unenumerated economic rights"); Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076, 3081 (2014) (essay) (discussing "a potential revival of *Brown*'s lost logic in the context of same-sex marriage").

12. For trivia buffs, the distinctly noniconic cases published before and after *Marbury* are *Turner v. Fendall*, 5 U.S. (1 Cranch) 117 (1801), and *Clark v. Young*, 5 U.S. (1 Cranch) 181 (1803). The slightly more well-known cases surrounding *Brown* are *Shaughnessy v. United States* ex rel. *Accardi*, 349 U.S. 280 (1955), and *Marcello v. Bonds*, 349 U.S. 302 (1955).

13. The radical unevenness of precedents' importance has been a dominant feature of Anglo-American law for more than a century. *See* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) ("The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law . . . . We could reconstruct the corpus from them if all that went before were burned."). That characteristic is also a premise of American legal education, as the very first casebook proposed to take "a branch of the law . . . and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the

The importance of iconic cases is what fuels controversy over their interpretation and status. Landmark rulings often renounce or reformulate prior practice, and where these shifts have special significance, they demand unusual methods of interpretation and justification. Ordinary cases can be explained with a string-cite or headnote, but to fully understand *Brown* or *Marbury* would take a library and a lifetime.

This Article systemizes interpretation of iconic cases using four kinds of historical material and four types of precedential meaning: (i) an opinion's text indicates a decision's *declared meaning*; (ii) adjudicative context reflects a precedent's *implied meaning*; (iii) reception by contemporary analysts depicts *understood meaning*; and (iv) later applications identify *developmental meaning*. As with other kinds of textualism (declared meaning), originalism (implied and understood meaning), and dynamic legalism (developmental meaning), historical materials concerning precedents often point in

growth, development, or establishment of any of its essential doctrines." 1 C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at vii (Bos., Little, Brown & Co. 1871). The notion that one could describe or learn about some expansive and longstanding field of law from a few dozen cases and a few hundred pages depends on the prior assumption that "leading" or "landmark" precedents are the ones that matter most. *See id.* at vi–vii ("The most important element [in selecting cases] . . . was the great and rapidly increasing number of reported cases in every department of law. . . . [T]he shortest and best . . . way of mastering . . . doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose . . . bear an exceedingly small proportion to all that have been reported. The vast majority are useless and worse than useless for any purpose of systematic study. . . . [T]he many different guises in which the same doctrine is constantly making its appearance . . . [are] the cause of much misapprehension."). Culturally constructed techniques of doctrinal analysis taught in law school continue to affect the behavior of alumni as they become practicing lawyers and judges. Especially because the latter groups tend to face even more urgent deadlines and resource constraints than are present in law school research, a few cases tend to matter a lot, and the devil may take the rest.

Physical collections of case reporters once made it easier to visualize just how many insignificant decisions are formally part of the United States legal system, though even those tens of thousands of physical volumes with published cases omitted nearly all trial court decisions and cases that ended in settlement or plea agreement. Perhaps twenty-first-century lawyers should imagine the results screen from a search of *all* state and federal decisions for *all* electronically available cases that include the words "of" or "and." With a great deal of time and money, a sophisticated empiricist might be able to estimate the fraction of total judicial decisions that have ever been cited anywhere by anyone. But any practical lawyer who has drafted a brief or judicial opinion would further stress that only a small fraction of even cited cases is actually meaningful, much less irreplaceable. The dismissiveness expressed by Holmes and Langdell regarding the significance of most judicial cases during the first decades of printed reporters seems immensely more warranted in present times of electronic research and resources.

different directions, as they unseat or reinforce interpretations that otherwise seem conventional.

Where the foregoing evidence does not fit neatly into a single interpretation, fracture-points emerge that lawyers, judges, and academics can use in modern struggles over precedential interpretation and authority. Any system of interpreting cases must therefore describe a world of contested opportunities rather than one of simple doctrinal answers.[14] These four categories of evidence demonstrate that there is no meaningful choice about whether to use history in precedential interpretation. "The only legal materials that are or ever have been or ever will be available are historical—cases that have already been decided, statutes that have already been enacted, and so on."[15] Instead, more interesting questions are what kinds of history to use and how. We shall see that to study methodologies for interpreting iconic cases will clarify the relationship between law and history, as well as the professional classifications of legal history and legal practice.[16]

Iconic cases lead double lives. In one respect, they are simply historical events that occur at specific times and derive from particular people, environments, ideas, and interests.[17] An iconic

14. As Bordieu has written, "[n]othing is more paradoxical . . . than [for] people whose whole life is spent fighting over words [to] strive at all costs to fix . . . the one true meaning of . . . ambiguous, overdetermined or indeterminate symbols, words, texts or events" that "generate interest [precisely] because they have always been at stake in struggles . . . [over] their 'true' meaning." PIERRE BOURDIEU, THE LOGIC OF PRACTICE 17 (Richard Nice trans., Polity Press 1990) (1980) (observing that this paradox recurs for "all sacred texts, which, being invested with a collective authority . . . can be used as the tools of a recognized power . . . through interpretation"). Against that backdrop, I should stress that the categories listed here are not exhaustive, nor are they necessarily listed in sequential importance. Even as interpreters debate whether a particular case qualifies as iconic, *see supra* note 10, they might also debate which interpretive methodologies should apply to iconic cases, as well as whether one category of evidence is more persuasive than another.

15. GRANT GILMORE, THE AGES OF AMERICAN LAW 146 n.6 (1977).

16. For an analogous discussion of jurisprudential canons, see J.M. Balkin & Sanford Levinson, *Legal Canons: An Introduction*, *in* LEGAL CANONS 3, 3–32 (J.M. Balkin & Sanford Levinson eds., 2000). *See also* Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as a Property*, 33 WM. & MARY L. REV. 995, 1000 n.11 (1992) ("Judicial precedents, like religious icons, develop their own tradition of faith, having independent meaning."). The main influence on my view of law as a cultural product, however, is Dan Rodgers's transformative scholarship on the relationships between ideas and material realities. *See, e.g.*, CULTURES IN MOTION (Daniel T. Rodgers et al. eds., 2014); RODGERS, *supra* note 10.

17. *See* Christopher Tomlins, *Framing the Field of Law's Disciplinary Encounters: A Historical Narrative*, 34 LAW & SOC'Y REV. 911, 912 (2000).

decision's *historical reality* can be discussed with different emphases: political histories link cases to partisan struggles, while economic histories focus on material conditions, and intellectual histories explore ideologies. These and other modes of analysis are judged by prevailing standards of expertise, sophistication, and connection to other scholarship.[18] For professional historians, categories of precedential meaning (declared, implied, understood, developmental) are data points to be used in support of narratives that other historians and intellectuals may appreciate as nuanced, truthful, well crafted, and above all else, interesting.

In a second sense, however, judicial precedents are more than academic objects; they are conduits of power that influence current legal disputes and violence.[19] In this *operative reality*, cases have a formal status—affirmed, overruled, revised—and they have a doctrinal meaning that changes over time. An iconic decision like *Carroll Towing* is not just a past event; it prescribes current standards for tortious negligence, just as *Lochner* today is a cautionary tale about the discredited freedom of contract.[20] For professional legal communities, analyzing iconic cases is more than a historical exercise, and standards for evaluating precedential interpretation are more practical than intellectual. Lawyers and judges use categories of precedential meaning as tools to persuade legal audiences that some disputed doctrinal result is correct in the present tense.

Any system of precedent implies that judicial decisions must be understood. As legal authorities, precedents can be authoritative only if they are legible and portable.[21] If a decision is opaque or understood solely by marginal elites, that precedent can have only limited effect.[22] If judicial decisions from the past are supposed to

18. *See* Lawrence M. Friedman, *Losing One's Head: Judges and the Law in Nineteenth-Century American Legal History*, 24 LAW & SOC. INQUIRY 253 (1999) (book review); Christopher Tomlins, *History in the American Juridical Field: Narrative, Justification, and Explanation*, 16 YALE J.L. & HUMAN. 323 (2004).

19. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1628 (1986).

20. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2616–18 (2015) (Roberts, C.J., dissenting) (discussing *Lochner*'s modern status); Loera v. United States, 714 F.3d 1025, 1031–32 (7th Cir. 2013) (discussing United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947)).

21. *See* JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 218–21 (1998); Michel Foucault, *Governmentality*, *in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87, 87–89 (Graham Burchell et al. eds., 1991).

22. Imagine Hammurabi's Code in a language that only he could read. *See* Kathryn E. Slanski, *The Law of Hammurabi and Its Audience*, 24 YALE J.L. & HUMAN. 97 (2012).

channel current legal force, they must be able to transport ideas and instructions from one context to another, thus synchronizing the activities of officials, lawyers, and actors who are dispersed across space and time.[23]

Judicial decisions' historical and operative aspects are equally important. Indeed, the two cannot be separated without undermining the premise of all precedential systems: that present legal power is guided by history's dead hand.[24] In practice, however, the past and present meanings of iconic decisions diverge. Each is constructed using different techniques in the service of different goals. By examining links between iconic cases' historical and current significance, this Article builds a template for comprehending the long, porous border between law and history—a border that is critical for lawyers and historians alike.

This Article proceeds in three steps. Part I applies my approach to two historical icons, *Erie v. Tompkins* and *Swift v. Tyson*.[25] The four categories of interpretive material discussed *supra* will show that beliefs about these well-known cases are upside down. Modern lawyers tend to view *Swift* as an instance of untrammeled power that contrasts with *Erie*'s judicial restraint,[26] but historical analysis reveals the opposite. In the 1840s, *Swift* located judicial authority in a carefully crafted network of precedents and authorities that formed an aspirationally cohesive system. In the 1930s, by comparison, *Erie* applied brute judicial force to establish a self-consciously novel regime of authority with meager explanation. The fact that *Erie*'s adventurism was accepted at the time speaks volumes about the New Deal Court's approach to constitutional law, and more broadly about iconic precedents' disruptive power.

Part II briefly examines *United States v. Windsor*, which invalidated a key section of the Defense of Marriage Act, and

23. *See* CHRISTOPHER TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIL IDENTITY IN COLONIZING ENGLISH AMERICA 1580–1865, at 68–70 (2010).

24. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (citing first BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921); and then citing Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J. SUP. CT. HIST. 13, 16) ("[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."); GILMORE, *supra* note 15, at 14.

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

26. *E.g.*, Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435, 1448 n.52 (1997).

Obergefell v. Hodges, which invalidated state restrictions on same-sex marriage.[27] *Windsor* and *Obergefell* addressed the greatest civil rights issue in a generation, but in both circumstances the Court's explanation left unresolved important ambiguities.[28] This juxtaposition of great doctrinal importance with unclear explanation is the defining feature of icons like *Brown* or *Erie*, and that same characteristic is what justifies unusual methods of precedential interpretation with respect to more recent cases.

No one can know whether *Windsor* or *Obergefell* will retain their iconic status—and each case has a much slimmer historical record than *Swift* or *Erie*—but both decisions are useful examples for studying interpretive methodologies. The Court's incomplete opinions suggest that future interpreters will conduct their own fights over what the decisions mean by using nontextual tools, such as adjudicative context, contemporary reception, and subsequent applications. Regardless of whether either precedent endures as an icon, *Windsor* and *Obergefell* thus illustrate this Article's relevance for any past, present, or future case where a judicial opinion, standing alone, seems inadequate to explain the decision's legal significance.

Part III concludes by discussing the relationship between techniques of legal history and preconditions for transmitting legal power.[29] Having described a system for interpreting iconic precedents, this Part notes the limited goals that such systems can achieve. The double lives of iconic cases embody a schism in our legal order. On one hand, imperatives of doctrinal effectiveness often simplify historical realities in order to effectuate the rule of law. On the other hand, inaccurate caricatures of the past may risk exposure of precedential interpretations as historically inauthentic and thus illegitimate. Legal doctrine and legal history—despite and because of their incommensurabilities—are thus revealed as equally crucial elements of American precedentialism.

27. Obergefell v. Hodges, 135 S. Ct. 2584, 2593, 2604–05 (2015) (invalidating same-sex marriage laws in Michigan, Kentucky, Ohio, and Tennessee); United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013) (invalidating Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2012))).

28. *See* Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 873 (2014).

29. *See supra* notes 17–18, 21–23 and accompanying text.

I. *ERIE*'S MANY MEANINGS

Erie is an ideal context for studying precedential interpretation because, as we shall see, the decision's iconic status has emerged through layers of historical misunderstanding. Most *Erie* scholarship today defends the Court's decision as properly revered, or assumes that a defense is unnecessary.[30] These writings are interesting on their own terms, and they illustrate how *Erie* is continually rebuilt for modern audiences. But their ahistorical approach cannot explain what *Erie* meant at the time it happened, nor can they describe how the *Erie* of 1938 became the iconic "*Erie*" that is so well known today.

To understand *Erie* in its own time requires understanding its nemesis *Swift*, and this Article's interpretive methods will be similar for both decisions. Applying precedential textualism, I will look first to the Justices' written opinions, which demonstrate each case's *declared meaning*. Then, I will use precedential originalism to contextualize those words with information about the lawyers and

30. *Compare* Ernest A. Young, *A General Defense of* Erie Railroad Co. v. Tompkins, 10 J.L. ECON. & POL'Y 17, 18 (2013) ("This article seeks primarily to rescue *Erie* from its academic critics."), *with* Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595, 596 (2008) [hereinafter Green, *Repressing* Erie] ("*Erie*'s bare holding . . . is established beyond boredom, and this Article will not dispute it."), *and* Craig Green, Erie *and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661, 669 (2008) [hereinafter Green, *Constitutional Structure*] ("With *Erie*'s doctrinal future secure, can anyone still muster energy to debate whether the decision has a valid constitutional basis?"). *See also* Curtis A. Bradley et al., Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 870, 872 (2007) (insisting that *Erie* is "of central importance in determining whether and to what extent [customary international law] has the status of federal common law"); Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 386 (1964) ("[T]he constitutional ground taken in *Erie* was precisely the right ground . . . ."); Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682, 1685–86 (1974) (defending *Erie* as "constitutional" because it "rests upon premises related to the basic nature of our federal system").

Exceptions to the ahistorical mainstream include TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM (1981) [hereinafter FREYER, HARMONY]; TONY ALLAN FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY (1979) [hereinafter FREYER, FORUMS]; EDWARD PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000) [hereinafter PURCELL, BRANDEIS]; and EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958 (1992) [hereinafter PURCELL, LITIGATION]. For other historically oriented works, see RANDALL BRIDWELL & RALPH U. WHITTEN, CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM (1977); GILMORE, *supra* note 15; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 245–52 (1977); and Irving Younger, *What Happened in* Erie, 56 TEX. L. REV. 1011 (1978).

judges (*implied meaning*), and with the decisions' contemporary reception by various commentators (*understood meaning*). Finally, I will apply methods of living precedentialism to examine the cases' application in subsequent judicial decisions and scholarship (*developmental meaning*). Although particular historical materials will obviously be different for *Swift* and *Erie*, each category of historical evidence presents another dimension of what the two cases meant over time, and the materials reveal more interpretive cracks than coherence. The discussion herein illustrates how new interpretive techniques can uncover new categories of historical evidence, and how that new evidence can generate new doctrinal interpretations. It offers a novel exegesis of two familiar cases, while also charting a general pattern for interpreting any precedent that modern legal actors deem to be important and controversial.[31]

A. Swift v. Tyson*: Creating a Monster*

The only thing most lawyers know about *Swift* is that *Erie* overruled it. To ignore *Swift*, however, overlooks an enormous amount. For example, *Swift*'s unanimous result was explained by Justice Joseph Story, a dominant judicial figure and arguably America's greatest conflicts scholar.[32] We shall see that *Swift* was probably more orthodox in its time than *Erie* is today.[33] To grasp why *Swift* would become outrageous, we must first consider the long period in which it was normal.

In 1842, *Swift* was not primarily about judicial power or federalism; it was about negotiable paper and commerce.[34] John Swift sued in New York federal court to enforce payment on a bill of exchange. The bill embodied George Tyson's promise to pay two speculators for offering Tyson the option to buy certain real estate. The speculators later gave Tyson's payment obligation to Swift, and in return, Swift agreed to cancel debts that the speculators owed him.[35]

When Swift sought payment on the bill of exchange, Tyson refused because the original property deal was a fraud. Tyson claimed that the speculators' trickery voided Swift's right to collect, but Swift

31. *See supra* note 10 (explaining what makes such precedents "iconic").

32. BRIDWELL & WHITTEN, *supra* note 30, at 123.

33. *See* R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 336 (1985).

34. *See, e.g.*, FREYER, HARMONY, *supra* note 30, at 1–43.

35. *Id.* at 5.

demanded payment because he had paid valuable consideration and knew nothing about the speculators' misdeeds. Tyson replied that Swift had not paid "consideration" for the bill of exchange because, under New York state-court cases, speculators' preexisting debts did not qualify.[36]

1. Textualism: Declared Meaning

Interpreting *Swift* starts with the declared meaning in the Court's opinion. From this textualist viewpoint, *Swift* was a minor case that addressed one issue of commercial law and one point of statutory law. The Court's "only real question" was whether cancelling Swift's debt should qualify as valuable consideration—like cash—"in the sense of *the general rule* applicable to negotiable instruments."[37] New York precedents were split, with recent decisions favoring Tyson's stance but an opinion authored by Chancellor James Kent supporting Swift's.[38] Decisions from other jurisdictions, including the United States Supreme Court, Connecticut, Massachusetts, and England, had endorsed Swift's legal theory by treating the cancellation of prior debts as equivalent to cash.[39]

Swift's grab bag of authority from various jurisdictions bolstered the Court's own judgment that a canceled prior debt should count as valid consideration. "It is for the benefit and convenience of the commercial world, to give as wide an extent as practicable to the credit and circulation of negotiable paper . . . ."[40] A rule granting payment to Swift would have allowed creditors to get satisfaction from debtors without resorting to litigation.[41] More importantly, a pro-Swift ruling would have let people like Tyson create negotiable instruments "of equivalent value to cash," without paying a premium to compensate for those instruments' limited alienability.[42] This would have allowed such credit instruments to circulate more freely in

36. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 15–16 (1842), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

37. *Id.* at 16 (emphasis added).

38. *Id.*

39. *Id.* at 16–18, 22 (collecting sources).

40. *Id.* at 20.

41. *See id.* at 6 (statement of Swift's counsel). For example, Swift would not have to sue the speculators to recover their preexisting debt; he could accept their bill of exchange as payment.

42. *Id.* at 20.

mercantile business transactions, thereby promoting "the benefit and convenience of the commercial world."[43]

In contrast, the Court feared that a victory for Tyson could ruin negotiable instruments for the "large class of cases" where banks discount "old securities . . . which have arrived at maturity" in exchange for debtors' proffer of "new notes . . . by way of renewal or security."[44] The Court wrote that "[p]robably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. [Tyson's proposed doctrine] would strike a fatal blow at all discounts of negotiable securities for pre-existing debts."[45] In theory, Tyson's arguments would require banks to investigate whether a third party's bill of exchange, when offered to cover existing debt, was obtained through inequitable conduct. In practice, however, that investigation would be so costly that creditors would have to price bills of exchange "at a ruinous discount" to cover risks that subsequent holders like Swift might be unable to collect.[46]

Only one page in *Swift* discussed the issue that would someday be notorious: "[A]dmitting the doctrine [of refusing payment] to be fully settled in New York, it remains to be considered, whether it is obligatory upon this Court, if it differs from . . . the general commercial law."[47] There was no doubt at the time that "general commercial law" existed, and it certainly applied to bills of exchange. This is why the Court cited so many cases—including New York decisions—in which judges had analyzed bills of exchange without relying on "any local statute, or positive, fixed, or ancient local usage[;] . . . they [instead deduced their results] from the general principles of commercial law."[48] A major goal of commercial law was to allow merchants to operate within a developed system of trade, and American courts were uniformly glad to oblige in this context by applying nationally and internationally harmonized legal doctrines.[49] The narrow question in *Swift* was whether federal courts were required to follow New York courts' interpretation of general

43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 18.
48. *Id.*
49. *See, e.g.*, *supra* notes 39–48 and accompanying text; *infra* notes 128–138 and accompanying text (discussing *Swift*'s efforts to accomplish such objectives); *infra* notes 128–138 (discussing similar efforts by New York courts in *Stalker v. M'Donald*, 6 Hill 93 (N.Y. 1843) (Walworth, Ch.)).

commercial law, even when the latter seemed demonstrably incorrect on the merits.

The statutory question in *Swift* concerned the First Congress's Rules of Decision Act, which ordered that "the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[50] *Swift* held that, in this context, the statutory term "laws" excluded judicial interpretations of general commercial law.[51] Nineteenth-century common law assumed that judges did not make law from whole cloth; instead, adjudicators sought to apply preexisting authorities such as precedents, customs, traditions, and widespread notions of reason and justice.[52] Within that tradition, judicial decisions were, "at most, only evidence of what the laws [were]; and [were] not of themselves laws."[53] Further, *Swift* reasoned that even though precedents "are often reexamined, reversed, and qualified by the Courts themselves," one could not use the singular noun to say that any new judicial ruling was itself a new "*law*."[54]

Instead, *Swift* interpreted "laws of the several states" to mean "rules and enactments promulgated by the legislative authority [of a state], or long established local customs having the force of laws."[55] The Court held that constitutional, statutory, and local customary law embodied the kind of fiat-based, localized authority that Congress had wanted federal courts to follow; judicial decisions about commercial law, however, did not.[56]

Prior Supreme Court decisions had applied the Rules of Decision Act only to "positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."[57] *Swift* saw no reason—absent explicit

50. Judiciary (Rules of Decision) Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2012)).

51. *Swift*, 41 U.S. (16 Pet.) at 18–19.

52. *Cf. id.* at 19 ("[S]tate tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.").

53. *Id.* at 18.

54. *Id.* (emphasis added).

55. *Id.*

56. *Id.* at 18–19.

57. *Id.* I have not found direct evidence that *Swift* intended to reference slavery with its term "intraterritorial in their nature." During the same year, however, Justice Story

congressional instruction—that the Rules of Decision Act should govern "questions of a more general nature, not at all dependent upon local statutes or local usages."[58] *Swift* thus concluded that New York courts' interpretation of general commercial law, if substantively incorrect, should not prohibit federal courts from reaching a different result.

As a matter of declared meaning, *Swift*'s judicial text portrays an almost boring decision. The Court described its commercial-law ruling as consistent with the bulk of prior case law and unbroken business practice. Perhaps even New York state courts would fall into line soon. For although *Swift*'s interpretation of general commercial law never required state courts to follow federal outcomes, the Court believed that tradition and good sense would prevail, thereby leading state tribunals sooner or later to enforce bills of exchange like Tyson's as well.[59]

2. Originalism: Implied and Understood Meanings

Every lawyer knows that written judicial opinions are an accessible resource for interpreting what a case means, as published reporters offer highly legible and portable justifications for many courts' decreed results. The unstated context of a judicial decision, however, can be important if legal interpreters deem the published opinion to be unsatisfying or incomplete. In *Swift*, for example, details

wrote the Court's opinion in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), which came rather close to that conclusion:

> By the *general law of nations*, no nation is bound to recognise the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favour of the subjects of other nations where slavery is recognized . . . . The state of slavery is deemed to be *a mere municipal regulation*, founded upon and limited to the range of the *territorial laws*.

Prigg, 41 U.S. (16 Pet.) at 611 (emphasis added). For political reasons and otherwise, it may have been vital for *Swift* to hold that federal judges in diversity cases would not opine about how "general common law" would regulate slavery—or even abolish it. *See also, e.g.*, NEWMYER, *supra* note 33, at 346–47, 354 (documenting Justice Story's role in developing the law surrounding slavery).

58. *Swift*, 41 U.S. (16 Pet.) at 18–19.

59. Perhaps ironically, Justice Catron's concurrence showed most clearly the Court's expectation that state courts would change their minds in response to *Swift*. Catron objected that part of the majority's holding was dictum, and that it was "improbable" that contrary state courts would "yield to a *mere expression of opinion* of this Court." *Id.* at 23 (Catron, J., concurring) (emphasis added). By contrast, "if the question [addressed in dictum] was permitted to rest until it fairly arose, the decision of it either way by this Court, probably, would, and I think ought to settle it." *Id.*

about the lawyers and the authoring judge support interpretations of "implied meaning" that diverge from the opinion's published text. Further complexities appear by examining *Swift*'s audience for the decision's "understood meaning" when it was rendered. The following subsections consider all of these agents who produced originalist interpretive material: lawyers and judges for implied meaning, and contemporary observers for understood meaning.

a. Lawyers[60]

Though the Supreme Court explained *Swift* as a decision of only middling importance, the lawyers representing Swift and Tyson argued as if it were monumental. Swift's lawyer, William Pitt Fessenden, emphasized the importance of commercial policy and celebrated negotiable paper's "great[] service to civilized man, in facilitating the transmission of the equivalent of money, and thus, . . . answering, in some respects, the purposes of money itself."[61] For Fessenden, the *Swift* case threatened the basic stability of America's monetary system. Although negotiable securities might be hard for some modern readers to appreciate as an alternative to specie currency, (consider bitcoin or credit cards), that function would have been painfully clear in the year 1842.[62]

The unspoken background for Fessenden's argument was the Panic of 1837, which had left the country with years of double-dipped aftershocks in what would be the economy's worst downturn until the Great Depression.[63] Unstable banks and securities prompted many

60. Twenty-first-century readers might instinctively doubt whether lawyers' arguments can illuminate the meaning of judicial decisions. This is because today's lawyers only rarely quote briefs or oral arguments to support particular interpretations of court decisions. *Compare* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (2007) (Roberts, C.J.) (interpreting *Brown v. Board of Education*, 347 U.S. 483 (1954), based on arguments made by the lawyers litigating in 1954), *with* Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, at A24 (quoting those same lawyers in 2007 decrying the Chief Justice's conclusions about *Brown* as "100 percent wrong," "preposterous," and "dirty pool"). In the 1840s, however, lawyers' arguments were so important that they were printed in advance of the judges' opinions. *E.g.*, *Swift*, 41 U.S. (16 Pet.) at 3–14. Unless one were to insist on some form of precedential hypertextualism—the text, the whole text, and nothing but the text—lawyers' arguments can offer a very useful source of contextual meaning.

61. *Swift*, 41 U.S. (16 Pet.) at 7 (statement of Swift's counsel).

62. James A. Henretta, *The "Market" in the Early Republic*, 18 J. EARLY REPUBLIC 289, 297–98 (1998) ("[M]ost American money was not . . . gold or silver, but 'token' or artificial money . . . ."); *see* FREYER, FORUMS, *supra* note 30, at 5, 36.

63. ALASDAIR ROBERTS, AMERICA'S FIRST GREAT DEPRESSION: ECONOMIC CRISIS AND DISORDER AFTER THE PANIC OF 1837, at 7–8 (2012) ("[The years 1836–48]

commercial actors to demand cash instead of accepting credit.[64] Those refusals to accept financial notes shrank the effective money supply and prompted deflation. As money became more scarce and valuable, the price of everything else dropped. A smaller quantity of decreasingly available, increasingly valuable money was able to buy more goods, services, property, and labor. And as prices fell, employers and consumers cut salaries and spending, which again reduced the money in people's pockets and reinforced deflationary pressure.[65]

Fessenden claimed that to adopt Swift's position would reduce litigation because already "thousands of suits have been prevented by receiving a bill of exchange or promissory note, . . . in discharge of a debt, which . . . the debtor . . . could discharge in no other way."[66] Fessenden's deeper argument, however, was about economic confidence. He implied that any refusal to accept commercial notes as equivalent to cash would undermine the desirability and circulation of credit instruments, thereby echoing the deflationary economic crisis that continued to devastate so many Americans.[67]

began with the collapse . . . and panic that caused . . . a 'paralysis of credit' among U.S. financial institutions. . . . By 1843, the United States was frozen out of international financial markets. . . . Economic decline unleashed civil and political disorder and caused an unraveling of the unwritten compact that held the federal system together. . . . [I]f we measure a crisis by . . . political and cultural shock . . . as well as by . . . economic dislocation, then the crisis of 1836–1848 is clearly a rival to the depression of the 1930s."); Peter L. Rousseau, *Jacksonian Monetary Policy, Specie Flows, and the Panic of 1837*, 62 J. ECON. HIST. 457, 486 (2002) ("The Panic of 1837 was the culmination of a series of policy shifts and unanticipated disturbances that shook the young U.S. economy at the core of its financial structure . . . .").

64. ROBERTS, *supra* note 63, at 47 ("[By 1842], two hundred banks had closed entirely. In the interim, economic activity ground to a halt. Money became scarce, and prices and trade declined precipitously.").

65. JESSICA M. LEPLER, THE MANY PANICS OF 1837: PEOPLE, POLITICS, AND THE CREATION OF A TRANSATLANTIC FINANCIAL CRISIS 231 (2013) ("Nine states defaulted on their loans. Foreign investors feared a general repudiation of state debts and drastically reduced the flow of capital and credit to the United States. . . . Although the actual crisis in 1837 was more acute, the Panic in 1839 brought on the worst deflation Americans had yet experienced. The English called the years that followed 'the hungry forties.' " (footnotes omitted) (citing first REGINALD CHARLES MCGRANE, FOREIGN BONDHOLDERS AND AMERICAN STATE DEBTS 265–69 (2013); then citing Namsuk Kim & John Joseph Wallis, *The Market for American State Government Bonds in Britain and the United States*, *1830–43*, 58 ECON. HIST. REV. 736, 755–56 (2005); and then quoting W.H. Chaloner, *The Hungry Forties*, *in* INDUSTRY AND INNOVAITON: SELECTED ESSAYS—W.H. CHALONER 232, 232–42 (D.A. Farnie & W.H. Henderson eds., 1990))).

66. *Swift*, 41 U.S. (16 Pet.) at 6 (statement of Swift's counsel).

67. *Id.*

Fessenden also discussed federal courts' reputation among international investors, who had been crucial to the 1837 Panic.[68] According to Fessenden, the federal courts faced a basic choice: if Tyson were to prevail, then diversity cases involving New York transactions would deny payment applying New York law, while identical cases concerning non-New York transactions would grant payment under general common law. Such inconsistencies from one case to the next would ruin the Supreme Court's international credibility:

> By all [outside] the United States, this Court is looked to as the judiciary of the whole nation, . . . whose commerce and transactions are as widely diffused as is the use of bills of exchange . . . . How can this Court preserve its control over the reason and affections of the people of the United States . . . [if] it has decided . . . the same identical question, arising on a bill of exchange, first one way, and then the other, with vacillating inconsistency? In what light will the judicial character of the United States appear abroad, under such circumstances[?][69]

Fessenden argued that federal courts should instead decide *all* general common law cases by reference to "the actual consciences and judgments of the minds of the [federal] judges who constitute those Courts"—just as state common law cases were left "to the best judgment of the state Courts, without respect to the decision of any Court of the United States."[70]

Tyson's contrary position was argued by Richard Henry Dana, who used the Rules of Decision Act to invoke broad theories about federal courts and the nature of common law.[71] Dana framed Tyson's argument by invoking the nation's earliest legal history. After the American Revolution, every state had created a judicial system by statutorily receiving English common law and authorizing state-court modifications "to meet the exigencies of an enterprising people."[72]

68. Rousseau, *supra* note 63, at 483 ("Disturbances from across the Atlantic . . . aggravated the monetary pressure . . . . Most serious was a renewed series of commercial bill rejections in England . . . ."); *see Swift*, 41 U.S. (16 Pet.) at 8 (statement of Swift's counsel) ("If there is any question of law . . . widely general in its nature and effects, it is the present question [i.e., the negotiability of bills of exchange]. It is one in which foreigners, the citizens of different states, in their contests with each other, nay, every nation of the civilized commercial world, are deeply interested.").

69. *Swift*, 41 U.S. (16 Pet.) at 8–9 (statement of Swift's counsel).

70. *Id.* at 9.

71. *Id.* at 9–14 (statement of Tyson's counsel).

72. *Id.* at 11.

But that emphatically did not happen for federal courts. There was never a federal statute adopting English common law, and Dana explained that Congress had created federal courts that were "anomalous in character [because they were] without rules of decision."[73] Relying on basic principles of federalism and separation of powers, Dana argued that no application of common law in federal courts could be legitimate in the absence of some prior constitutional or legislative authorization.[74]

Dana claimed that the Rules of Decision Act had never licensed federal courts to apply English or "general" common law. Instead, the Act ordered federal courts to apply common law derived from "the several states," thereby avoiding "*perpetual confliction between the state and Federal Courts*" in contexts where the two systems might disagree over particular common-law requirements.[75] Dana explained that "[o]ur law idiom is essentially of common law origin, yet not foreign. It is the language familiar to us in the jurisprudence of the respective states."[76] Moreover, Dana argued that "[i]n coming together . . . , the framers of the Constitution, and our representatives in [the first] Congress . . . had in view the language, laws, and institutions of the states which they represented."[77] According to Dana, Congress never adopted English common law, much less some kind of imaginary "uniform" common law.[78] Instead, Congress had told federal courts to follow the common law as it existed in state courts and as previously authorized by state reception statutes.[79]

Dana argued that the Rules of Decision Act "express[ed] all that was necessary for the adoption of the state laws."[80] But he further noted that

> [the Act] is all the provision there is upon the subject; and in so far as it falls short of the adoption of laws for the direction of the Courts, the defect is still unprovided for. The common law has never been otherwise adopted, nor have the Courts the

73. *Id.* at 10.
74. *Id.* at 11–12, 14.
75. *Id.* at 10–11 (emphasis added).
76. *Id.* at 13.
77. *Id.*
78. *Id.*
79. *Id.* at 11.
80. *Id.*

> power to create or adopt laws—they must administer the law as existing.[81]

According to Dana, a requirement of statutory authorization for common-law decisionmaking reflected Congress's foundational power to control federal courts, including federal judges' obligation to apply law instead of inventing it. Without addressing Swift's arguments about international commerce, Dana concluded that Tyson's position was mandated by constitutional principle and also by statute.[82]

Unfortunately for Tyson, the Court ignored Dana's thesis about judicial lawmaking, instead concluding that the Rules of Decision Act's term "laws" did not include general commercial law.[83] On the other hand, the Court endorsed Fessenden's economic thesis only in mild tones.[84] And thus began interpretive debates about *Swift*'s original meaning that have lasted for 150 years. One interpreter might emphasize the Court's result, which favored Fessenden and Swift and arguably implied a preference for commerce over legalism.[85] A different interpreter, however, could focus on the opinion's cautious language and the wide gap between the lawyers' arguments and the Court's explanation.[86] Perhaps *Swift* was milquetoast after all—or maybe not. To further explore ambiguities about *Swift*'s original context requires examining the case from the deciding Justices' perspective.

b. Judges

Much like lawyers' courtroom arguments, judicial biographies offer a powerful source of implied precedential meaning. Few judges are studied as full human beings, but for those who are—legal celebrities like Marshall, Taney, Holmes, Cardozo, and Warren—their lived experiences offer context for studying their judicial work.[87] Justice Story's life is particularly significant for interpreting *Swift* because he did not accept the lawyers' characterization of a pitched

81. *Id.*
82. *Id.* at 14.
83. *Id.* at 18–19.
84. *See id.* at 20.
85. *E.g.*, HORWITZ, *supra* note 30, at 250.
86. *See, e.g.*, NEWMYER, *supra* note 33, at 336, 338.
87. *E.g.*, JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION (1996).

battle between law and economics.[88] Instead, he saw a case where those concepts reinforced one another, under the management of erudite federal judges like himself.[89]

Understanding *Swift*'s author begins with Story's published *Commentaries*. In their day, these publications were unprecedented in scope and impact, and they remain among the most significant legal scholarship ever written in America.[90] Distinctively important for

88. *See* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 238–39 (1909) ("Among the causes which led to the decision in *Swift v. Tyson*, the chief seems to have been the character and position of [Justice] Story."). One might analyze all nine Justices who decided *Swift*, but an aggregate approach could distort reality just as grievously as an individual focus. There is often simply no way to identify who meaningfully created a collectively written work.

89. NEWMYER, *supra* note 33, at 116–17 ("Behind Story's opinions was a vision of economic man and a plan for economic progress. At the center of this American plan, shaping and guiding the process, were American common lawyers and judges.").

90. *See* Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 247 ("[Story] was unquestionably 'one of our greatest jurists and legal theorists.' His numerous *Commentaries* . . . helped create a national legal system. His vast legal scholarship made him a 'one-man West Publication Company.' " (quoting NEWMYER, *supra* note 33, at 282)); H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285, 1286 (1985) ("Alexander H. Stephens credited Story with virtually creating *ex nihilo* the nationalist constitutionalism that legitimized Abraham Lincoln's successful war against secession . . . . Professor Morton Horwitz has identified Story as a key actor in 'the transformation of American law' between 1780 and 1860, while Professor James McClellan has portrayed Story as, even more than John Marshall, the author of the political and constitutional system of the modern United States." (footnotes omitted) (citing first 1 ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES 505 (Phila., Nat'l Publ'g Co. 1868); then quoting HORWITZ, *supra* note 30, at 255–56; and then citing JAMES T. MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 305–09 (1971))); NEWMYER, *supra* note 33, at 193 (noting James Kent's statement that Story's scholarly "comprehensiveness" threw "all my little brief & narrow Sketches into the Shade"); *see also* BRIDWELL & WHITTEN, *supra* note 30, at 123 ("[T]here is no question that Justice Story was the most learned and scholarly man ever to sit on the high bench."); NEWMYER, *supra* note 33, at 184 ("By modern standards [Story's *Commentaries on the Constitution*] look[] like a great beached whale; but in the nineteenth century it swam majestically in the raging seas of constitutional disputation."); *id.* at 19 (describing Story as "the most prolific legal publicist in the nineteenth century"); 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 144 (2d ed. 1926) ("[S]tory well earned the place of honor in American legal history to which he was assigned by the Bar; and his decisions will always be one of the great glories of the American Judiciary."); ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS 2 (1992) (describing Story as "the prime architect of nineteenth-century American conflicts law"); Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws: One Hundred Years After*, 48 HARV. L. REV. 15, 38 (1934) ("In the United States and England, Story is revered today as the father of the conflict of laws. In this one hundredth anniversary year of the publication of his *Commentaries*, the rest of the world joins the Anglo-American in rendering homage to

current purposes are Story's commentaries on bills of exchange, his commentaries on conflicts of laws, and his commentaries on the Constitution.[91]

i. Commercial Law

Story's commentaries on bills of exchange assembled cases from both sides of the Atlantic.[92] Story synthesized cases around shared practicalities and principles, thus presenting commercial law as a unified, singular object to be evaluated for its coherence and pragmatism.[93] His vision of transatlantic unity matched the economic function of negotiable paper. Shared legal principles allowed credit to move across borders, with goods and services following close behind.[94] In the mid-nineteenth century, enforceable commercial instruments allowed people who were divided by national boundaries to nonetheless rely on each other for credit and payment, and such transnational business activities were indispensable on both sides of the Atlantic.[95]

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the great American jurist, and to acclaim him one of the leading personalities of all time in the field of the conflict of laws.").

91. *See generally* JOSEPH STORY, COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE (Bos., Little, Brown & Co. 4th ed. 1860) (1843) [hereinafter STORY, COMMENTARIES ON BILLS OF EXCHANGE]; JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (Bos., Hilliard, Gray & Co. 1834) [hereinafter STORY, COMMENTARIES ON CONFLICTS]; 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Bos., Hilliard, Gray & Co. 1833) [hereinafter STORY, COMMENTARIES ON THE CONSTITUTION].

92. NEWMYER, *supra* note 33, at 246 ("Onto the body of the common law [Story] graft[ed] the 'enlightened and liberal rules' of commercial law, which he drew from every age and all nations.").

93. *Id.* at 285 ("Bringing rational order out of apparent chaos was, as Story saw it . . . the distinguishing mark of Mansfield's commercial law . . . and in this tradition Story made the search for organizing principle the essence of his legal science."); *cf.* Ellen Holmes Pearson, *Revising Custom, Embracing Choice: Early American Legal Scholars & The Republicanization of the Common Law*, *in* EMPIRE AND NATION: THE AMERICAN REVOLUTION IN THE ATLANTIC WORLD 93, 95 (Eliga H. Gould & Peter S. Onuf eds., 2005) (discussing Mansfield's efforts to tame the "confusing, unwieldy system" of English common law through the "creation of a commercial law code" of systematic judicial precedents).

94. *See* Henretta, *supra* note 62, at 302.

95. *Id.* at 302; J. Sperling, *The International Payments Mechanism in the Seventeenth and Eighteenth Centuries*, 14 ECON. HIST. REV. 446, 446 (1962) (quoting financier Nathan Rothschild's opinion that England was "the Bank for the whole world . . . [as] all transactions in India, in China, in Germany, in the whole world are guided here and settled through this country"); *see also* FREYER, FORUMS, *supra* note 30, at 3 ("Between 1815 and 1860 the value of the [United States's] foreign trade grew from $166 to $762 million. . . . In 1810, 93 million pounds of cotton were exported, and, after [1815], the volume increased steadily . . . [to] more than one billion pounds annually in the late

Story saw uniform commercial law as a precondition for the international mercantile economy that had dominated American life, and he sought—as a commentator and also a judge—to describe and prescribe standards that would regulate bills of exchange effectively across borders.[96] Story was always certain that his analysis of commercial practice and legal doctrine was correct, which explains his faith that *Swift*'s reasoning would ultimately persuade lawyers or state judges who might otherwise disagree.[97]

ii. Conflicts of Law

Story's commentaries on conflicts of law reveal a different side of *Swift*. The entire topic "conflicts of law" presupposes variation among the laws of different nations and states.[98] Even as Story synthesized the substantive law governing bills of exchange, he had no delusions about a preordained or unified commercial law in the Anglo-American world.[99] More than anyone, Story understood the multilayered and polycentric structure of nineteenth-century common law, and that experience was certainly important in *Swift*.[100] Story's

1850s." (footnote omitted) (citing first Joseph J. Klein, *The Development of Mercantile Instruments of Credit in the United States*, 12 J. ACCT. 321, 321–45 (1911); then citing Nathan Isaacs, *Business Postulates and the Law*, 41 HARV. L. REV. 1014, 1014–30 (1928))); *id.* at 4 ("[L]ong-distance credit transactions were made through the medium of special commercial contracts, particularly bills of exchange and promissory notes."); *id.* at 24 ("The inconveniences arising from [state-law] diversities would seem . . . not only to trouble the lawyer and the court, but to render the commercial and trading part of the community liable to perpetual mistakes, losses, and vexations." (quoting Book Review, The American Jurist, 29 N. AM. REV. 418, 422 (1829) (reviewing Joseph Story, *An Address Delivered Before the Members of the Suffolk Bar, at Their Anniversary, on the Fourth of September, 1821*, 1 AM. JURIST 1 (1829)))).

96. *See* FREYER, FORUMS, *supra* note 30, at 79–80; NEWMYER, *supra* note 33, at 120, 281–82.

97. *See* FREYER, HARMONY, *supra* note 30, at 18.

98. *See* WATSON, *supra* note 90, at 1.

99. *See* NEWMYER, *supra* note 33, at 289 ("Story came to understand . . . the centrifugal disruption of uniformity caused by federalism and the unevenness of doctrinal transplantation."); *id.* at 305–06 ("[Story] knew from practice that . . . . [t]he commercial wants to which these groups adjusted law were not abstract verities written in the clouds but instead the practical calculations of businessmen who needed law to help them mobilize resources, expand markets, and maximize profits."); Pearson, *supra* note 93, at 94 ("[L]ocal versions of common law continued to evolve as each state built its own form of republican government and redefined the common law system to fit new republican parameters.").

100. NEWMYER, *supra* note 33, at 288 ("Commercial common law was not, [for Story], a vague, mystical creation, a 'brooding omnipresence in the sky,' as Holmes would later put it. The comparative and historical techniques, as Story applied them, were demanding and rigorous, and the 'universal reasoning' they ascertained was based . . . more on what

commentaries explained that courts had applied conflicts doctrine for centuries, with the overriding goal of creating an interjurisdictional system that could manage frictions and complexity.[101]

Story saw that, taken as a conflicts case, *Swift* had no perfect answer. If the Court were to grant payment on the bill of exchange, that would create disparities and "confliction[s]" between federal courts and state courts in cases about New York transactions.[102] Yet to deny payment would differentiate federal cases about New York transactions from federal cases about non-New York transactions.[103] Conflicts of law jurisprudence was designed to address exactly these kinds of difficulties, and so was *Swift*. With respect to transjurisdictional mechanisms like bills of exchange, Story wrote that the Supreme Court—like state courts—should apply the transnational law of merchants.[104] According to Justice Story, capital should flow freely across borders, aided by interterritorial legal doctrines, and no state court could claim authoritative superiority in applying such aspirationally uniform and enduring principles.[105] In this respect, Story was not only confident in his substantive analysis regarding bills of exchange; he also thought that *Swift*'s approach to conflicts of law could manage any period of interjurisdictional difference.[106]

iii. Constitutional Law

Story's commentaries on the Constitution place *Swift* in an appropriately political context.[107] Story dedicated these commentaries

was than on what should be." (quoting S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting))).

101. STORY, COMMENTARIES ON CONFLICTS, *supra* note 91, at 8. *See generally* WATSON, *supra* note 90, at 2.

102. *See supra* note 75 and accompanying text.

103. *See supra* notes 68–69 and accompanying text.

104. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18–19 (1842), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 646 (1938).

105. *Id.* at 19.

106. *See id.* ("Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world.").

107. Story's Harvard professorship highlights the politics of legal education and scholarship. As the Federalist Party lost national elections to Jeffersonian Democrats, its first response was to add new federal judges who could maintain order until the next election. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Stuart v. Laird, 5 U.S. (1

to John Marshall, and they defended the same broad national powers that the Chief Justice had upheld throughout his judicial career.[108] In the Jacksonian era that Story occupied, such nationalist views were controversial, and the response to his work was correspondingly mixed.[109]

Even as Story urged all judges—federal, state, and English—to support transatlantic commerce, his constitutional commentaries assigned federal courts a privileged position.[110] Federal judges were constitutional architects on topics like federalism and separation of powers, and Story practiced what he preached. Story wrote the majority opinion in *Martin v. Hunter's Lessee*, which proclaimed the need for uniform federal law and declared the Supreme Court as its mouthpiece.[111] He also authored the Court's decision in *Prigg v. Pennsylvania*, which enforced federal fugitive slave statutes despite state liberty laws that were significantly more protective.[112]

In *Swift*, Story read the Rules of Decision Act much like vague constitutional provisions that left important unresolved issues for the

Cranch) 299 (1803). When Democrats kept winning, however, Federalists relied on Harvard to manufacture conservative lawyers and legal culture to counter Jeffersonian excess. *See* R. Kent Newmyer, *Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence*, 74 J. AM. HIST. 814, 817–19 (1987). In this regard, everything about Story's scholarly work was deeply political in nature. NEWMYER, *supra* note 33, at 217 ("The duty of 'public men' was to resist [Jacksonian political abuse], and in the lead had to be the 'professional intelligence' of the country. At the head of this intelligentsia, one assumes, were certain Justices of the Supreme Court." (quoting Letter from Justice Story to Richard Peters (Apr. 24, 1833), *in* 2 LIFE AND LETTERS OF JOSEPH STORY 140, 141 (William W. Story ed., New World Book Mfg. Co. 1971) (1851))).

108. 1 STORY, COMMENTARIES ON THE CONSTITUTION, *supra* note 91, at iii.

109. *See* NEWMYER, *supra* note 33, at 219; Powell, *supra* note 90, at 1285–86.

110. FREYER, HARMONY, *supra* note 30, at 18 ("Story . . . suggested . . . that a prime 'tendency' of federal jurisdiction was 'to increase the confidence and credit between the commercial and agricultural states. No man can be insensible to the value, in promoting credit, of . . . prompt, efficient, and impartial administration of justice in enforcing contracts.' " (quoting 3 STORY, COMMENTARIES ON THE CONSTITUTION, *supra* note 91, at 564)); NEWMYER, *supra* note 33, at 121 ("To strengthen the federal courts and regularize the process of adjudication . . . was to enhance the potential for the kind of law American business needed; it was to accelerate the 'tendency' toward the goal of a national system of contract and credit . . . ." (quoting 3 STORY, COMMENTARIES ON THE CONSTITUTION, *supra* note 91, at 564)); *cf.* JOSEPH STORY, JOSEPH STORY AND THE ENCYCLOPEDIA AMERICANA 106 (Valerie L. Horowitz ed., Lawbook Exch. Ltd. 2006) (1844) ("[N]o legislature can make a system half so just, or perfect, or harmonious, both from want of time, and experience, and opportunity of knowledge, as judges, who are successively called to administer justice, and gather light from the wisdom of their predecessors.").

111. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 344, 347–48 (1816).

112. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625–26 (1842).

Court to decide. Under all circumstances, Story had deep faith in the Supreme Court's ability to interpret vague language in a way that would implement constitutional values. In deciding *Swift*, as elsewhere, Story did not perceive a real tension between law and democratic politics. Congress had enacted the Rules of Decision Act with apparently sensible intentions, but it was the Court's duty to interpret and apply the legislature's unspecified term "laws of the several states," just as the Court interpreted unclear constitutional terms in other kinds of cases.[113]

Justice Story's biography reflects a celebratory view of federal courts' leadership, and *Swift* definitely fits the pattern. Topics like "general commercial law" were key to America's economic and national success, and Story and *Swift* envisioned common lawmaking as an elite, professional, transnational discourse based on enduring principles and adaptive practicality.[114] In the United States, federal courts were major agents of both stasis and change, and in that political context, the triumph of Swift over Tyson was one more victory for Marshallian nationalism over states-rights restrictions.[115] Story might even have thought that the genius of general common law, wielded by conservative visionaries like himself, could strengthen commercial bonds and buffer the partisan sectional divisions that would eventually prompt national war in the 1860s.[116] Law, economics, and constitutional politics were bound together in this one

113. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 400 (1819); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

114. *See* FREYER, FORUMS, *supra* note 30, at 41, 79; FREYER, HARMONY, *supra* note 30, at 33; NEWMYER, *supra* note 33, at 281 ("[Story's] constant premise . . . was his long-held distrust of legislative competence and a preference for law made by judges."); Henretta, *supra* note 62, at 301–03.

115. *See* NEWMYER, *supra* note 33, at 197–98 (describing "the classic dilemma of adjudication" as "the need to adjust old law to new history while preserving the semblance of legal continuity on which judicial authority must rest"); Pearson, *supra* note 93, at 98 (noting that some nineteenth-century American jurists, such as Philadelphia lawyer and law lecturer Peter DuPonceau, viewed the common law as "America's 'national law,' " which "had gradually 'become incorporated and in a manner identified not only with the national jurisprudence, but, under the name of *Constitution*,' with America's government" (citations omitted)); *id.* at 106 (noting objections by state-sovereignty Republicans that "it would be 'altogether a hopeless attempt, to endeavor to extract from such discordant materials, [a] uniform system of national jurisprudence' " (citations omitted)).

116. NEWMYER, *supra* note 33, at 290 ("Commercial operations, as Story noted in his *Commentaries on the Constitution*, depended on political unity, on constitutional union; ties of union, on the other hand, would be strengthened by uniform private commercial law, which would enhance business relationships between citizens of different states, thus circumventing and finally diminishing state and regional particularism.").

man's life, and from a biographical viewpoint, they can also be seen in the *Swift* opinion that Story was perfectly suited to write.

c. Contemporary Reactions

Three interpretations of *Swift* should now be visible: "nothing-to-see" textualism, "law-versus-economics" lawyering, and "trust-the-judges" biography. But there is another category of originalist context to consider. Reception history, as it is called, allows interpreters to discern a case's "understood meaning" based on contemporary reactions of lawyers, judges, and commentators. Such reception history is rare in legal discourse and scholarship, though it sometimes appears in variants of constitutional interpretation.[117]

Even the most careful legal historians have overlooked immediate reactions to the *Swift* decision,[118] and that silence has been read to mean that either: (a) *Swift* was an unremarkable application of longstanding principles,[119] or (b) the Court's pro-commercial aggression had become a dominant and accepted ideological system.[120]

All of those judgments are incorrect. Within a month of the Court's decision, at least twelve newspapers—from New Orleans to New Hampshire, from Ohio to New York City—printed descriptions of *Swift* as an "Important Decision."[121] Each of these sources

117. One basis for resisting reception history is a form of ultra-legalism that posits the meaning of legal sources as independent of social and cultural facts, such that cases like *Swift* "are what they are," regardless of what observers thought at the time. Cultural scholars have debunked comparable symbolic naturalization in other historical contexts. *E.g.*, Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, *in* THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 3, 3–30 (1973).

118. NEWMYER, *supra* note 33, at 334 ("The [*Swift*] decision was barely noticed by contemporary newspapers and periodicals . . . ."); *see* FREYER, HARMONY, *supra* note 30, at 17–18; FREYER, FORUMS, *supra* note 30, at 89, 152; *see also* BRIDWELL & WHITTEN, *supra* note 30, at 69; HORWITZ, *supra* note 30, at 245–52 (ignoring *Swift*'s contemporary reception); PURCELL, LITIGATION, *supra* note 30, at 60–61; 2 WARREN, *supra* note 90, at 89; *cf.* GILMORE, *supra* note 15, at 33–34 (citing only judicial decisions that applied or endorsed the doctrine).

119. *See* FREYER, FORUMS, *supra* note 30, at 170; NEWMYER, *supra* note 33, at 336.

120. *See* FREYER, FORUMS, *supra* note 30, at 53; HORWITZ, *supra* note 30, at 249–50.

121. *Important Decision*, PUB. LEDGER (Phila.), Jan. 28, 1842, at 2; *Important Decision*, THE SUN (Balt.), Jan. 28, 1842, at 2; *Important Decision*, OHIO STATESMAN (Columbus), Feb. 8, 1842, at 1; *Important Decision*, DEMOCRATIC STANDARD (Georgetown, Ohio), Feb. 15, 1842, at 3; *Important Decision*, N.H. PATRIOT & ST. GAZETTE, Feb. 24, 1842, at 1; *Important Decision*, S. PIONEER & CARROLL, CHOCTAW & TALLAHATCHIE COUNTIES ADVERTISER (Carrollton, Miss.), Apr. 23, 1842, at 1; *Important Decision of the Supreme Court of the United States*, N.Y. HERALD, Jan. 29, 1842, at 1; *Important Decision of the Supreme Court of the United States*, N. AM. & DAILY

proclaimed, in nearly identical terms: "The Supreme Court of the United States has pronounced an opinion settling an important commercial question, which ought to be soon and generally known."[122] While emphasizing *Swift* as a ruling about bills of exchange, newspapers also mentioned the Court's holding that the Rules of Decision Act "only extends to the statutes and permanent usages of a State, and not to the judicial decisions of the States upon questions of general commercial law."[123]

Such contemporary reactions offer a striking contrast from modern legal interpretations of *Swift*. Early reports did not link *Swift* with mid-nineteenth-century fights over constitutional federalism and nationalism.[124] Nor did contemporaries view *Swift* as a judicial usurpation that violated separation of powers.[125] Despite the litigants' ambitious arguments about constitutional structure, no early news report analyzed *Swift* in that light, nor was the case an occasion for partisan struggle.

Commentary on *Swift* from the nineteenth-century legal profession was also ostensibly apolitical, as the country's most prominent legal writers formed a tight circle of mutual admiration. Just as Story's *Swift* opinion had cited James Kent's work as legal support, Kent praised the Supreme Court's decision in *Swift*, and Story-as-publicist expressed admiration for his own product on the bench.[126] A powerful consensus of academic and lawyerly

ADVERTISER (Phila.), Feb. 1, 1842, at 2; *Important Decision of the Supreme Court of the United States*, S. ARGUS (Columbus, Miss.), Feb. 15, 1842, at 2; *Important Decision of the Supreme Court of the United States*, CONN. COURANT, Feb. 12, 1842, at 3; *Supreme Court Decision*, DAILY PICAYUNE (New Orleans, La.), Feb. 9, 1842, at 4; *Supreme Court Decision*, NEW ORLEANS WKLY. PICAYUNE, Feb. 14, 1842, at 3. Legal periodicals were scant at the time, yet at least three mentioned *Swift* for its commercial holding. *See Bills of Exchange*, 1 PA. L.J. 219 (1842); *District Court of the United States, for the Western District of Virginia, Prentice v. Lane.*, 6 W.L.J. 46 (1848) (discussing *Swift* several years after the fact); *Selections from McLean's Reports*, 1 W.L.J. 134, 135 (1843) (noting the "striking illustration of the inconclusiveness of precedents"); *see also* 2 WARREN, *supra* note 90, at 88–89 (referencing additional historical newspaper sources).

122. *See* sources cited *supra* note 121.

123. *Id.*

124. Story was publicly decried in other contexts as improperly boosting central governmental authority, yet *Swift* was consistently absent from such indictments. *E.g.*, Speech of Charles J. Ingersoll, *in* U.S. MAG. & DEMOCRATIC REV., Jan. 1839, at 230; *Life of Joseph Story, by His Son*, EVENING POST (N.Y.C.), Jan. 29, 1852, at 2 (pt. 1), Feb. 4, 1852, at 2 (pt. 2) (reviewing LIFE AND LETTERS OF JOSEPH STORY (William W. Story ed., 1851)).

125. *See, e.g.*, sources cited *supra* note 121.

126. FREYER, HARMONY, *supra* note 30, at 46; STORY, COMMENTARIES ON BILLS OF EXCHANGE, *supra* note 91, at 191–92, 204–10 & n.4.

commentary endorsed *Swift* for almost forty years, *with literally no dissent*,[127] as the decision was interpreted as a leading case of commercial law and federal jurisprudence.

Despite these endorsements, however, *Swift* did not produce national doctrinal uniformity with respect to commercial paper. In *Stalker v. M'Donald*,[128] New York's high court rejected *Swift*'s treatment of bills of exchange, thereby creating a "confliction" between federal and state courts that would endure for five decades.[129] Chancellor Walworth criticized *Swift*'s interpretation of cases from New York and elsewhere, as he also disparaged *Swift* for issuing dicta on facts that were not before the Court.[130] To understand *Stalker*'s critique, however, modern readers must note that Walworth wholeheartedly accepted *Swift*'s interpretation of the Rules of Decision Act and the Supreme Court's relationship to general commercial law:

> [I]n questions of local law, . . . the decisions of the highest court of judicature of the state are the evidence of what the law of the state is; and are to be followed in preference to those . . . even of the United States. On a question of commercial law, however, it is desirable that there should be . . . uniformity of decision, not only between the courts of the several states and of the United States, but also between our courts and those of England, from whence our commercial law is principally derived, and with which country our commercial intercourse is so extensive.[131]

According to Walworth, *Swift*'s mistake did not involve the nature of general commercial law, separation of powers, federal overreaching, or the state sovereignty of New York to establish its own rules concerning bills of exchange. Walworth simply believed that Story and his peers had misread applicable commercial law precedents, and he asserted New York's legal authority only by declining to follow the Supreme Court's mistake. Walworth held that

127. The first categorical attack on *Swift*'s federal general common law was Robert G. Street, *Is There a General Commercial Law of the United States*, 21 AM. L. REG. 473 (1873); *see infra* text accompanying note 166.

128. 6 Hill 93 (N.Y. 1843).

129. *Id.* at 95; W.M. Crook, *Uniform State Laws: An Economic Legal Development Resulting from the Relation of the State to Federal Government*, 4 TEX. L. REV. 316, 319 (1926).

130. *Stalker*, 6 Hill at 95, 104. Walworth issued his own dictum in *Stalker*, which New York courts adopted and applied in other cases. *See, e.g.*, Farrington v. Frankfort Bank, 24 Barb. 554, 565 (N.Y. App. Div. 1857).

131. *Stalker*, 6 Hill at 95.

the New York rule, not *Swift*, was the accurate reflection of general common law as it was adopted from England and applied in other state courts; he also took special pains to emphasize New York's unwavering doctrinal stability in enforcing bills of exchange according to proper legal principles.[132]

The fact that the state courts *of New York* rejected Story's view of doctrine and finance is immensely important, but it has never been adequately discussed.[133] By 1842, New York was America's greatest city, with vastly more international trade than anywhere else in the country.[134] New York judges therefore had deep experience with the law and practice of interjurisdictional commerce. If Story was so obviously right about the economic stakes in *Swift* or *Stalker*, how could New York courts retain a contrary and self-destructive rule for many decades, with frequent opportunities to change course?[135] Justice Story had written that *Swift*'s approach to bills of exchange was indispensable to American banking and credit. And although academics and some state courts agreed, the legal center of American finance unapologetically did not.[136]

It is not clear why New York rejected the doctrine that *Swift* and its admirers so warmly endorsed. Yet it is evident that the dispute did not turn on federalism, separation of powers, judicial role, doctrinalism, popular democracy, pro-commercial interest, or any other extant scholarly explanation. One important possibility, suggested in Walworth's opinion itself, concerns New York's reputation for doctrinal stability as the preeminent commercial court

132. *Id.* at 111–12.

133. America's second financial center, Philadelphia, also followed New York's rule. *See, e.g.*, Pratt's Appeal, 77 Pa. 378, 382 (1875); Trotter v. Shippen, 2 Pa. 358, 358 (1845).

134. Rousseau, *supra* note 63, at 462–63 (noting that New York banks held a reserve base "more than ten times that of New Orleans, and . . . nearly triple the combined specie reserves of deposit banks in Alabama, Kentucky, Louisiana, Mississippi, and Tennessee"); *see* SVEN BECKERT, THE MONIED METROPOLIS: NEW YORK CITY AND THE CONSOLIDATION OF THE AMERICAN BOURGEOISIE, 1850–1896, at 17–18 (2001) ("By 1860, . . . [New York's] chief rivals, Boston, Philadelphia, and Baltimore . . . traded in goods only one-quarter the value of those which passed through the port of New York.").

135. *See, e.g.*, Grocers' Bank v. Penfield, 69 N.Y. 502 (1877).

136. Twelve states (California, Connecticut, Georgia, Illinois, Indiana, Massachusetts, Mississippi, Missouri, New Jersey, Rhode Island, South Carolina, and Texas) followed *Swift*'s commercial-law doctrine, whereas thirteen states (Alabama, Arkansas, Iowa, Kentucky, Maine, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Wisconsin) did not. Arthur Biddle, In re *Huddle & Seitzinger*, 14 AM. L. REV. 503, 506–13 (1880).

in America.[137] Perhaps the battle between *Swift* and *Stalker* turned on the axiom that New York courts would take orders from no one on issues of commercial law, yielding to neither federal courts nor self-confident publicists. *Stalker*'s outcome may thus have been influenced by a regional competition between Chancellor Walworth's Gotham and Justice Story's Washington, D.C. In both cities, self-confident judges claimed to represent the best transnational thinking about commercial law, and they sought to wield correspondingly decisive power over the nation's economic future through their judicial decisions. In this sense, nineteenth-century jurists may thus have understood the conflict of *Stalker* versus *Swift* as a now-forgotten choice between a commercial empire led by New York's state courts and one directed by national federal judges like Story.[138]

Nearly all modern commentators have ignored the reaction of America's great commercial center, thereby lending *Swift*'s economic analysis a patina of inevitability—just as Story and national elites would have preferred. New York's persistent doctrinal conflict, however, shows that Story's educated analysis did not tell (and could not know) the whole truth about American law and American commerce. Pro-*Swift* judges and national-elite commentators described only one plausible vision of commercial credit and bills of exchange. The proliferation of that vision in the decades to follow resulted from complicated political, cultural, and regional dynamics; it did not derive from objectively neutral economic truth or financial efficiency.

3. Living Precedentialism: Developmental Meaning

This Part has thus far focused on originalist nineteenth-century materials from the time *Swift* was decided. As is true with statutes and constitutions, however, precedents' original meanings do not stand pat.[139] Over nine decades, *Swift* came to represent far more than commercial credit and pluralism. As Grant Gilmore wrote, "*Swift v. Tyson* became a headless monster, marked down for destruction by

137. *Stalker*, 6 Hill at 111–12. Modern readers might compare Delaware's current status as a nerve center of American corporate law. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 590 (2003).

138. *Cf.* GILMORE, *supra* note 15, at 34 (suggesting that the *Swift* decision is what made "the Supreme Court of the United States . . . a great commercial law court. [Thereafter, as] novel issues generated controversy and conflict, the Court's function was to propose a generally acceptable synthesis").

139. *Cf.* BALKIN, *supra* note 3; ESKRIDGE, *supra* note 2.

all right-thinking men."[140] This subsection demonstrates that *Swift*'s path to the heretical stake was astonishingly slow, episodic, and political. To understand *Swift*'s development will require consulting judicial opinions, academic commentary, and democratic politics from the late-nineteenth century; yet those labors will ultimately produce fresh interpretations of *Swift*'s successor, *Erie v. Tompkins*.[141]

Even when *Swift* was decided, its result governed more than negotiable instruments, and the Supreme Court issued many rulings over twenty years that applied, expanded, and debated the proper scope of federal general common law.[142] Throughout this period, however, judicial dissents were rare and mild, and no judge or commentator criticized the category of *Swift*-era common law as unwise or illegitimate.[143]

Between 1860 and 1910, only two judicial opinions questioned *Swift*; both of these were dissents, and neither one had much doctrinal impact on other cases. The first dissent arose from *Gelpcke v. City of Dubuque*, a case about municipal bonds that had been issued to support railroad construction.[144] When the Panic of 1837 destroyed the city's tax base, Dubuque refused to make payments, claiming that the state statute authorizing the bonds violated the state constitution.[145] Iowa's highest court had rejected similar arguments many times before, but it reversed course in 1862 and invalidated municipal bonds that were identical to Dubuque's.[146]

Gelpcke's plaintiffs tried to avoid Iowa's newly dangerous precedent by filing their suit against Dubuque in federal district court; on appeal, the United States Supreme Court voted eight to one that Dubuque should pay its bonds.[147] The Court did not reinterpret Iowa

140. GILMORE, *supra* note 15, at 61.

141. *See infra* Section I.B.

142. *E.g.*, Carpenter v. Providence Wash. Ins. Co., 41 U.S. (16 Pet.) 495, 496 (1842) (applying *Swift*'s federal general common law to insurance contracts).

143. *E.g.*, Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1885) (applying federal general common law to equitable remedies against corporate directors); Williamson v. Berry, 49 U.S. (8 How.) 495 (1850) (private statutes in an ejectment case); Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847) (contract law concerning slavery).

144. Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 202–03 (1864); *see also* MICHAEL ANTHONY ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 89–90 (2003).

145. *Gelpcke*, 68 U.S. (1 Wall.) at 203–04.

146. *Id.* at 205; ROSS, *supra* note 144, at 89.

147. Stephen Field became the tenth Justice only months before *Gelpcke* was decided, and December 1863 was the only term in which all ten Justices would sit together. As it

state law—that would have been impossible given authoritative judgments from the state's own high court. Instead, *Gelpcke* protected bondholders using federal general common law. "It cannot be expected that this court will follow every [state court] oscillation, from whatever [political] cause arising . . . . [Iowa's] earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen States of the Union."[148] And the majority opinion closed with a swagger: "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. . . . We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."[149] Whatever Iowa's courts might do with bondholder cases on their own dockets, *Gelpcke* made clear that litigants in federal courts would receive general common law principles only and exactly as federal judges saw fit to apply them.

Gelpcke's lone dissenter, Justice Miller, was an Iowa resident who had recused himself from similar bond cases involving his hometown.[150] Miller predicted that Iowa's state courts would never be convinced by the majority's reasoning.[151] "Thus we are to have two courts, sitting within the same jurisdiction, deciding upon the same rights, arising out of the same statute, yet always arriving at opposite results, with no common arbiter of their differences."[152] He declaimed, "[w]hat this may lead to it is not possible now to foresee."[153]

The risk of "confliction" between state and federal courts had been inherent and foreseeable ever since *Swift*, with *Stalker* as immediate proof.[154] Nonetheless, in other cases outside the context of municipal bonds, the entire Court—including Justice Miller—continued to apply general commercial law with no reservations whatsoever.[155]

happens, however, Chief Justice Taney did not participate in *Gelpcke* because of illness. *See* 1 G. EDWARD WHITE, LAW IN AMERICAN HISTORY 430 (2012).

148. *Gelpcke*, 68 U.S. (1 Wall.) at 205–06.

149. *Id.* at 206–07.

150. Lee Cty. v. Rogers, 74 U.S. (7 Wall.) 181 (1868).

151. ROSS, *supra* note 144, at 89–92, 169–75, 222, 224.

152. *Gelpcke*, 68 U.S. (1 Wall.) at 209 (Miller, J., dissenting).

153. *Id.*

154. *Compare* case cited *supra* note 75 and accompanying text (anticipating such "confliction"), *with* sources cited *supra* notes 129–135 and accompanying text (discussing *Stalker*).

155. *See* Yates v. City of Milwaukee, 77 U.S. (10 Wall.) 497, 506 (1870) (Miller, J.) (applying "general common law" that did "not depend upon State statute or local State

In the particular circumstance of Iowa's bond crisis, Miller's fears were confirmed when thousands of citizens rallied to protest being "persistently pursued in the federal courts by certain holders of . . . railroad bonds."[156] One politician ranted: "You freed the negro . . . and fastened eternal white slavery upon yourselves and [your] children by lowering and knuckling to . . . the monied monopolies of the country."[157] Gelpcke's bank was sacked, and Otto Gelpcke fled to a jailhouse as a mob besieged his home.[158] When Miller dissented in a later bondholder case, he offered his own personal report of *Gelpcke*'s consequences:

> These frequent dissents . . . are as distasteful to me as they can be to any one else. But when I am compelled, as I was last spring, by the decisions of this court, . . . to jail . . . over a hundred of the best citizens of Iowa, for obeying, as they thought their oath of office required them to do, an injunction issued by a competent court of their own State, . . . I must be excused if, when sitting here, I give expression to convictions which my duty compels me to disregard in the Circuit Court.[159]

By century's end, the Court had heard roughly 300 bond cases, as identical issues arose in nearly every state.[160] Pennsylvania's Chief Justice Black wrote that enforcing railroad bonds was "beyond all comparison, the most important cause that has ever been in this court since the formation of the government."[161] And Iowa's state courts bemoaned that "counties and cities throughout the State . . . incurred debts amounting to several millions of dollars, . . . exceeding their ability to pay. Disaster, the child of extravagance and debt, and

law," and declaring that "this court has never acknowledged the right of the State courts to control our decisions, except, perhaps, in a class of cases where the State courts have established, by repeated decisions, a rule of property in regard to land titles peculiar to the State"); *see also* Burgess v. Seligman, 107 U.S. 20, 33 (1883) (similar).

156. ROSS, *supra* note 144, at 169–70.

157. *Id.*

158. *Winslow's Career in Dubuque: How He Became General Manager of a Bank—And What Became of the Bank*, DAILY INTER OCEAN (Chi.), Jan. 16, 1877, at 6; *Duties of Trustees in Compromising Debts*, N.Y. TRIB., Aug. 27, 1875, at 2; *The Dubuque County Railroad Indebtedness—The Gelpcke Claim Settled*, MILWAUKEE DAILY SENTINEL, May 6, 1864, at 1. The city of Dubuque reportedly had only 40,000 inhabitants and $1.5 million in debt. *The Dubuque County Railroad Indebtedness—The Gelpcke Claim Settled*, *supra*, at 1.

159. Butz v. City of Muscatine, 75 U.S. (8 Wall.) 575, 587 (1869) (Miller, J., dissenting).

160. FREYER, HARMONY, *supra* note 30, at 60.

161. Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 158 (1853) (Black, C.J.).

dishonor, the unbidden companion of bankruptcy, are the bitter but legitimate consequences of that decision, 'and the end is not yet.' "[162]

Although *Swift*'s general common law had never entered such political minefields, the public silence that accompanied *Gelpcke*—outside of Iowa—is impressive.[163] Only one sentence can be found in newspapers announcing the decision,[164] and despite heated fights over comparable state decisions, no commentary in the next decade (again excepting Iowa) criticized federal courts' "general common law" as a category.[165] Political battles over municipal debt never focused their attacks on federal general common law itself until 1873, after an entirely separate financial panic.[166] In this much later period, it was Justice Miller's opposition to railroad bonds—not concerns about federal general common law—that almost carried him to two presidential nominations.[167]

The second judicial dissent that criticized *Swift* in the nineteenth century arose from cases involving industrial accidents. Injuries from trolleys, industry, and railroads were more prevalent in Guilded-Era America than anywhere in the world, and such accidents affected many aspects of public life.[168] In 1862, the Supreme Court applied federal

162. Hanson v. Vernon, 27 Iowa 28, 33 (1869). The Iowa court did not identify the reference for its quotation, but the most likely source is the Bible. *Matthew* 24:6 (King James).

163. The Supreme Court's early bond cases were *Butz*, 75 U.S. (8 Wall.) at 575 (7–2 decision); *Lee County v. Rogers*, 74 U.S. (7 Wall.) 181 (1868) (8–0 decision); *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175 (1863) (8–1 decision). Also notable were *Olcott v. Supervisors*, 83 U.S. (16 Wall.) 678 (1872); *Chicago v. Sheldon*, 76 U.S. (9 Wall.) 50 (1869); *Havemeyer v. Iowa County*, 70 U.S. (3 Wall.) 294 (1865); *Thomson v. Lee County*, 70 U.S. (3 Wall.) 327 (1865).

164. *Supreme Court of the United States*, DAILY NAT'L INTELLIGENCER (D.C.), Jan. 12, 1864, at 3 ("Mr. Justice Swayne delivered the opinion of the Court, reversing the judgment of the said District Court, with costs, and remanding the cause for further proceedings to be had therein, in conformity to the opinion of this Court."). Because *Gelpcke* consisted of three consolidated cases, the *Intelligencer* printed that same sentence three times.

165. *Compare Summary of Events*, 5 AM. L. REV. 126, 156–58 (1870) (endorsing *Gelpcke*), *with Iowa Reports*, 1 W. JURIST 216, 218–23 (1867) (opposing *Gelpcke* in a publication from Des Moines).

166. Street, *supra* note 127, at 473; *see* Nicolas Barreyre, *The Politics of Economic Crises: The Panic of 1873, the End of Reconstruction, and the Realignment of American Politics*, 10 J. GILDED AGE & PROGRESSIVE ERA 403, 403 (2011) (describing the financial panic following Reconstruction.).

167. ROSS, *supra* note 144, at 237–38.

168. *See* PURCELL, LITIGATION, *supra* note 30, at 19; 2 GEORGE BROWN TINDALL & DAVID EMORY SHI, AMERICA: A NARRATIVE HISTORY 590 (9th ed. 2012); BARBARA WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920, at 3–4 (2001).

general common law to resolve *Chicago City v. Robbins*, which concerned a pedestrian who was injured beside a construction site.[169] Illinois law would have excused the owner for his contractor's negligent excavations, yet the Supreme Court unanimously imposed liability under federal general common law:[170] "[W]here private rights are to be determined by the application of common law rules alone, this Court . . . does not feel bound by [state] decisions."[171]

General "common law rules alone" were similarly decisive in 1884, when *Chicago, Milwaukee & St. Paul Railroad Co. v. Ross* decided whether employees could sue employers for a coworker's negligence.[172] (This was the nationally significant "fellow-servant rule."[173]) The Court unanimously agreed that general common law should decide the issue, but they split 5–4 on the merits.[174] Justice Stephen Field's majority opinion allowed the plaintiff to recover, citing as support a nationally prominent treatise and case law from several different states.[175] Justice Joseph Bradley wrote a one-paragraph dissent that fully endorsed the application of federal general common law, but he argued that the "long-established" rule of fellow-servant immunity meant the defendant should win on the merits.[176]

For yet another decade, the Court's fights about the *content* of general common law unanimously presumed such law's *existence* and *validity*. In 1893, however, every member of the *Ross* majority had retired except Field.[177] In that year, the majority opinion in *Baltimore*

169. Chi. City v. Robbins, 67 U.S. (2 Black) 418, 418–20 (1862), *aff'd*, 71 U.S (4 Wall.) 657 (1866).

170. Freyer has written that Miller and Justice Samuel Nelson dissented from this decision without opinion, but those dissents are not recorded in the *United States Reports*. *Compare* FREYER, HARMONY, *supra* note 30, at 65, *with Robbins*, 67 U.S. (2 Black) at 418–29. The *Robbins* Court's holding was unanimously affirmed in a subsequent appeal concerning the same facts, raising further questions about whether Miller and Nelson had dissented earlier. *See* Robbins v. Chi. City, 71 U.S. (4 Wall.) 657 (1866).

171. *Robbins*, 67 U.S. (2 Black) at 428–29 (maintaining an exception to this rule for federal courts to apply state law "[w]here rules of property in a State are fully settled").

172. Chi., Milwaukee & St. Paul R.R., 112 U.S. 377, 377–78 (1884).

173. The "fellow-servant rule" was an exception to the principle that defendant-employers should be liable for their agents' negligence, and it denied recovery to plaintiff-employees for countless workplace injuries and deaths. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 51–54 (1967).

174. *Ross*, 112 U.S. at 377.

175. *Id.* at 390–91; *see also* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 52 (2003).

176. *Ross*, 112 U.S. at 396 (Bradley, J., dissenting).

177. *Cf.* Balt. & Ohio R.R. v. Baugh, 149 U.S. 368, 390 (1893) (Field, J., dissenting); Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 106 (1893) (Field, J., abstaining).

& Ohio Railroad Co. v. Baugh held—fully consistent with *Robbins*, *Ross*, and other *Swift*-era cases—that tort rules such as fellow-servant immunity did not pose any "question of local law, to be settled by an examination merely of the decisions of [Ohio] . . . , but rather one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant."[178] Despite the Court's unbroken adherence to prior cases concerning the applicability of federal general common law, *Baugh* overruled the *substantive result* in *Ross*, reinterpreting general common law to hold that the defendant-employer was not liable for a fellow-servant's negligence.[179]

One might have easily predicted that Justice Field would dissent from *Baugh*'s judgment that his own opinion in *Ross* was incorrect. But no one could have foreseen Field's unprecedented claim in *Baugh* that "the settled law of Ohio . . . should control."[180] Ignoring fifty years of federal cases and acres of tort law, Field wrote that master-servant relations "are matters of legislative control, and are in no sense under the supervision or direction of the judges or courts of the United States."[181] Field continued: "There is no unwritten general or common law of the United States on the subject. Indeed, there is no unwritten general or common law of the United States *on any subject*."[182] This latter statement contradicted numerous judicial authorities, including Field's opinion in *Ross* itself.[183]

178. Balt. & Ohio R.R. v. Ross, 149 U.S. 368, 370 (1893); *id.* at 378 (explaining that the fellow-servant rule was inherently "a question in which the nation as a whole is interested. It enters into the commerce of the country").

179. *Id.* at 390 (Field, J., dissenting) ("The opinion of the majority not only limits and narrows the doctrine of the *Ross case*, but, in effect, denies, even with the limitations placed by them upon it, the correctness of its general doctrine . . . ."); *cf. id.* (Fuller, C.J., dissenting) ("I dissent because, in my judgment, this case comes within the rule laid down in *Chicago, Milwaukee, & Railway v. Ross*, 112 U.S. 377, and the decision unreasonably enlarges the exemption of the master from liability for injury to one of his servants by the fault of another.").

180. *Id.* at 391 (Field, J., dissenting).

181. *Id.* at 394; *see, e.g.*, Chi. City v. Robbins, 67 U.S. (2 Black) 418 (1862), *aff'd*, 71 U.S. (4 Wall.) 657 (1866); Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

182. *Baugh*, 149 U.S. at 394 (Field, J., dissenting) (emphasis added).

183. Chi., Milwaukee & St. Paul R.R. v. Ross, 112 U.S. 377, 383 (1884) (citing "numerous cases, both in this country and in England" as support for the Court's federal general common law ruling); *id.* at 390 ("There is, *in our judgment*, a clear distinction to be made in their relation to their common principal, between servants of a corporation exercising no supervision over others engaged with them in the same employment and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. . . . This

Resuscitating arguments that had been ignored for fifty years, Field claimed that (1) the federal government was composed only of states, (2) common law could not be adopted without explicit legislative enactment, and (3) general common law would impermissibly differentiate between state and federal courts in the same geography.[184] Field also argued that federal general common law was "nothing less than an attempt to control the State in a matter in which the State was not amenable to Federal authority," thereby violating "the judicial independence of the states" and "encroach[ing] . . . the sovereign rights reserved to them by the Tenth Amendment."[185] The most quotable passage of Field's opinion depicts a superficially heartfelt conversion:

> I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that . . . I have, myself, in many instances, unhesitatingly and confidently . . . repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and

view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders." (emphasis added)); *id.* at 390–91 (citing Wharton's treatise on the law of negligence); *id.* at 394 ("There are decisions in the courts of other States, more or less in conformity with those cited from Ohio and Kentucky, rejecting or limiting, to a greater or less extent, the master's exemption from liability to a servant for the negligent conduct of his fellows. *We agree with them* . . . ." (emphasis added)).

184. *Id.* at 393–95; *cf. supra* notes 74–81 and accompanying text (describing similar arguments from *Swift*).

185. *Baugh*, 149 U.S. at 397–99 (Field, J., dissenting). For other examples of Field's extreme assertions of states' rights in his *Baugh* dissent, *see id.* at 401 ("[T]he general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme, but the States, within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States." (quoting Collector v. Day, 78 U.S. (11 Wall.) 113, 124 (1870))); *see also id.* at 402 ("To this autonomy and independence of the States their legislation must be as free from coercion as if they were separated entirely from connection with the Union. There must also be the like freedom from coercion or supervision in the action of their judicial authorities.").

> independence of the States—independence in their legislative and independence in their judicial departments.[186]

This dramatic renunciation, however, is difficult to square with the rest of Field's opinion in *Baugh* itself, which concludes with a four-page defense of *Ross* based exclusively on federal general common law.[187] Furthermore, Field showed no qualms about applying general common law in any subsequent case—any more than Justice Miller did after *Gelpcke*.[188] During their own time, the *Gelpcke* and *Baugh* dissents were nothing more than highly personalized, fringe critiques that were not fully explained or consistently applied by even their own authors. Unsurprisingly, these opinions had no doctrinal effect on the Court's continued elaboration and application of federal general common law.

Nonjudicial critiques of federal general common law were equally rare and slow to develop. The first published commentary attacking *Swift* appeared in 1873—over thirty years after *Swift*—and such arguments achieved very little popularity for at least another quarter-century after that.[189] Some observers decried *Swift*, others attacked *Gelpcke*, and a few previewed arguments that would be featured much later in *Erie*.[190]

Only a few historians have even noticed this florescence of anti-*Swift* commentary, and its timing has never been adequately explained.[191] The only causal factors mentioned in existing scholarship involve the Civil War or some kind of shift in legal thought,[192] but each of these theories has problems. The Civil War, for example, was never mentioned by *Swift*'s nineteenth-century critics, and it seems temporally remote from writings that were authored decades later.[193]

186. *Id.* at 401.

187. *Id.* at 408–11.

188. *See* Oakes v. Mase, 165 U.S. 363, 364 (1897); Bucher v. Cheshire R.R., 125 U.S. 555, 585 (1888) (Field, J., dissenting).

189. FREYER, HARMONY, *supra* note 30, at 85–100 (collecting sources). Where nineteenth-century commentators lodged constitutional objections, they were never linked to a specific constitutional provision; instead, commentary relied on abstract theoretical arguments about ahistorical first principles. *Id.*

190. *Id.* at 85–87.

191. *See id.* at 85–100.

192. *E.g.*, *id.* at 93–100 ("The impact of the Civil War itself . . . was no doubt a factor . . . ."); BRIDWELL & WHITTEN, *supra* note 30, at 123 (citing the "legitimation of a positivistic judicial philosophy . . . at the expense of the historical school of jurisprudence"); GILMORE, *supra* note 15, at 93 (stating without explanation that "[t]he *Swift v. Tyson* device, which had over a long period been of great service, had ceased to work").

193. *See* FREYER, HARMONY, *supra* note 30, at 85–100 (collecting sources).

By contrast, the character of legal thought changes so frequently that such dynamics are hard to associate with any particular stance on *Swift*. Legal thinking surely mutated on many occasions between the 1840s and the 1920s, in many different times and places. Upon close scrutiny, however, there was a wide assortment of late-nineteenth-century characters who criticized *Swift*, and none of them seemed terribly interested in macro-shifts of legal thought—whether such dynamics were called positivism, proto-realism, or anything else.[194]

One unexplored causal explanation for *Swift*'s fall from grace might emphasize the development of legal institutions during this half-century. Harvard Law School began retooling American legal education in 1870, and new legal publications flourished alongside new law schools and bar associations.[195] These engines of legal culture promoted an image of experts and expertise that was different from prior generations. Legal commentary became a more accessible enterprise than the one built on Story's genius, and the new generation of written commentary was more intensely nationalized than before.[196] New organizations and publications represented conscious efforts to approach law in different ways, and those institutional changes yielded new opportunities for some jurists and scholars to challenge *Swift*'s quondam orthodoxy.

Changes in the publication of professional legal analysis coincided with broader political fights concerning federal courts. Federal courts were central to debates about freed slaves, and the late 1870s witnessed many proposals to limit the availability of diversity jurisdiction, especially for corporate litigants.[197] In 1880, a congressman from Iowa claimed that federal courts "have grown to be largely corporation mills, in which the tolls are taken largely from the individual citizen . . . it has become the fact that . . . the old feudal system . . . has sought refuge behind the judicial system."[198] Likewise, Senator Garland of Arkansas lamented that federal courts, in applying *Swift*-era common law, had

194. *Id.*

195. *See* J. WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 249–378 (1950); WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 1–6 (1993); CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA (1909); Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 750–64 (1985).

196. Swygert & Bruce, *supra* note 195, at 750–63.

197. FREYER, HARMONY, *supra* note 30, at 79–84; PURCELL, LITIGATION, *supra* note 30, at 15.

198. FREYER, HARMONY, *supra* note 30, at 80.

"done little else than wreck the towns and counties and cities within their jurisdiction."[199] Some of these critics emphasized federal decisions about municipal bonds and busts, while others worried over personal injury suits and insurance claims.[200] These objections captured broad public frustration, and they also resonated through new institutions of professional reason; all of these voices would become more powerful in the decades to come.

The intermingling of law, intellect, and politics that prompted *Swift*'s collapse can be seen quite clearly in the life of Oliver Wendell Holmes, whose ideas would be prominently featured in *Erie*.[201] Soon after graduating law school, Holmes became co-editor of the *American Law Review*, one of the first periodicals to publish a diatribe against *Swift*.[202] Holmes also edited a revised edition of Kent's *Commentaries*, which led him to renounce *Swift*'s older perspective on common law.[203] Holmes was a paragon for the self-conscious confidence and novelty of late-nineteenth-century thought, and his appointment to the Supreme Court carried such talents and beliefs into even greater national prominence.[204]

Justice Holmes manifested his opposition to *Swift* through dissents in three cases: *Kuhn v. Fairmont Coal Co.*, *Southern Pacific Co. v. Jensen*, and *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*[205] In *Kuhn*, the majority held that "when contracts and transactions are entered into[,] . . . the Federal courts properly claim the right to give effect to *their own judgment* as to what is the law of the state . . . even where a different view has been expressed by the state court after the rights of the parties accrued."[206]

199. *Id.; see also id.* at 81 ("[O]pposition to the *Swift* doctrine was a major factor behind Congressional efforts to limit federal jurisdiction.").

200. *See* discussion *supra* note 189.

201. Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938) (discussing Holmes's resistance to *Swift*).

202. *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER LIFE 105, 108, 112–13 (1993).

203. *Id.* at 104–05; *see* sources cited *supra* note 126.

204. WHITE, *supra* note 202, at 3–5, 476–88; *see id.* at 299 ("[W]ith Holmes' ninetieth birthday radio address . . ., he had become a rival to Marshall in the pantheon of eminent and visible judges . . . .").

205. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 523 (1928) (Holmes, J., dissenting); S. Pac. Co. v. Jensen, 244 U.S. 205, 218 (1917) (Holmes, J., dissenting); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370 (1910) (Holmes, J., dissenting).

206. *Kuhn*, 215 U.S. at 360 (majority opinion) (emphasis added). As with *Swift*, *Gelpcke*, *Ross*, *Robbins*, and *Baugh*, the Supreme Court in *Kuhn* did not rest its judgment on an interpretation or reinterpretation of any particular state's law. Instead, federal

But Holmes tossed aside several decades of *Swift*-era cases with a turn of phrase, noting abstract "uncertainty and vacillation" about "*the theory* upon which *Swift v. Tyson*, and later extensions of its doctrine, have proceeded."[207]

Holmes's *Kuhn* dissent did not technically attack the results of *Swift* or its progeny, but his logic was simple and broad: (1) all cases involving property and tort law must "surely" be governed by state law, (2) such law is derived solely from state courts or legislatures, and (3) when the Supreme Court "know[s] what the source of the law has said that [the result] shall be, our authority is at an end."[208] Contradicting a lifetime of precedent, Holmes wrote in conceptual terms that "[t]he law of a state does not become something outside of the state court . . . by being called the common law. Whatever it is called, it is the law as declared by the state judges, and nothing else."[209]

In *Jensen*, the Court refused to compensate a stevedore under a New York statute because the latter "conflict[ed] with the general maritime law."[210] A five-Justice majority held that, "in the absence of some controlling statute, the general maritime law, as accepted by the federal courts, constitutes part of our national law."[211] Because general maritime law denied recovery, the Court held that a New York statute was powerless to do otherwise. Holmes's dissent was again irreconcilable with *Swift* and prior practice: "If admiralty adopts common law rules without an act of Congress . . . [t]he only authority available is the common law or statutes of a state."[212] Holmes thundered that "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign . . . that can be identified . . . . It always is the law of some state . . . ."[213]

Holmes's most trenchant critique involved the *Taxicab* case of 1928.[214] A corporate plaintiff had dissolved in one state and reincorporated in another so that it could use federal diversity

courts in these circumstances relied on principles of federal general common law that they themselves ultimately created. *Id.*

207. *Id.* at 370 (Holmes, J., dissenting) (emphasis added).

208. *Id.* at 372.

209. *Id.*

210. *Jensen*, 244 U.S. at 212 (majority opinion).

211. *Id.* at 215.

212. *Id.* at 222 (Holmes, J., dissenting).

213. *Id.*

214. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532 (1928) (Holmes, J., dissenting).

jurisdiction to litigate a contractual dispute.[215] Applying "general law," the Supreme Court enforced the contract under federal general common law and disregarded state precedent to the contrary.[216] For the first time, Holmes in his dissent characterized objections to *Swift* as the identification of a "fallacy." Echoing Field's rhetoric while making a very different argument, Holmes claimed that *Swift*'s fallacy had "resulted in an unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[217]

Holmes described this fallacy in metaphysical terms, concerning the basic conditions of law's existence. He wrote that, if common law were to exist as "one august corpus" located in decisions from various courts, "[i]f there were such a transcendental body of law outside 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."[218] "But," Holmes wrote with unbending confidence, "there is no such body of law."[219]

> [L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law . . . whether called common law or not, is not the common law generally, but the law of that state existing by the authority of that state and without regard to what it may have been in England or anywhere else.[220]

According to Holmes, *Swift* and Story had operated "under the tacit domination" of this fallacy, and despite proposing to yet again "leave *Swift v. Tyson* undisturbed," Holmes wished not to "spread [its] assumed dominion into new fields."[221]

Late-twentieth-century commentators have viewed Holmes's *Taxicab* dissent as an apotheosis of pre-*Erie* criticism of federal general common law, but it was never anything like that.[222] Holmes voiced arguments that were quite different from Miller's practical

215. *Id.* at 522 (majority opinion); *cf.* FREYER, FORUMS, *supra* note 30, at 26 (noting similarly prevalent forum shopping with respect to individuals as early as 1825).

216. *Black & White Taxicab*, 276 U.S. at 525.

217. *Id.* at 532–33 (Holmes, J., dissenting); *cf. supra* note 186 and accompanying text.

218. *Black & White Taxicab*, 276 U.S. at 533.

219. *Id.*

220. *Id.* at 533–34.

221. *Id.* at 535.

222. *See, e.g.*, Lawrence Lessig, Commentary, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1787 (1997).

concern over state-federal "confliction" and from Field's Tenth-Amendment federalism. Nor were Holmes's twentieth-century critiques appreciably stronger than their elders. For example, Holmes's greatest quote of all time was probably "[t]he life of the law has not been logic: it has been experience."[223] Holmesian attacks on federal general common law, however, discarded experience entirely and relied on conceptual analysis of "fallacies" and "brooding omnipresence."[224] Holmes's arguments were doctrinally muddled as well: he refused to defend or reconcile *Swift*, but he also could not justify overruling it.

Holmes's breezy polemics echoed commentary from the *American Law Review* more than it resembled his precursors' judicial opinions.[225] He claimed that federal general common law did not "exist," yet that verb was either vague or untrue. How could general common law not "exist" when authoritative courts—including the *Taxicab* majority—had held otherwise for eighty years? Federal judges and marshals—throughout the country and even in Iowa—continued to enforce federal general common law *as law*. Such law thus satisfied all of the ordinary criteria for law, including loyal adherents, governmental violence, and a legitimating ideology.[226]

Whatever the substantive weakness of Holmes's argument, his *Taxicab* dissent quickly became a rallying point for critiques of federal courts' abuse. The idea that corporate litigants could manipulate substantive contract law merely by shuffling papers, changing state citizenship, and removing their cases to federal court became increasingly unacceptable. A wonderful example of this criticism appeared in the early federal courts casebook by Felix Frankfurter and Wilber G. Katz.[227] After an anti-*Swift* polemic and

223. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1909).

224. *Black & White Taxicab*, 276 U.S. at 532–33; S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

225. *Cf.* sources cited *supra* note 188–189 and accompanying text.

226. For an exploration of what scholars call "Holmesian positivism," compare William R. Casto, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907 (1988), with Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998), and Green, *Repressing* Erie, *supra* note 30, at 667–70. On violence in legal decisionmaking, see Cover, *supra* note 19, at 1628.

227. *See generally* CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE (Felix Frankfurter & Wilber G. Katz eds., Callaghan & Co. 1931) (compiling critiques of both abusive federal courts and manipulative corporate litigants).

an excerpt from the *Taxicab* case,[228] the authors reproduced the following pamphlet: "Why Corporations Leave Home."

> A good many businessmen know that by incorporating in some state other than that of where the business is to be carried on the corporation gains the right to bring and defend law suits in the Federal courts that might otherwise be tried in the state courts . . . . The opinion is found among both lawyers and laymen that in labor cases the United States courts are less likely to be affected by local and temporary tides of feeling or purely political considerations, while in the protection of corporate titles and trade names there seems solid reason for expecting more from the Federal than the state courts.[229]

According to Frankfurter and Katz, this pamphlet was "printed and widely circulated among attorneys" by a company whose "principal activities" were to incorporate and manage corporations under the laws of Delaware "whose principal business offices are maintained outside the state of incorporation."[230]

Policymakers also recognized pro-corporate distortions caused by *Swift*'s federal general common law. One year after the *Taxicab* decision, President Hoover appointed a National Commission on Law Observance and Enforcement.[231] The study found that a large majority of federal diversity actions were tort or contract disputes; of those, almost sixty percent involved out-of-state corporate defendants; and such out-of-state corporations were defendants in eighty-six percent of the suits filed by resident plaintiffs.[232] Statistics like these exacerbated concern that federal courts were manufacturing defendant-friendly doctrines that benefited national corporations and damaged local victims.[233] Diversity plaintiffs had a lower success rate than any other category of litigant—half the success of claimants against the United States—and negligence plaintiffs lost more often than anyone.[234]

228. *Id.* at 154 n.3, 159–66.

229. *Id.* at 167.

230. *Id.* at 167 n.2. Frankfurter's revised casebook, published one year before *Erie*, amplified objections to *Swift*-era common law by adding discussion of *Gelpcke* and other municipal bond precedents. CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE 206–10 & nn.1–4 (Felix Frankfurter & Harry Shulman eds., rev. ed. 1937).

231. PURCELL, LITIGATION, *supra* note 30, at 21.

232. *Id.*

233. *Id.* at 79–84.

234. *Id.* at 22.

All of these developments combined to place federal general common law, alongside other pro-business doctrines such as economic due process and limited federal commerce power, in the cross-hairs for protests that federal courts had distorted American justice and had sold out America's economy.[235] Such was the political environment when *Erie* was argued, not six months after the failure of Roosevelt's "court-packing plan," and on the first day in session for Roosevelt's newest appointee, Justice Stanley Reed.[236] By 1938, *Swift* was indeed a "headless monster" in Holmesian academic circles.[237] But that conclusion was debatable at the time, and in any event, it represented only *Swift*'s developmental meaning, which had emerged over a long period that is now forgotten. Although Holmes blustered in the 1920s that *Swift* was timeless in its "unconstitutional assumption of powers," it would be a serious mistake for any modern jurist to take such words at face value.[238]

B. Erie v. Tompkins*: Hooray for Our Side*

Erie is one of the best-known cases in American law, yet it remains an unsolved puzzle.[239] Modern commentary falls in two camps: a few interpreters assume that the opinion's text is the exclusive source of *Erie*'s meaning, while most jurists obscure the text and reconstruct *Erie* on Holmesian foundations.[240] This Article will supplement existing debates by analyzing the same four categories of historical materials discussed above—some of which have been completely ignored with respect to *Erie*—and generating distinctive arguments about the decision's meanings.[241]

235. *See* FREYER, FORUMS, *supra* note 30, at 148.

236. PURCELL, BRANDEIS, *supra* note 30, at 105.

237. GILMORE, *supra* note 15, at 61.

238. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532–33 (1928) (Holmes, J., dissenting).

239. *See* Green, *Repressing* Erie, *supra* note 30, at 595 n.2, 596 n.4 (collecting sources discussing *Erie*).

240. *Compare* Green, *Repressing* Erie, *supra* note 30, at 596–97 (textualism), *with* other sources cited *supra* note 30 (nontextual interpretations). Theorists who link *Erie* with separation of powers often claim that federal courts lack authority to "make" federal common law. The core premise of such arguments is Holmes's metaphysical claim that "there is no . . . body of law" in existence that federal judges could apply to such cases. *See Black & White Taxicab*, 276 U.S. at 532–34. *See supra* note 226 and accompanying text (questioning the accuracy of that premise).

241. Although particular historical materials will of course be different for *Swift* in the nineteenth century as compared to *Erie* in the twentieth century, the interpretive methods applied to both cases will be identical.

Erie's facts were simple. Tompkins was hurt while walking beside train tracks.[242] His lawyer believed that the railroad negligently failed to close a train-car door.[243] Under Pennsylvania cases, Tompkins was a trespasser who could recover only for wanton negligence, which this was not. Thus, he sued in federal court and claimed that the railroad's safety standards posed questions of general law, not local law.[244] Most state courts would have used the doctrine of "permissive pathways" to allow pedestrians like Tompkins to recover for ordinary negligence.[245] The district court and Second Circuit in Tompkins's case reached that same conclusion, but they did so as a matter of federal "general law."[246]

1. Textualism: Declared Meaning

For modern commentators who seek to defend *Erie*, the opinion's text is an embarrassment.[247] The Court began with fireworks: "The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."[248] Textual analysis of the Court's opinion, however, reveals inadequate support for its boldly affirmative answer.

The Court's opinion contained three separately enumerated elements. The first criticized *Swift* in general terms, citing commentary from 1873 to 1923.[249] The Court implied without holding that *Swift* had misread the term "laws" in the Rules of Decision Act,[250] and the opinion cited several academic and professional critiques that discussed the *Taxicab* case.[251] Nothing in section one purported to justify overruling *Swift* or upsetting Tompkins's jury verdict.

Erie's second section criticized *Swift* for producing social and political "defects," while failing to provide appreciable "benefits."[252]

242. Erie R.R. v. Tompkins, 304 U.S. 64, 69 (1938).

243. PURCELL, BRANDEIS, *supra* note 30, at 96.

244. *Erie*, 304 U.S. at 69; PURCELL, BRANDEIS, *supra* note 30, at 96–97.

245. Tompkins v. Erie R.R., 90 F.2d 603, 604 (2d Cir. 1937), *rev'd*, *Erie*, 304 U.S. 64 (1938).

246. *Id.*; Younger, *supra* note 30, at 1020–21.

247. *See* Green, *Repressing* Erie, *supra* note 30, at 602–14.

248. *Erie*, 304 U.S. at 69.

249. *Id.* at 71–74; *see* FREYER, HARMONY, *supra* note 30, at 85–100.

250. *Erie*, 304 U.S. at 72–73 & n.5 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51–52, 81–88, 108 (1923)). *But see* WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 79, 148 (Wythe Holt & L.H. LaRue eds., 1990) (disputing Warren's thesis).

251. *Erie*, 304 U.S. at 73–74.

252. *Id.* at 74.

The Court discussed age-old problems about "confliction" among state and federal courts, as well as vagueness in separating "general" from "local" law.[253] The Court also mentioned recent concerns about favoring out-of-state corporations, including manipulations of diversity jurisdiction (*Taxicab*) and tort standards (*Robbins* and *Baugh*).[254]

At the end of section two, the Court explained that all of the arguments about *Swift*'s practical effects were dicta:

> The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. . . . If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so.[255]

The Court held quite explicitly that, regardless of *Swift*'s defects or benefits as a matter of policy, *Erie*'s doctrinal result depended exclusively and deliberately on constitutional law.

Erie's third section offered—in two pages and seven-hundred words—the Court's only constitutional arguments against *Swift*. The majority held that because "Congress has no power" to regulate "substantive rules of common law" through legislation, federal courts lacked comparable power through adjudication.[256] The Court quoted states-rights arguments from Justice Field's *Baugh* dissent, relying on extreme "autonomy and independence of the states."[257] And the opinion concluded by referencing the Tenth Amendment without citation.[258]

Section three blended Field's arch-federalism with Holmes's *Black & White Taxicab* dissent, though the two arguments were not at all similar.[259] For example, because Holmes asserted an intellectual

253. *Id.* at 74–76.

254. *Id.* at 74–77 & nn.11, 13; *see also id.* at 76 n.15.

255. *Id.* at 77.

256. *Id.* at 78. Note that the Court's argument was *not about separation of powers*. On the contrary, the Court first limited Congress's authority, by excluding the legislative power to prescribe substantive common law, and then inferred an identical limit on the power of the federal courts. The argument's logic assumes a *comparability* among the branches' powers, not their constitutional *separation*.

257. *Id.* (quoting Balt. & Ohio R.R. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

258. *Id.* at 80; *see* U.S. CONST. amend. X.

259. *Erie*, 304 U.S. at 78–79.

"fallacy" concerning the existence of law, he was less interested in Field's defense of states' power than he was in limiting federal judges' power to innovate.[260] In any event, Holmes never explained how his metaphysical analysis of "law in the sense in which courts speak of it today" rendered *Swift* "unconstitutional,"[261] and *Erie* did nothing to solve that mystery. Accordingly, the Holmes quotations in *Erie* remain to this day more of a judicial homage than a constitutional argument.[262]

From a textualist perspective, the differences between *Erie* and *Swift* are striking. *Swift* presented itself as a minor gap-filler that leaned heavily on judicial precedents, common-law practice, and economic necessity.[263] *Swift* interpreted the Rules of Decision Act to create space for the Court's commercial lawmaking, which meant that every step of *Swift*'s approach was subject to congressional correction. *Swift*'s judgment about commercial paper was federal general common law, and its decision that federal courts should *apply* that judgment was federal choice of law.

By contrast, *Erie* was a deliberately violent departure from one-hundred years of precedent, supported by vague references to federalism and by quotes from three judicial dissents. Although the Court disclaimed "hold[ing] unconstitutional" the Rules of Decision Act or any other federal statute, its constitutional basis placed a necessary limit on what future legislators could do—including reauthorizing *Swift*'s common law by statute.[264] These textual characteristics make it all the more interesting to explore how *Swift* became a "monster," with *Erie* emerging as a triumphantly vanquishing hero.

2. Originalism: Implied and Understood Meanings

Erie's text is cracked if not broken. Because Justice Field's theories of dual sovereignty were rejected long ago, *Erie*'s modern defenders try to minimize the opinion's Tenth-Amendment verbiage about "rights which . . . are reserved by the Constitution to the several

260. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532–33 (1928) (Holmes, J., dissenting).

261. *Erie*, 304 U.S. at 79.

262. Beyond the passages discussed *supra*, the *Erie* Court's majority opinion also contained a few sentences that were purely declaratory rather than explanatory or analytical. *E.g.*, *id.* at 78 ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied is the law of the state."); *id.* ("There is no federal general common law.").

263. *See* NEWMYER, *supra* note 33, at 336.

264. *Erie*, 304 U.S. at 79–80.

states."[265] The Cult of Holmes remains unmistakably strong, but today's emphasis on interpretive methodology weakens efforts to convert his sparkling epithets—"brooding omnipresence" and "transcendental law"—into persuasive constitutional arguments.[266] *Erie*'s textual flaws require other kinds of interpretive material to understand this iconic precedent, and this subsection will consider *Erie*'s "implied meaning" based on evidence about the decision's lawyers, judges, and contemporary audience.

a. Lawyers

We have seen that the lawyers in *Swift* argued their case as though it were a mountain, but the Court decided a molehill.[267] The opposite was true in *Erie*. No lawyer had suggested that "the oft-challenged doctrine of *Swift v. Tyson* should be disapproved."[268] Nor did anyone but the Supreme Court foresee that as even a possibility. The district judge—a Roosevelt appointee hearing his first civil case—had applied federal general common law without hesitation.[269] And a Second Circuit panel that included Learned Hand and Thomas Swan had unanimously used federal general common law with casual confidence.[270]

Even in the Supreme Court, the litigating parties focused on minor details: When the train struck, was Tompkins parallel to the tracks or walking diagonally?[271] Did lower courts misread the federal general common law of contributory negligence?[272] Exactly how settled was Pennsylvania's rejection of the "permissive pathways" doctrine?[273] None of the lawyers sensed that *Erie* might be a bombshell, and even the railroad's brief referenced "persistent criticisms of *Swift v. Tyson*" only en route to showing that such critiques were "misdirected."[274] For

265. *See* Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1635 (2002).

266. *Cf.* WHITE, *supra* note 202, at 488.

267. *See supra* Sections I.A.1–I.A.2(a).

268. *Erie*, 304 U.S. at 69.

269. Younger, *supra* note 30, at 1020–21.

270. Tompkins v. Erie R.R., 90 F.2d 603, 604 (2d Cir. 1937), *rev'd*, *Erie*, 304 U.S. 64 (1938); *see also, e.g.*, Younger, *supra* note 30, at 1022–23; Michael E. Smith, *Let Us Now Praise Famous Men*, 82 CALIF. L. REV. 1643, 1643 (1994) (book review).

271. *E.g.*, Brief on Behalf of Petitioner at 4, 7–9, *Erie*, 304 U.S. 64 (No. 367).

272. *E.g.*, *id.* at 46–48.

273. *E.g.*, Brief on Behalf of Respondent at 18–26, *Erie*, 304 U.S. 64 (No. 367).

274. *See* PURCELL, BRANDEIS, *supra* note 30, at 97–101.

both sides, the main puzzle was to understand why the Court chose to hear the case at all.[275]

The railroad did try to somewhat limit the application of *Swift* and its successors, claiming that the dividing line between general and local law should be whether relevant state cases were firmly established.[276] On this approach, general common law would apply in federal and state courts alike, but only for undecided questions. When doctrine is firmly established, state courts are duty bound to follow past precedents instead of general principles, and Erie's lawyers claimed that federal courts should do the same.[277]

Tompkins replied with a barrage of Supreme Court decisions that had ignored settled state law.[278] Echoing the bond cases, Tompkins wrote that "[t]he ultimate aim of both [state and federal courts] is justice, and where a State Court has gone astray, to compel Federal adhesion to such injustice is not only to destroy the judicial function but to make a feti[s]h of legalistic conflicts principles."[279] Tompkins claimed that, even if the Court was sometimes vague in separating local and general law, a broad standard was the right one: "Let the Federal Courts exercise their own judgment on all principles of general law, except where local rules of property, . . . [or] peculiar local customs . . . have grown up."[280]

Erie's constitutional arguments were never briefed or argued, and this was because the experienced lawyers on the scene—including the district judge and Second Circuit panel—unanimously failed to anticipate *Erie*'s result or rationale in any way.[281] Though some intellectuals had criticized *Swift* for nearly sixty-five years, there was no signal that the case might be overruled until Brandeis's opinion was announced from the bench.[282]

275. *See* Robert H. Jackson, *The Rise and Fall of* Swift v. Tyson, 24 A.B.A. J. 609 (1938); PURCELL, BRANDEIS, *supra* note 30, at 98.

276. Brief on Behalf of Petitioner, *supra* note 271, at 28–38 & n.1.

277. *Id.*

278. Brief on Behalf of Respondent, *supra* note 273, at 6–12, 17–18.

279. *Id.* at 13.

280. *Id.* The railroad's reply brief did not revisit its theory of "settled" state law.

281. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 87–90 (1938) (Butler, J., dissenting); Tompkins v. Erie R.R., 90 F.2d 603, 604–05 (2d Cir. 1937) (detailing lawyers' arguments and the court of appeals' conclusion), *rev'd*, *Erie*, 304 U.S. 64 (1938); Younger, *supra* note 30, at 1020–21 (discussing relevant proceedings in district court).

282. Justice Brandeis "pointedly inquired" about *Swift v. Tyson* at oral argument, but such questions were not understood to prefigure any radical decision by the majority of Justices. PURCELL, BRANDEIS, *supra* note 30, at 99.

To construe *Erie*'s arguments as inevitable or necessary is victors' history soaked in hindsight. Some theorists viewed *Swift* as a "headless monster" at the time,[283] but the lawyers and judges who participated in *Erie* missed that memo. *Erie*'s litigative context shows that the decision was not compelled by a consensus shift in legal thinking any more than *Swift* was compelled by a consensus view of financial necessity.[284] *Swift* had weathered critiques since 1873, and when *Erie* came, it shocked its participants like a thunderbolt.[285] The Court's decision was not the lingering consequence of a civil war, nor was it some natural dawn that had gradually broken *Swift*'s jurisprudential darkness. Instead, *Erie* was a historically contingent product of the Court and its members at the time.

b. Judges

In search of originalist context, *Erie*'s interpreters have often turned to biography, as Louis Brandeis is among America's most famous judges, and *Erie* is his most famous opinion.[286] This subsection considers the virtues and flaws of seeking *Erie*'s implied meaning based on details about its author. Edward Purcell's book, *Brandeis and the Progressive Constitution*, offers a strong argument for viewing *Erie* this way, and his thesis appears in striking terms:

> Most immediately, [*Erie*] was due to Brandeis. The Court's decision was largely due to his drive to overrule *Swift*, and its opinion was almost wholly due to his insistence that it rest . . . on specific constitutional grounds of his own choosing. *Erie* was, perhaps to an unusual degree, a decision of the

283. GILMORE, *supra* note 15, at 61.

284. *See supra* note 137 and accompanying text.

285. *See* PURCELL, BRANDEIS, *supra* note 30, at 97–101; Jackson, *supra* note 275, at 609 (speculating that "[t]he first intimation that all was not well must have come when the Supreme Court granted certiorari," though of course that is precisely what the Erie Railroad's petition had sought). It is especially hard to think that a railroad's attorney would have ever knowingly jeopardized the longstanding existence of corporate-favorable federal general common law, and the historical record does not suggest that counsel did so in *Erie*. *See* Jackson, *supra* note 275, at 609 (noting that "the railroad company in its brief was careful to avoid any suggestion that its argument involved a repudiation of *Swift v. Tyson*").

286. *Compare* Olmstead v. United States, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting) (privacy), *and* Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring) (free speech), *with* Younger, *supra* note 30, at 1011 ("[*Erie*] is the keystone of the procedure course taught at every American law school.").

> Supreme Court that embodied the well-considered and fundamental constitutional theory of only a single justice.[287]

A major consequence of treating *Erie* and Brandeis as exactly identical is to displace a textualist focus on states-rights federalism in favor of an originalist analogy to authorial intent. In this Article's terminology, Purcell seeks to focus on *Erie*'s implied meaning rather than its declared meaning, and that choice of methodology has serious substantive consequences. Like many modernists, Purcell seeks to shelve *Erie*'s awkward text in order to interpret the case based on broad constitutional principles—such as judicial restraint and separation of powers—that a "good progressive" like Brandeis might have endorsed.[288] According to Purcell, Brandeis's *Erie* opinion "implemented the Progressive values that he had absorbed, nourished, and articulated for a lifetime[, especially including] what he regarded as the compatible causes of social justice, organizational efficiency, and popular government."[289]

Purcell insists that interpreters can be misled by reading *Erie* too closely, as the opinion's botched language could muddy the constitutionally progressive truth that lies beneath.[290] There is no denying that *Erie* quotes Justice Field's dual-sovereignty federalism and uses language from the Tenth Amendment, but Purcell insists that such elements do not represent what Brandeis stood for in life.[291] Therefore, they cannot describe what his judicial masterwork *really meant*.[292]

287. PURCELL, BRANDEIS, *supra* note 30, at 114. The strength of Purcell's personal focus on Brandeis overwhelms his acknowledged caveats concerning "sweeping political, social, and legal developments that extended back for more than half a century." *See id.* at 109, 113–14.

288. *See id.* at 120–24, 190–91 (explaining Brandeis's *Erie* decision as a link between his ideas of judicial restraint and social progressivism).

289. *Id.* at 140, 165.

290. *See id.* at 296 ("The opinion's relatively terse and misleading language compounded the normal problems of interpretation . . . ."); *id.* at 156 ("The opinion, in sum, was brief—perhaps even gnomic—and devoid of detailed legal and social analysis. Its purposes were Brandeisian, but its argument was not."); *id.* at 159 ("Brandeis treated the social facts sketchily and quite inaccurately, and he relied on a picture of the world that he fundamentally rejected."); *id.* at 163 ("Why would Brandeis write such a flawed, abstract, oblique, and misleading opinion? . . . [I]n the context of early 1938, he had quite a number of reasons for doing so."); *id.* at 163–64 (listing five possible rationales underlying the opinion).

291. *See id*. at 114, 179, 182, 189 (drawing distinctions between Brandeis's ideology and the *Erie* opinion's text).

292. *See id.* at 6, 305 (urging readers to look past *Erie*'s textual meaning).

A second consequence of Purcell's biographical approach stems from his conclusion that *Erie*'s implied meaning was properly understood for only a brief period of time.[293] Purcell portrays Brandeis as a singularly personal link between Holmes's critique of *Swift*'s theoretical "fallacies" and socially progressive constitutionalism.[294] The climax of Brandeisian jurisprudence, however, had nearly passed when *Erie* was decided. Brandeis left the Court within a year, and he died in 1941.[295] By Purcell's account, the centralization surrounding World War II altered "the landscape of American life . . . dramatically," such that Brandeis's "political rhetoric of 'Progressivism' suddenly appeared quaint and even archaic."[296] For this reason, Purcell's book is largely dedicated to explaining how the Brandeisian "original *Erie*" was coopted and distorted after just a few years by subsequent theories and political movements.[297]

To appreciate disputes over how to characterize *Erie*'s implied meaning, one might consider a different biographical interpretation, drawn from Anthony Freyer's book *Harmony and Dissonance*.[298] Freyer views the Court's *Erie* opinion not as espousing Brandeis's own idiosyncratic progressivism, but as a confluence point for *Swift*'s critics over a broader timespan.[299] *Erie* cited a variety of sources: from the arch-Texan Robert Street to Field's rant in *Baugh*, from the urbane theorizing of John Chipman Gray to Charles Warren's statutory research.[300] Freyer's image of an eclectic Brandeis who "gathered his citations" describes a fastidious quote-clipper more than a visionary progressive prophet.[301]

Some difficulties with biographical analysis of *Erie* are somewhat endemic to biography as a genre. For example, the personalized subject of a biography can be celebrated, simplified, or given inflated

293. *Id.* at 195 (noting that the "legal, social, and political concerns" articulated in *Erie* were "passing away as Brandeis delivered his opinion").

294. *See id.* at 137 ("Brandeis was inspired by a related motive, private and compelling. Perhaps because of his advancing age, [Brandeis] viewed *Erie* as an opportunity to pay his last respect to the departed Holmes.").

295. *See id.* at 195–201; G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 577, 607 (1995).

296. *See* PURCELL, BRANDEIS, *supra* note 30, at 198–99.

297. *See infra* Section I.B.3 (charting *Erie*'s developmental meaning).

298. FREYER, HARMONY, *supra* note 30.

299. *Id.* at 131–42.

300. *See* FREYER, HARMONY, *supra* note 30, at 85–100; *see also* Erie R.R. v. Tompkins, 304 U.S. 64, 72 & n.4 (1938).

301. FREYER, HARMONY, *supra* note 30, at 133.

importance.[302] Bulky organizing labels—including Purcell's "progressivism"—often do not fit particular individuals very well.[303] And it can be hard to connect any individual's life with collectively written products like Supreme Court opinions.

Problems of this sort become particularly evident if one considers Brandeis's colleagues, who played various important roles in producing the *Erie* majority. For instance, an early Brandeis draft described the Court's constitutional ruling very tentatively: "We need not determine whether the objections disclosed by experience are alone sufficient reason for abandoning [*Swift*]."[304] It was a comment from Justice Stone that pushed Brandeis to write more forcefully: "If only a question of statutory construction were involved, we should not be prepared to abandon [*Swift*]."[305] Likewise, Chief Justice Hughes caused Brandeis to add longer quotations from Field than he had planned, and it was Hughes who first said at conference: "If we wish to overrule *Swift v. Tyson*, here is our opportunity."[306]

Even Justice Butler in dissent influenced the Court by requesting clarification of "precisely the principle or provision of the Constitution held to have been transgressed."[307] Brandeis replied with Tenth-Amendment rhetoric concerning "rights" that were "reserved . . . to the several states."[308] And, indeed, it was the physically failing Justice Cardozo who made certiorari possible in the first place by granting the railroad a preliminary stay.[309] Insofar as all of these different people—with all of their disparate goals and beliefs—were significant in *Erie*'s creation, then Brandeis cannot be retrofitted as the decision's single interpretive compass.

A similar challenge concerns the uneasy relationship between "Brandeis's constitutional progressivism" and the non-Brandeisian, nonprogressive words in *Erie*'s decisive third section. As a matter of intellectual genealogy, Holmes's dissents echo nineteenth-century

302. *See* Nick Salvatore, *Biography and Social History: An Intimate Relationship*, 87 LABOUR HIST. 187 (2004).

303. *See* Daniel T. Rodgers, *In Search of Progressivism*, 10 REV. AM. HIST. 113, 114 (1982).

304. FREYER, HARMONY, *supra* note 30, at 135, 138.

305. Erie R.R. v. Tompkins, 304 U.S. 64, 77 (1938); *see* FREYER, HARMONY, *supra* note 30, at 135, 138.

306. FREYER, HARMONY, *supra* note 30, at 131 (citing 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 710 (1951)); PURCELL, BRANDEIS, *supra* note 30, at 179.

307. PURCELL, BRANDEIS, *supra* note 30, at 179–80.

308. *Id.*

309. Younger, *supra* note 30, at 1023–24.

commentary, and section three of *Erie* embraces Holmes. Yet Holmes had a conflicted relationship with "progressivism," and *Swift*'s early critics were not progressives by any metric—nor was Field in *Baugh*.[310]

Perhaps the correct answer is to acknowledge, contrary to Purcell's thesis, that *Erie*'s decisive repudiation of *Swift* had no necessary or enduring connection with Brandeisian progressivism. Every word in part three could have been written by a nonprogressive jurist like Holmes or Street, and some words that Brandeis chose to include in that section were not progressive at all. Methodological and substantive tensions between the textualism of *Erie*'s declared meaning and the originalism of the decision's implied meaning could hardly be more starkly represented.

To read *Erie* as its author's creation is obviously correct in one sense, but there are many ways to interpret that fact. One could follow Purcell's invitation and deemphasize text in favor of idealized biography. One could embrace Freyer by haphazardly mixing Brandeis's progressive motivations with states-rights federalism and abstract theories. Or one could conclude that, whatever the opinion's author intended to say, *Erie* was simply not well drafted. Using Brandeis's personal experiences to interpret *Erie* may be attractive for modern interpreters who happen to appreciate his legacy more than that of Field or even Holmes. But political imperatives to redeem *Erie* as a fundamentally desirable precedent cannot resolve interpretive questions about how biographical analysis should fit with other historical materials, including the Court's textual opinion itself.

c. Contemporary Reactions

Erie's puzzling text and fractured context led the *Harvard Law Review* to the remarkable understatement that "[t]he opinion in *Erie Railroad v. Tompkins* lacks much of the precision which an important reexamination of constitutional distribution of power might be expected to contain."[311] That reaction, however, represented only the smallest part of *Erie*'s contemporary audience. Even vocal critics of the Court's constitutional argument believed that they understood the decision—including Felix Frankfurter, a friend and associate of Brandeis, who would soon join the Court himself.[312] In 1938, then-

310. WHITE, *supra* note 202, at 378–79.

311. *Congress, the* Tompkins *Case, and the Conflict of Laws*, 52 HARV. L. REV. 1002 (1939).

312. PURCELL, BRANDEIS, *supra* note 30, at 196, 202.

Professor Frankfurter wrote privately that he "disagree[d] *in toto* with Brandeis' constitutional view as to *Swift v. Tyson*" because *Erie* had wrongly relied on the Tenth Amendment and extremist federalism.[313] Most early commentators were also critical, if they bothered to mention *Erie*'s constitutional holding at all.[314]

Erie did not win immediate fans based on what Purcell has called its progressive constitutionalism, yet some observers did eventually appreciate the decision's significance. Initially, *Erie* was thoroughly unmentioned by general circulation periodicals.[315] In May 1938, however, Justice Stone told journalist Arthur Krock that *Erie* was "the most important opinion since I have been on the court," sparking several national newspaper articles.[316] Krock later wrote that his own

313. *Id.* at 202–03.

314. *E.g.*, Joseph C. Hutcheson, Jr., *Status of the Rule of Judicial Precedent*, 14 U. CIN. L. REV. 271 (1940) (conference of the Cincinnati Bar Association).

315. Younger, *supra* note 30, at 1029 (noting a cursory *Law Week* entry as the lone exception).

316. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 476–77 (1956). For early newspaper reactions to *Erie*, see Arthur Krock, *A Momentous Decision of the Supreme Court*, N.Y. TIMES, May 3, 1938, at 22 (calling the decision "transcendently significant" in its decision to reverse the venerable landmark, "Smith [sic] v. Tyson"); *id.* (declaring *Erie* "a stout[] blow in behalf of the original American system"); *id.* ("State Rights Reasserted"); *id.* ("[Reed] wondered whether Justice Brandeis's decision does not deprive Congress 'of power to declare what rules of substantive law shall govern the Federal courts.' Many lawyers think it does."); Arthur Krock, *Final TVA-Utilities Settlement Seems Nearer*, N.Y. TIMES, May 6, 1938, at 20; Arthur Krock, *More About the Epochal* Tompkins *Decision*, N.Y. TIMES, May 4, 1938, at 22 (describing the Court's "voluntary confession of error" and "admission of error under pressure"); Chesly Manly, *Black's Friends Rush to Defense of Legal Ability*, CHI. DAILY TRIB., May 16, 1938, at 4 (describing *Erie* as a "history making opinion [that] grew out of an obscure damage suit"); Lewis Wood, *Court Again Helps New Deal*, N.Y. TIMES, May 29, 1938, at 40 ("Aside from cases already mentioned, perhaps the most momentous event of the term was the upset of a ninety-six-year-old rule in the *Erie vs. Tompkins* case. . . . [T]he court swept aside ancient precedents, newly holding that State court interpretation of the Federal law shall be applied by Federal courts which in the past have used their own definitions of the general law."); *In Praise of Black*, WASH. POST, June 10, 1938, at X9 (statement of Harold C. Havinghurst) ("Subsequently the majority of the court came to Black's point of view, and the old doctrine was expressly overruled in Erie Railroad Co. v. Tompkins."); *id.* (explaining that "Holmes's dissent triumphs"); *id.* ("Once more the Supreme Court's dissent becomes the Supreme Court's decision, but rarely in a more momentous instance than this. And there is romance, too, in what even the layman can see is no mere musty matter of law."); *id.* ("Justice Holmes's co-dissenters . . . lived on . . . to the day when the Supreme Court was so constituted that it would follow them and the spirit of Holmes in righting the errors of almost a hundred years."); *Overlooked by the Press*, WASH. POST, May 6, 1938, at X8 ("[*Erie*] is of perhaps greater fundamental importance than the NRA, the AAA or other much publicized judgments of recent years."); *id.* (calling *Erie* "perhaps the most interesting story to emanate from the Court in this most interesting period of its history"); *id.* ("It abruptly reverses a trend toward centralization which has been

Erie article had generated a responsive "shower of approving letters from lawyers."[317]

Frankfurter sought to further boost *Erie*'s public profile by writing to President Roosevelt on April 27:

> I certainly didn't expect to live to see the day when the Court would announce, as they did on Monday, that it itself has usurped power for nearly a hundred years. And think of not a single New York paper—at least none that I saw—having a nose for the significance of such a decision.[318]

In July 1938, Solicitor General Robert Jackson delivered a lecture to an American Bar Association section entitled "The Rise and Fall of *Swift v. Tyson*."[319] Jackson's speech celebrated *Swift*'s demise, yet he also refused to endorse *Erie*'s constitutional reasoning.[320]

Even as journalists trumpeted *Erie*'s significance and impact, they wrote surprisingly little that the general public could understand. There was no discussion, for example, of federal general common law's effect on corporate litigation, municipal bonds, or workplace accidents.[321] Nor did newspaper accounts recoil at what one writer called "State Rights Reasserted."[322] Despite the Tenth Amendment's obvious and acknowledged appearance, no contemporary public discussion ever linked *Erie* with pre-New Deal federalism. To be sure, *Erie* was not celebrated as an instance of anti-corporate progressivism, but its apparent revival of states-rights ideology also was not construed as resuscitating discredited jurisprudential principles from the previous decade.

This historical record seems to indicate that the press and public interpreted *Erie* alongside other seismic changes at the Court in 1938—

proceeding for nearly a century in the judicial field. It reaffirms and re-establishes the absolute sovereignty of the States in the broad field of 'general law.' . . . And by so doing it throws incalculable emphasis on the States as the vital and sovereign units in the American form of government."); *Supreme Court Admits an Error: Decision of 1842 Reversed in Opinion Handed Down by Justice Brandeis*, DAILY BOS. GLOBE, May 1, 1938, at C4.

317. Krock, *Final TVA-Utilities Settlement Seems Nearer*, *supra* note 316, at 20.

318. Younger, *supra* note 30, at 1029.

319. Jackson, *supra* note 275, at 609.

320. *See id.* at 644; Craig Green, *Can* Erie *Survive as Federal Common Law?*, 54 WM. & MARY L. REV. 813 (2013).

321. Even the "romance" of Warren's statutory research drew more press than these issues of national legal policy. Krock, *More About the Epochal* Tompkins *Decision*, *supra* note 316, at 22.

322. Krock, *A Momentous Decision of the Supreme Court*, *supra* note 316, at 22.

though *Erie* is seldom viewed in this light by modern audiences.[323] For decades, federal courts had been pilloried as subverting democratic control and economic health.[324] National judges were seen as captives of formalism and constitutional purity that had invalidated legislative reforms and damaged ordinary Americans, with Roosevelt's court-packing plan as a high-water mark of such political critique.[325]

In this highly volatile context, *Erie* offered a sudden public apology—"voluntarily" and quite unsolicited, as the newspapers wrote—that explicitly renounced its predecessors' longstanding jurisprudence as unconstitutional.[326] Brandeis and Holmes had been dissenters on issues of federal general common law as recently as 1928.[327] Ten years later, reinforced by Roosevelt's appointees, their views now ruled the Court, and it was the old regime's holdover "Horsemen" who fulminated in dissent. The New Deal's good guys had won again, and constitutional progress marched on with confidence. Perhaps the public and press did not need to know much more than that.

Erie's radical judgment fueled different reactions among various groups. Legal practitioners saw the case as a major development in their clients' battles over federal general common law, which had lasted for a half-century.[328] Legal academics attacked the Court for shoddy reasoning, if not bad results.[329] And although the press seemed pleased with *Erie*, it is less clear what their readership truly understood about the case.

For interpretive purposes, these reactions to *Erie* from its time are extremely useful in contradicting certain modern views of the decision. For example, no one in 1938 celebrated *Erie* as a grand case involving separation of powers, dual-sovereignty federalism, or Brandeisian progressivism. Evidence of *Erie*'s understood meaning makes it harder to accept that, for example, *Erie*'s great progressive holding fell in the

323. *Compare, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 192, 769 (5th ed. 2013) (discussing major constitutional shifts in the late 1930s without mentioning *Erie*), *with, e.g.*, BARBARA ALLEN BABCOCK ET AL., CIVIL PROCEDURE: CASES AND PROBLEMS 509–10 (5th ed. 2013) (presenting *Erie* without mentioning contemporary changes in constitutional law).

324. PURCELL, LITIGATION, *supra* note 30, at 26.

325. *Id.* at 218; *cf. id.* at 26 (quoting Sen. Robert LaFollette's view of federal courts as "a Frankenstein which must be destroyed").

326. *Supreme Court Admits an Error*, DAILY BOS. GLOBE, *supra* note 316, at C4.

327. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532 (1928) (Holmes, J., dissenting).

328. PURCELL, LITIGATION, *supra* note 30, at 22–27.

329. PURCELL, BRANDEIS, *supra* note 30, 216–28 (collecting sources).

woods without anyone hearing it at the time. Likewise, *Erie*'s purportedly constitutional basis was viewed as the decision's most disfavored element, and also its least important. The grand 'constitutional *Erie*' that has sparked so much modern controversy lacks any basis in the original history of 1938; instead, we shall see that it was the novel creation of legal-process scholars in the 1950s and political conservatives in the 1980s.

3. Living Precedentialism: Developmental Meaning

Tracing *Erie*'s developmental meaning is difficult not only because the story spans eighty years, but also because it concludes in the ambiguous present. This subsection will consider three categories of post-hoc reactions—from courts, commentators, and policymakers—that have contributed to make *Erie* what it is today.

Federal courts' reaction to *Erie* was uniformly and immediately positive.[330] President Roosevelt appointed six new Justices after *Erie*, and all of them focused on implementing the decision rather than undermining it.[331] Judges debated *Erie*'s scope, but not its correctness; thus, the Court quickly addressed how to interpret unsettled state law, how *Erie* applied to conflicts of law, and *Erie*'s relationship to the Federal Rules of Civil Procedure.[332] These questions were resolved in exclusively practical terms, eschewing constitutional arguments that some Justices (i.e., Reed and Frankfurter) had never embraced, and that other Justices (i.e., Wiley Rutledge and Frank Murphy) were inclined to hedge or shelve.[333]

330. Ruhlin v. N.Y. Life Ins. Co., 304 U.S. 202, 208–09 (1938); Bash v. Balt. & O.R. Co., 102 F.2d 48, 49 (3d Cir. 1939); *see, e.g.*, Sampson v. Channell, 110 F.2d 754, 757–61 (1st Cir. 1939); Coca-Cola Bottling Co. v. Munn, 99 F.2d 190, 193 (4th Cir. 1938); Brabham v. Mississippi, 97 F.2d 251, 253 (5th Cir. 1938); Deslauriers Steel Mould Co. v. Gangaway, 97 F.2d 78, 79 (3d Cir. 1938); Hack v. Am. Sur. Co., 96 F.2d 939, 946 (7th Cir. 1938). None of these discussed *Erie*'s constitutional basis.

331. These appointees were Felix Frankfurter (1939), William Douglas (1939), Frank Murphy (1940), James Byrnes (1941), Robert Jackson (1941), and Wiley Rutledge (1943). THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–2012 (Clare Cushman ed., 2013).

332. Sibbach v. Wilson & Co., 312 U.S. 1, 10–11 (1941); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); Fidelity Union Tr. Co. v. Field, 311 U.S. 169, 172 (1940).

333. *See supra* notes 313 and accompanying text (discussing the views of Frankfurter, J.); Erie R.R. v. Tompkins, 304 U.S. 64, 91–92 (1938) (Reed, J., concurring in part); Guar. Tr. Co. v. York, 326 U.S. 99, 113 (1945) (Rutledge, J., dissenting, joined by Murphy, J.).

Ever since 1938, the Court has struggled to distinguish state "substantive" law from federal "procedural" law,[334] yet the Court has never again relied on *Erie*'s indecipherably weak constitutional basis.[335] To the contrary, the Court has synthesized *Erie*'s "twin aims" as entirely practical entities: "discouragement of forum shopping and avoidance of inequitable administration of the laws."[336] Furthermore, even as applicable doctrinal tests have become tangled over the years, no judicial opinion has suggested overruling *Erie*; instead, through decades of unbroken application and repetition, the case has only increased in doctrinal prominence.[337]

Compared to *Erie*'s consistently positive judicial reception, academic commentary has been diverse and unstable. Some academics in the decades after *Erie* shared Frankfurter's view that the case was rightly decided but wrongly reasoned.[338] Another group objected that *Erie* limited federal courts' independence, transforming them into a kind of "ventriloquist's dummy to the courts of some particular state."[339] One professor even claimed that *Erie*'s repudiation of "general common law" undermined the standard law school practice (that continues today) of studying torts, property, and contracts without any state-specific focus.[340]

Even as federal courts ignored *Erie*'s constitutional basis, however, a central figure in the academy attempted a grand reconstruction. Henry Hart was a founding influence in the "legal process" movement, and he co-authored the greatest casebook in American history.[341] Many post-war academics expressed confidence in their ability to design systems that, aided by properly examined facts,

334. *See, e.g.*, Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393 (2010).

335. *See, e.g.*, Gasperini v. Ctr. of Humanities, Inc., 518 U.S. 415, 426–27 (1996). *But cf., e.g.*, *Shady Grove*, 559 U.S. at 415–16 (invoking metaphysics and referring to *Erie*'s "constitutional source").

336. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

337. *E.g.*, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2535 (2011); Sosa v. Alvarez-Machain, 542 U.S. 692, 740–41 (2004).

338. PURCELL, BRANDEIS, *supra* note 30, at 216–28 (collecting sources).

339. Richardson v. Comm'r, 126 F.2d 562, 567 (2d Cir. 1942) (Frank, J.), *quoted in* Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 284 (1946).

340. PURCELL, BRANDEIS, *supra* note 30, at 217.

341. Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 688 (1989) (book review) ("[I]ts first edition was beautiful and brilliant—probably the most important and influential casebook ever written."); Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 954–55 (1994).

could beneficially organize human life.[342] Hart's sweeping theories about American governance—and especially federal courts—amply reflected this self-assured tone.

Hart offered a rationalized and panoramic view of state and federal legislatures and courts. Whereas Frankfurter saw diversity jurisdiction as a quaint vestige or mistake, Hart saw it as a reminder of national unity and interstate activity under law. In their exercise of diversity jurisdiction, elite and disinterested federal judges, aided by efficient federal procedures, were able to deliver a "juster justice than state courts."[343] On the other hand, Hart did believe that full adjudicative creativity was appropriate only in federal cases that applied federal substantive law.[344]

For Hart, *Erie* therefore struck the perfect balance and was "superbly right" in requiring federal courts to follow state common-law precedents.[345] Hart articulated a "logic of federalism" that arranged state and federal courts within reasoned spheres of pluralist decisionmaking.[346] In Hart's view, the "perpetual confliction" that had plagued *Swift v. Tyson* was more than a pragmatic nuisance.[347] He saw the application of "inconsistent systems of law" in the same geographic space as positive proof that *Swift*'s legal architecture was irretrievably flawed.[348]

Hart's core notion was that all legal institutions have a proper, defined, and orderly role. Hart thought that some post-*Erie* decisions went too far in making federal courts "only another court of the state,"[349] yet he deserves recognition as the first true theorist of *Erie*. For although Hart claimed fidelity to "the foundations of principle of Justice Brandeis' opinion"—as opposed to its textual terms—he offered under that banner a truly novel analysis of adjudication, federalism, the "constitutional plan," and nearly everything else.[350]

A different approach to *Erie* appeared in the American Law Institute's *Study of the Division of Jurisdiction Between State and*

342. Steven Schryer, *Fantasies of the New Class: The New Criticism, Harvard Sociology, and the Idea of the University*, 122 PMLA 663, 666–69 (2007).

343. PURCELL, BRANDEIS, *supra* note 30, at 246.

344. *Id.* at 244–45.

345. *Id.* at 247.

346. *Id.* at 248–49.

347. *Id.* at 247 (discussing Hart's views); *see supra* note 75 and accompanying text (presenting nineteenth-century objections to federal-state disparities).

348. PURCELL, BRANDEIS, *supra* note 30, at 247.

349. *Id.* at 251.

350. *See id.* at 229.

Federal Courts in 1969.[351] Chief Justice Warren had called for systemic analysis of state and federal courts in "light of the basic principles of federalism," and the report offered exactly that.[352] The study applied legal-process methodologies but disagreed with Hart, concluding that federal courts should generally avoid diversity jurisdiction's "undesirable interference with state autonomy," just as "questions of federal law are [typically] best left to the federal courts."[353]

The ALI study begrudgingly stated that, "[i]f *Erie* had a constitutional base, it was the absence of federal legislative power as to the run of factual situations presented in diversity cases."[354] Yet the authors viewed *Erie* as a manifestly second-best alternative to reducing or eliminating diversity jurisdiction altogether. Thus, the report strongly advocated "the basic proposition that federal courts should not be called upon for the application of state law."[355]

Almost fifty years of *Erie* commentary can be organized by comparing Hart's writings to the ALI's study. One set of academics, like Hart, have ingeniously discovered large parts of their own intellectual theories hidden between the lines of *Erie*'s great and powerful ruling.[356] Such writers embrace *Erie* as a case worth celebrating, but only on the authors' own terms (federalism, separation of powers, or conflicts of law), and often without much attention to historical text or context.[357] A second set of commentators has followed the ALI by quietly ignoring or accepting *Erie*'s vague constitutional basis, while prioritizing instead Frankfurter's practical focus on forum shopping and unfairness.[358]

351. *Id.* at 273–84.

352. *Id.* at 270.

353. *Id.* at 274.

354. *Id.*

355. *Id.*

356. One recent effort to displace *Erie*'s Tenth-Amendment language, based on a mixture of judicial biography and post-*Erie* legal-process theory, is particularly vigorous. Young, *supra* note 30, at 65–69. In a moment of candor about his ahistorical atextualism, Young writes: "If *our* understanding of *Erie* . . . has evolved over time, that is part of the genius of *our* system of precedent." *Id.* at 80–81 (emphasis added). Young's effort to integrate *Erie*-in-1938 as part of his own substantive view of "the contemporary structure of constitutional doctrine[,]" *id.* at 82, connects his scholarship with political projects in other eras, which at various times have created and relied upon a wide number of different "contemporary structure[s] of constitutional doctrine" in promoting diverse political results. Green, *Constitutional Structure*, *supra* note 30, at 661.

357. *See, e.g.*, sources cited *supra* note 30.

358. *See* Green, *Repressing* Erie, *supra* note 30, at 596 n.4 (collecting sources).

Perhaps the most important aspect of *Erie*'s developmental meaning has been its enduring practical effect on diversity jurisdiction. With only a few exceptions,[359] *Erie*'s elimination of federal general common law has defanged political fights over diversity jurisdiction, making that institution safe—almost boring—in the decades to follow. Before *Erie*, many politicians and commentators had clamored to restrict or abolish diversity jurisdiction, especially insofar as the latter symbolized pro-corporate abuse.[360] After 1938, however, diversity jurisdiction changed from a political hot button to a harmless oddity.[361]

Although there remain differences today between state courts and federal courts, post-*Erie* variations seem mild and inoffensive by comparison to the "confliction" that *Swift* produced.[362] *Erie* ended the *Taxicab*-style application of flagrantly different substantive law to identical cases in courthouses just blocks apart.[363] And a vital precondition for political objections to *Swift*'s "forum shopping" was that litigants *as well as the public* had to identify circumstances where the federal forum would make a difference—otherwise the public could not know what to protest. With one stroke, *Erie* drastically reduced those differences' number, scope, and public visibility.

4. Lessons Learned: *Erie* as Regime Change

Everything that modern lawyers think they know about *Erie* emerged years and decades after the fact. *Erie*'s current meaning exists within an elaborate cultural framework that students, lawyers, and scholars use to interpret the case. Erased from popular memory are *Lochner*-era notions of state sovereignty that were originally inscribed as the decision's justification. Lost are commitments to constitutional arguments that the Court once viewed as both comfortable and necessary. Forgotten is the radicalism of discarding a century of precedent that no litigant had challenged or defended. Faded are the

359. *See* Suzanna Sherry, *Overruling* Erie*: Nationwide Class Actions and National Common Law*, 156 U. PA. L. REV. 2135, 2138–40 (2008) (discussing the Class Action Fairness Act of 2005).

360. PURCELL, BRANDEIS, *supra* note 30, at 77–85; PURCELL, LITIGATION, *supra* note 30, at 15.

361. PURCELL, BRANDEIS, *supra* note 30, at 265–69.

362. For a general discussion of these differences, see Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977), and Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797 (1995). *See also* William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999); Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593 (1991).

363. Guar. Tr. Co. v. York, 326 U.S. 99, 109 (1945).

generational and constitutional politics that were once unmistakably crisp.

By comparison to its complex history, today's *Erie* is a cartoon: a monument to whiskered Holmesian genius, penned by the self-restrained Brandeis, and bolstered by hard-boiled practicalities of forum shopping. Hardly anyone cares about *Erie*'s constitutional analysis, and only experts wonder how the Court—especially Brandeis—could embrace such poorly crafted arguments.[364] *Erie* never needed a constitutional basis,[365] which makes the Court's decision to produce one even more surprising. This Article has used unnoticed historical evidence and untried analytical techniques to challenge conventional interpretations of *Erie* as an iconic case. Our last topic in this subsection is to examine how such a reinterpretation of *Erie* casts revisionist light on this period of Supreme Court history as a whole.

This Article has characterized *Erie*'s original meaning as a politicized generational rivalry between twentieth-century revolutionaries and a demonized old guard.[366] In the 1950s, however, legal-process scholars' obsession with self-restraint obscured *Erie*'s assertiveness in its own time. Insofar as one recovers an originalist version of *Erie*, that reinterpretation could destabilize broader images of the New Deal Court as constitutionally "passive" as opposed to "activist."[367]

Ordinary descriptions of the 1930s characterize Justices Brandeis, Cardozo, and Stone as internalizing objections to *Lochner* and therefore instructing courts to uphold legislative expressions of democratic will.[368] According to this familiar tale, Roosevelt appointed new judges, Roberts "switched in time," and the Court turned an institutional corner, eschewing rootless doctrines such as freedom of contract and substantive due process.[369] The post-1937 Court was supposedly different from its predecessor because the new crop of

364. *Cf.* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (articulating a "series of rules under which [the Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision").

365. The Court certainly could have accepted Reed's argument as an alternate holding. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring in part).

366. *See supra* Sections I.B.1–I.B.3.

367. To understand how terms like "judicial activism" entered popular discussion, see Green, *supra* note 6, at 1201–09.

368. BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000); PURCELL, BRANDEIS, *supra* note 30, at 30.

369. *See* W. Coast Hotel v. Parrish, 300 U.S. 379, 391 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 43–44 (1937).

judges steadfastly refused to manipulate the Constitution in the service of their own normative visions.[370]

The New Deal Court never matched this image of jurisprudential discipline, as one can see by comparing an originalist view of *Erie* with its celebrated companion case, *United States v. Carolene Products*.[371] In *Carolene Products*, the makers of "Milnut" challenged a federal statute that criminalized their blend of skim milk and coconut oil. The producers claimed that combining milk and vegetable fat was a perfectly safe commodity that should be freely bought and sold wherever market forces allowed.[372]

The Court's holding and its now-famous footnote four were a manifesto for the new legal regime, as the majority announced sweeping principles that were entirely unnecessary to the case.[373] For example, the Court bracketed and set aside the extensive congressional record that supported the Filled Milk Act, just so it could declare hypothetically that "in the absence of such [legislative] aids, the existence of facts supporting the legislative judgment is to be presumed."[374] The Court further proclaimed, with remarkable breadth, that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . [one can] preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[375] This was a clear and conscious departure from *Lochner*-era skepticism of legislative policymaking.

Even more expansively, footnote four of *Carolene Products* explained that other cases—which might affect constitutionally protected groups, liberties, and political processes—might require "more exacting scrutiny" and "more searching judicial inquiry" than mere regulation of Milnut.[376] Modern observers have called footnote four "the great and modern charter" of American constitutional law,

370. For an especially pointed expression of this mythology, see Arthur M. Schlesinger Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 73 (using the term "judicial activists" for the first time to describe sitting Justices, in contrast to other Justices who were labeled "champions of self-restraint"). For a modern retelling of this same jurisprudential story, see Obergefell v. Hodges, 135 S. Ct. 2584, 2617–18 (2015) (Roberts, C.J., dissenting).

371. 304 U.S. 144 (1938).

372. *Id.* at 145–47.

373. *Cf. id.* at 148 (sustaining the federal statute based on a clearly applicable twenty-year-old Supreme Court precedent about state laws regulating such milk products).

374. *Id.* at 152.

375. *Id.*

376. *Id.* at 152–53 n.4.

endorsing strong protection for liberty and equality, while requiring judicial deference on topics of economic and social policy.[377] The Court's effort to prescribe a doctrinal architecture for every application of judicial review—especially as footnoted dicta in a case about coconut-fattened milk—represents judicial boldness of the highest order.

In *Carolene Products*, the Court itself crafted both sides of the equation—the commitment to judicial restraint as well as the protection of individual rights—thereby indicating the majority's own view of when and where judges should act. Historians once characterized the Revolution of 1937 as a craven surrender to Roosevelt's court-packing pressure, but that was profoundly wrong.[378] The Court's decisions obviously represented not merely the President's or the public's view of the Constitution; they also reflected ideas of the Justices themselves. The late 1930s embodied a constitutional reformulation *by the Court*, rather than simply the puppeteering of other political agents. Even at the height of their so-called "restraint," Roosevelt's new Justices profoundly revised constitutional jurisprudence and unhorsed an older legal regime that had been dominant throughout their adult lives.[379]

A revisionist account of *Erie*—produced with new techniques and evidence—confirms beyond any doubt that, alongside notions of judicial restraint, the New-Deal Court embraced immense judicial boldness, and it did so well beyond the parameters prescribed by *Carolene Products*.[380] The *Erie* majority collected and invented constitutional arguments without hesitation. *Erie* was nothing like the chastened application of passive virtues that subsequent legal-process scholars would urgently desire.[381]

377. Owen Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979).

378. *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 228–31 (1995).

379. *E.g.*, Erie R.R. v. Tompkins, 304 U.S. 64 (1938); W. Coast Hotel v. Parrish, 300 U.S. 379 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

380. *See supra* Section I.B.1 (detailing constitutional arguments in *Erie* that are unrelated to *Carolene Products*' concern for individual rights and "discrete and insular minorities").

381. *See generally* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (advocating judicial passivity in a prominent example of legal-process scholarship that was published many years after *Erie*).

Nor did the *Erie* decision claim any plausible link to individual rights or democratic process.[382] Instead, *Erie*'s result issued from a Court that was remarkably free to pursue its own constitutional vision. Newly appointed Justices had spent their careers watching the Court implement constitutional beliefs of then-sitting Justices.[383] They had seen Congress and President Roosevelt promote a constitutionally transformative agenda for federal governance.[384] And Roosevelt had dramatically threatened separation of powers by trying to alter the number of Justices in order to serve his political ends.[385]

In the abstract, New-Deal Justices *could have reacted* to those events with self-restrained caution about employing broad constitutional arguments. Having seen the consequences of judicial abuse, the Court could have renounced aggression altogether, perhaps only with exceptions enumerated under *Carolene Products*. But that is not the historical record. In *Erie*, *Carolene Products*, and elsewhere during this period, the legal-process narrative of New Deal restraint appeared only after front-line combat with the old regime was complete.[386] As contemporary support for this jurisprudential image, consider the *Harvard Law Review*'s marvelous analysis of *Erie* in 1938:

> In holding that for nearly a century it had pursued an "unconstitutional" "course" by following *Swift v. Tyson* in an unbroken line of decisions, the Supreme Court has made a startling avowal. Reserving comment we now note only the gratuitous courage of the Court and the fluidity of the Constitution.[387]

Perhaps only in 1938 could such "gratuitous courage" and constitutional "fluidity" have been celebrated so explicitly and earnestly.[388] Basic constitutional principles had become flexible, and the new Court was more pleased than ashamed in announcing that fact.

382. *See generally* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) (prescribing those as justifications for greater judicial activity).

383. LEUCHTENBERG, *supra* note 368, at 25–34.

384. CUSHMAN, *supra* note 368, at 11–43.

385. PURCELL, BRANDEIS, *supra* note 30, at 105.

386. *Cf. supra* notes 338–63 and accompanying text (describing similar phenomena).

387. Commentary, 51 HARV. L. REV. 1245, 1245 (1938).

388. By comparison, some commentators have celebrated and criticized the constitutional fluidity of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *See* sources cited *infra* note 390. But even the historically significant shift on same-sex marriage draws no close comparison to the sudden and grand constitutional revision pronounced by *Erie*. *Obergefell* was presaged by at least three majority opinions over the course of twenty years that had expanded LGBT rights in particular ways. *See* United States v. Windsor,

II. MEANINGS-IN-PROGRESS: *WINDSOR* AND *OBERGEFELL*

Part I examined iconic cases from the nineteenth and twentieth centuries in order to identify different modes of interpretation and their various doctrinal consequences. Such schemes might seem inherently valuable to intellectuals, especially as they transform broader understandings of Supreme Court history.[389] But practicing lawyers and judges will also see pieces on a chess board. Interpretive techniques and evidence can be applied to many doctrinal puzzles, and systematic modes of interpretation (textualism, originalism, living precedentialism) can be used for debates over interpreting any set of vague and powerful precedents.

This Part solidifies precedential interpretation as a general theory—not just a revisionist account of *Erie* and *Swift*—by considering *United States v. Windsor* and *Obergefell v. Hodges*, two cases from the ephemeral present rather than the excavated past. We have seen that applying new interpretive techniques to old and familiar cases can dramatically revise conventional wisdom. But interpretive methodologies are also useful for understanding new iconic precedents. Because so much more historical evidence is available concerning *Swift* and *Erie*, the modern project of interpreting *Windsor* and *Obergefell* should be relatively open and unsettled. Lawyers and judges have struggled greatly over *Windsor*'s meaning, and debates about *Obergefell* continue today.[390] Applying the same techniques we have

133 S. Ct. 2675 (2013); Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996). Also, *Obergefell* explicitly overruled only one per curiam opinion. *See Obergefell*, 135 S. Ct. at 2605, *overruling* Baker v. Nelson, 409 U.S. 810 (1972). As we have seen, *Erie* was altogether unprecedented, as it upended dozens of fully reasoned and explained Supreme Court decisions spanning almost a century.

389. *See supra* Section I.B.4.

390. Katie Eyer, Brown, *Not* Loving*:* Obergefell *and the Unfinished Business of Formal Equality*, 125 YALE L.J.F. 1, 1–3 (2015), http://www.yalelawjournal.org/forum/obergefell-and-the-unfinished-business-of-formal-equality [http://perma.cc/5ZEA-VJV4]; Adam Lamparello, *Justice Kennedy's Decision in* Obergefell*: A Sad Day for the Judiciary*, 6 HOUS. L. REV. OFF REC. 45 (2015); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. (forthcoming 2016); Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. (forthcoming 2016); Emily Bazelon & Adam Liptak, *What's at Stake in the Supreme Court's Gay-Marriage Case*, N.Y. TIMES MAG. (Apr. 28, 2015), http://www.nytimes.com/2015/04/28/magazine/whats-at-stake-in-the-supreme-courts-gay-marriage-case.html [http://perma.cc/68FZ-KLKJ]; Amy Davidson, *The Here and Now of Same-Sex Marriage*, NEW YORKER (Apr. 28, 2015), http://www.newyorker.com/news/amy-davidson/obergefell-v-hodges-supreme-court-same-sex-marriage [http://perma.cc/QK8P-DG9U]; Amy Davidson, *The Supreme Court Reaffirms Marriage Vows*, NEW YORKER (June 26, 2015), http://www.newyorker.com/news/amy-davidson/supreme-court-same-sex-marriage-kennedy [http://perma.cc/8LL3-D9WW]; Adam Liptak, *"Equal*

discussed will illustrate—despite scarce historical materials and with suitably briefer discussion—how precedential interpretation may proceed for *Windsor*, *Obergefell*, or any other important, ambiguous icon that may appear in the future.

To be explicit, nothing in the following analysis depends on whether *Windsor* or *Obergefell* in fact remain enduring icons. My purpose is to analyze the moment when each of these cases did seem important and vague, thereby offering a template that can be used to interpret other precedents with similar characteristics.

In its own time, *Windsor* embodied the notion of "iconic cases" exceptionally well. *Windsor* was the Supreme Court's most outspoken decision involving sexual orientation and same-sex marriage, which in turn represents one of the greatest civil rights debates in this century.[391] Yet we shall see that the Court's textual explanation was so flawed that other interpretive tools were needed to understand what the decision meant. Indeed, nontextual interpretations of *Windsor* were crucial in producing *Obergefell*. And although *Obergefell* answered the biggest doctrinal question left open in *Windsor*, it has now raised other doctrinal puzzles that remain vague and will require precedential interpretation.

One cannot know how or when some other case will emerge that transforms or displaces *Windsor* and *Obergefell* as iconic cases, but that is emphatically not the point. Tomorrow will become history soon enough. For now, it is sufficient to consider what advanced interpretive

Dignity", N.Y. TIMES, June 27, 2015, at A1; Adam Liptak, *Divided Justices Spar over Right to Gay Marriage*, N.Y. TIMES, Apr. 29, 2015, at A1; Adam Liptak, *Justices To Decide Marriage Rights for Gay Couples*, N.Y. TIMES, Jan. 17, 2015, at A1; Jeffrey Toobin, *God and Marriage Equality*, NEW YORKER (June 26, 2015), http://www.newyorker.com/news/daily-comment/god-and-marriage-equality [http://perma.cc/U34B-WBJ9]; Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights* (Univ. of Va. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 42, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642640 [http://perma.cc/ECK3-YQ9E].

391. *See also* Franklin, *supra* note 28, at 873 ("[After *Windsor*,] courts do not treat the marriage question as isolated or exceptional, but rather, as embedded in a larger set of social, political, and legal changes. The invalidation of laws restricting marriage . . . is part of the dismantling of an entire social status regime in which gays and lesbians rank as second-class citizens. . . . Extending marriage rights to same-sex couples . . . is part of a broader equality project founded on the notion that discrimination on the basis of sexual orientation violates core constitutional values."); *id.* at 874 ("[After *Windsor*,] courts have repeatedly concluded . . . that efforts to recruit or coerce people into heterosexuality . . . cause serious harm—to individuals of all ages and to society itself. . . . [C]ourts' reasoning about liberty in recent same-sex marriage cases—like their reasoning about equality—has applications beyond the context of marriage.").

techniques can reveal about two of the most difficult and interesting Supreme Court decisions in recent memory.

A. Windsor v. United States*: An Iconic Practice Run?*

As with constitutional and statutory textualism, to focus on *Windsor*'s declared meaning draws a useful separation between what the decision-maker said and what a later audience might wish to hear. The distinction between textual and nontextual interpretation is especially important for politically charged issues like same-sex marriage, and this Section will consider the *Windsor* opinion's textual flaws because—much like *Erie*, *Brown*, or *Marbury*—they imply a demand for interpretive materials outside the judicial text.

1. Textualism: Declared Meaning

Edith Windsor and Thea Spyer were married in Canada, and they lived as a married couple under the laws of New York.[392] When Spyer died, her property went to Windsor, who claimed tax exemption as a "surviving spouse."[393] The federal government denied that exemption based on the Defense of Marriage Act ("DOMA"), which declared that, in every federal statute, the word "marriage" should include only "a legal union between one man and one woman" and "spouse" should include only members of an opposite-sex marriage.[394] Windsor challenged that denial on equal protection grounds.[395] The Supreme Court ruled five to four in Windsor's favor, and the text of Justice Kennedy's majority opinion blended three constitutional themes.

Windsor's first textual theme was constitutional equality. The Court held that DOMA "single[d] out" same-sex marriages and "impose[d] a disability" by declaring them "less worthy than the marriages of others."[396] DOMA's refusal to recognize same-sex marriage was "unusual" because it created disparities between the treatment of couples under federal statutory law and state family law.[397] The Court saw such disparities as unconstitutionally broad and "motived by an improper animus or purpose."[398]

392. *Windsor*, 133 S. Ct. at 2682.
393. *Id.*
394. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2012)), *invalidated in part by Windsor*, 133 S. Ct. 2675 (2013).
395. *Windsor*, 133 S. Ct. at 2683.
396. *Id.* at 2695–96.
397. *Id.* at 2692–94.
398. *Id.* at 2693.

A second textual theme concerned liberty. The Court held that failing to recognize Windsor's marriage inflicted an "injury and indignity" that constituted a "deprivation of an essential part of the liberty protected by the Fifth Amendment."[399] The majority went beyond the doctrine of "reverse incorporation," which applies equal protection to the federal government, and stated explicitly that DOMA "violate[d] basic *due process and equal protection* principles."[400] The Court also declared that, "[w]hile the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved."[401] The Court did not clarify how the nineteenth-century term "equal protection" could possibly make the eighteenth-century term "due process" more "specific" or "better understood and preserved."[402] Nor did the opinion explain how future courts should analyze this interaction between constitutional equality and liberty.

Windsor's third and most curious theme was federalism. The Court emphasized that "[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."[403] The Court acknowledged Congress's power to treat couples as married even though some states would not and also to ignore marriages that would be valid under state law.[404] Yet the Court insisted that ordinary examples of federal-state divergence over lawful marriage were "limited" and were designed to "further federal policy."[405] By contrast, the Court saw DOMA as rejecting "the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State."[406]

In a strange double-pivot, the Court first discarded its own federalism analysis as dicta, explaining that "it is unnecessary to decide whether this federal intrusion on state power is a violation of the

399. *Id.* at 2692, 2695.

400. *Id.* at 2693 (emphasis added); *id.* at 2692 (quoting Lawrence v. Texas, 539 U.S. 558, 567 (2003) (applying due-process liberty against the Texas state government)); *see also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

401. *Windsor*, 133 S. Ct. at 2695.

402. *Id.*

403. *Id.* at 2689–90; *see id.* at 2691–93.

404. *Id.* at 2690; JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 8 (2014).

405. *Windsor*, 133 S. Ct. at 2690.

406. *Id.* at 2692.

Constitution . . . because it disrupts the federal balance."[407] Then the Court switched again, declaring that "[t]he State's power in defining the marital relation is *of central relevance in this case quite apart from principles of federalism*."[408]

This "non-federalism federalism" argument understandably confused many commentators,[409] but the Court's approach may be analogous to "governmental interests" analysis under choice of law.[410] *Windsor* emphasized the "status" conferred by state same-sex marriages as a communitarian "recognition, dignity, and protection of the class."[411] The Court reasoned that New York's recognition of same-sex marriages "reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality."[412] In a case about conflicts of law—which *Windsor* technically was not—these factors might have bolstered New York's interest in applying its own broad definition of marriage instead of the narrower federal standard.

The Court's choice-of-law language might also clarify its decision not to use modern "tiers of scrutiny," which are typically used in liberty and equality cases to analyze the *existence* of certain kinds of governmental interests.[413] The *Windsor* Court never considered whether national interests could be found to support the federal marriage definition; instead, it held that such unspecified federal interests were in any event *outweighed* by state interests.[414] This kind of balancing approach does not figure into typical equal protection or due process cases, but it is very familiar in conflicts law. What the *Windsor* Court never explained is how a choice-of-law balancing of interests was

407. *Id.*

408. *Id.* (emphasis added).

409. *E.g.*, Heather K. Gerken, Windsor*'s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 588 (2015); Neil S. Siegel, *Federalism as a Way Station:* Windsor *as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87, 88–89 (2014).

410. *See* Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 459–62 (1985). For more language echoing conflicts of law, see *Windsor*, 133 S. Ct. at 2692–94.

411. *Windsor*, 133 S. Ct. at 2681, 2692.

412. *Id.* at 2692–93.

413. *See* Craig Green, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 YALE L.J. 439, 446–47 (1998).

414. *Windsor*, 133 S. Ct. at 2696 ("[N]o legitimate purpose *overcomes* the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." (emphasis added)).

related to constitutional principles of equality, liberty, federalism, or anything else.

Now that *Windsor*'s textual arguments have been identified, substantive problems appear in each component part. For example, although the Court's liberty and equality arguments stressed that DOMA's "injury and indignity" had "deprive[d]" same-sex couples of rights, those statements lack context. Almost all of the laws that make married people "married"—including solemnization, divorce, child custody, property rules, wills and estates, evidentiary privileges, medical visitation, contractual rights, consumer benefits, state taxation, litigation procedures, and a great deal more—are prescribed by state law, not federal law.[415] And even though DOMA affected "over 1,000 [federal] statutes" that governed marital status in various federal contexts, DOMA did not affect the 10,000 or more state regulations governing marital status.[416] The Court fretted over details of federal ethics law, federal educational loans, and federal veterans' cemeteries, yet DOMA altered only a tiny part of the massive and multilayered rules that define what it is to be "legally married."[417]

DOMA's exclusively federal scope also deflates *Windsor*'s visceral language about personal humiliation, because the "daily lives" of "families in their community" have always been built upon thick webs of state-law rules and extralegal society.[418] Marriage—putting aside its significance for personal commitment and love—concerns one's neighbors, relatives, local community, and state-law regulations much more than it turns on federal cemeteries and the estate tax.[419]

The Court's references to federalism and choice-of-law-federalism are similarly unsound. In the realm of federal statutory law, Congress has no constitutional obligation to accept state-law definitions of marriage. This includes immigration, social security, any federal-law context, or indeed every federal-law context. It makes no constitutional difference that DOMA implemented federal-law definitions through a sweeping definitional statute, rather than amending each particular statute one at a time. So long as Congress had federal power to enact the estate tax in the first place, the Constitution did not require federal definitions of married beneficiaries to mirror state law. Absent some

415. *See* HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS AND QUESTIONS 19 (5th ed. 2003).

416. *Windsor*, 133 S. Ct. at 2683.

417. *Id.* at 2683, 2694–95.

418. *Id*. at 2694; *see also id.* at 2683.

419. *See, e.g.*, Perry v. Brown, 671 F.3d 1052, 1078–79 (9th Cir. 2012).

connection to questions of individual rights, the *Windsor* Court's theories of federalism and choice of law had no "central relevance" whatsoever.[420]

Turning to equal protection, the *Windsor* majority held that DOMA was "motived by an improper animus or purpose," but such animus was presumed rather than proved.[421] The Court stressed that DOMA had excluded all marriages and spouses involving same-sex couples from federal statutory law, yet DOMA also excluded all marriages and spouses involving trios, quartets, or nonhuman participants. What the Court avoided explaining is why the exclusion of same-sex couples was constitutionally "improper" and therefore different from other statutory exclusions.[422] *Windsor* was thus a great victory for LGBT couples, but the Court's opinion said almost nothing about such people's constitutional status or characteristics.

As a matter of longstanding doctrine, "heightened scrutiny" is the constitutional mechanism for courts in both liberty and equality cases to demand substantial justifications for governmental regulations.[423] The Court made no effort in *Windsor* to explain or even identify the need to apply heightened scrutiny. Yet if the Court applied "rational basis scrutiny" by default, it is difficult to understand why DOMA would be invalid when so many other policies that are based—at least in part—on personal beliefs or animus are routinely upheld in other contexts.[424]

420. *Windsor*, 133 S. Ct. at 2692, 2695.

421. *Id.* at 2693; *see also id.* at 2696 (Roberts, C.J., dissenting); *id.* at 2718 (Alito, J., dissenting); *id.* at 2709 (Scalia, J., dissenting).

422. *Windsor* was not the Court's first ruling based on unsubstantiated findings of "animus." *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring in the judgment) (collecting cases).

423. *See* Green, *supra* note 413, at 439–40, 476–77. The historical roots of tiered scrutiny can be indirectly traced to the two-track approach of *Carolene Products*, 304 U.S. 144, 152–53 n.4 (1938), or even to *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873) ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause]. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.").

424. *E.g.*, N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568 (1979) (arguable public animus against methadone users); Williamson v. Lee Optical, 348 U.S. 483 (1955) (arguable optometric animus against competing opticians); *Carolene Prods.*, 304 U.S. at 144 (arguable animus of dairy farmers against producers of filled milk). For other peculiar applications of rational basis that are based upon notions of unconstitutional "animus," see sources cited *supra* note 421 and accompanying text.

2. Originalism: Implied and Understood Meanings

To repeat what is obvious, I would not propose to criticize *Windsor* simply for the sake of doing so. The opinion has textual problems, but that is ordinary for a high court that hears only the nation's hardest cases. It is the combination of *Windsor*'s textual flaws and precedential importance that justifies using interpretive methods and materials outside the opinion itself. The difficulty of specifying precedential meaning *and the cultural need to do so* are what define iconic cases to justify interpretive techniques beyond textualism.[425] Understanding *Windsor*'s ambiguities is important not only because that decision is a leading precedent on LGBT equality and "animus," but also because *Windsor* is a uniquely significant episode for understanding *Obergefell*. Accordingly, this subsection will examine *Windsor*'s original history, including evidence from lawyers and judges to identify the decision's "implied meaning," and evidence from contemporary observers to explain its "understood meaning."

a. Lawyers

Windsor's case reached the Supreme Court as a culmination of twenty years of gay-rights litigation. The DOMA statute was a reaction to a Hawaiian state-court decision protecting same-sex couples, and the United States Supreme Court had also moved toward protecting sexual orientation and sexual relationships.[426] Same-sex marriage was a fierce political battleground, and *Windsor* seemed like a case that, alongside *Hollingsworth v. Perry*,[427] would finally resolve matters. As a matter of litigative context, such expectations and resources make *Windsor*'s textual shortcomings even more interesting.

Edie Windsor's case was distinctively potent because her biography embodied personal sacrifice and upper-class respectability.[428] Her legal team included a prestigious New York firm as well as the ACLU, and the case even drew support from the federal government, her ostensible adversary.[429] *Windsor*'s companion case, *Hollingsworth*, directly challenged whether a state could exclude same-sex couples

425. *See supra* notes 7, 10 and accompanying text (discussing what qualifies cases as "iconic").

426. *Lawrence*, 539 U.S. at 574–78; Romer v. Evans, 517 U.S. 620, 636–37 (1996); Baehr v. Lewin, 852 P.2d 44, 69–70 (Haw. 1993).

427. 133 S. Ct. 2652 (2013).

428. Ariel Levy, *Profiles: The Perfect Wife*, NEW YORKER, Sept. 30, 2013, at 54–55.

429. Brief for the United States on the Merits Question at 12–14, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12–307).

from its legal definition of marriage.[430] *Hollingsworth* had its own sympathetic plaintiffs, its own extraordinary lawyers, and its own flock of amicus briefs.[431] Against this background, it is hard to construct any circumstances that could have more forcefully presented the legal questions surrounding same-sex marriage than *Windsor* and *Hollingsworth*.

Lawyers in the two cases addressed every legal and factual issue imaginable. Doctrinal questions such as the meaning of *Lawrence* and *Romer*, the applicable tier of scrutiny, and analogies to *Brown* and *Loving v. Virginia*; sociological claims about interrelationships among marriage and sex and childrearing; cultural issues of how marriage laws could affect perceptions of the institution; the social status of gays, lesbians, and their children; structural concerns over the role of constitutional adjudication in a democracy; all of these and more were exhaustively briefed with remarkable skill.[432]

Most importantly, *Windsor* and *Hollingsworth* offered a distinctively wide range of possible outcomes. At its preference, the Court could have upheld or invalidated DOMA and/or California's marriage law, and it could have done so through opinions of any conceivable breadth or narrowness. In the case that became *Hollingsworth*, the Ninth Circuit ruled on grounds that invalidated only California's same-sex marriage ban—a so-called "one-state solution."[433] The United States argued that California and seven other states had violated equal protection by granting substantive benefits to gay and lesbian couples but denying nominal marital status—this was an "eight-state solution."[434] Or the Court could have applied heightened constitutional scrutiny to invalidate all state barriers against same-sex marriage—a "fifty-state solution."

430. *Hollingsworth*, 133 S. Ct. at 2661.

431. Richard Socarides, *The Biggest Stakes in the Supreme Court Marriage Cases*, NEW YORKER (June 24, 2013), http://www.newyorker.com/news/news-desk/the-biggest-stakes-in-the-supreme-court-marriage-cases [http://perma.cc/58K9-VFKF]; Margaret Talbot, *A Risky Proposal: Is It Too Soon To Petition the Supreme Court on Gay Marriage*, NEW YORKER, Jan. 18, 2010, at 40–51.

432. *E.g.*, Brief of Petitioners at 2–3, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144); Brief for Respondents at 1–2, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12–144); Brief for the United States as Amicus Curiae Supporting Respondents at 1–2, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

433. Perry v. Brown, 671 F.3d 1052, 1063–64 (9th Cir. 2012), *vacated and remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

434. Brief for the United States as Amicus Curiae Supporting Respondents, *supra* note 432, at 10–11.

Windsor was discussed by lawyers and the general public as if it would be a landmark case, yet the Court studiously avoided every constitutional issue concerning state marriage laws. *Windsor* explicitly declined to address state definitions of marriage,[435] and *Hollingsworth* ruled five to four that the litigants lacked standing to pursue their appeal.[436] In both decisions, the Court said nothing about state laws that excluded same-sex marriage, and Kennedy's *Hollingsworth* dissent maintained that same silence.[437] From an originalist perspective, *Windsor* and *Hollingsworth* were cases of immense force that somehow managed to shrink on their day of judgment. The interpretive gap between *Windsor*'s potential and its textual reality made the case controversial *and also useful* as a focal point for constitutional debate.[438]

b. Judges

No one can analyze *Windsor*'s textual ambiguities without considering the opinion's author, Justice Kennedy. Kennedy may not be a grand figure like Story or Brandeis—hardly anyone is—but he has written every Court decision addressing gay rights for twenty years, and his personal connection to such cases is hard to overstate.[439] Each opinion has taken small steps toward protecting lesbians and gays, while also refusing to discuss the full implications of doing so. For example, Kennedy's *Romer* opinion about sexual-orientation discrimination did not consider the constitutionality of banning sodomy.[440] His opinion in *Lawrence* protected sodomy, but refused to address same-sex marriage.[441] In *Windsor*, Kennedy led the Court even closer to protecting same-sex marriage across the board, yet once again his opinion stopped short.[442]

Although the fact is often ignored, Kennedy publicly addressed gay rights long before he wrote opinions for the Supreme Court. Just

435. United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) ("This opinion and its holding are confined to [state-recognized] lawful marriages.").

436. *Hollingsworth*, 133 S. Ct. at 2652–53.

437. *Id.*; *id.* at 2668 (Kennedy, J., dissenting); *Windsor*, 133 S. Ct. at 2682.

438. *See, e.g.*, sources cited *supra* note 409.

439. *Windsor*, 133 S. Ct. at 2675; Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996); *see also* Adam Liptak, *Surprising Friend of the Gay Rights Movement in the Highest of Places*, N.Y. TIMES, Sept. 2, 2013, at A10 ("Justice Kennedy has emerged as the most important judicial champion of gay rights in the nation's history . . . .").

440. *See Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

441. *Lawrence*, 539 U.S. at 578.

442. *Windsor*, 133 S. Ct. at 2696.

three weeks after *Bowers v. Hardwick* was decided in 1986,[443] then-Judge Kennedy spoke to the Canadian Institute for Advanced Legal Studies in an address entitled "Unenumerated Rights and the Dictates of Judicial Restraint."[444] The speech was featured in Kennedy's confirmation hearings after the Senate rejected arch-conservative Robert Bork,[445] and it yields three overlapping ways that Kennedy's biography can illuminate *Windsor*'s ambiguities.

A first approach concerns Kennedy's image as a cosmopolitan advocate for human rights.[446] His 1986 speech paid close attention to the Canadian Constitution and case law from the European Court of Human Rights. The European court had protected same-sex sodomy based on rights concerning "respect for . . . private and family life."[447] Kennedy would much later cite this decision to justify a similar result under the United States Constitution.[448] Yet even in 1986, Kennedy argued that basic constitutional issues were similar in Europe and the United States, despite the absence of any explicit language in the American Constitution about "privacy," "family life," or "private" rights.[449]

Kennedy's speech described *Bowers* with an ambivalence that referenced political philosophy: "Many argue that a just society grants a right to engage in homosexual conduct. If that view is accepted, the *Bowers* decision in effect says that the State of Georgia has the right to make a wrong decision. . . ."[450] During confirmation hearings, Kennedy explained his constitutional approach in explicitly multinational terms:

> The framers had an idea *which is central to Western thought*. . . . It is central to the idea of the rule of law. That is

443. Bowers v. Hardwick, 478 U.S. 186 (1986).

444. Judge Anthony M. Kennedy, U.S. Court of Appeals for the Ninth Circuit, The Stanford Lectures Address to the Canadian Institute for Advanced Legal Studies, Unenumerated Rights and the Dictates of Judicial Restraint (July 24, 1986).

445. *Confirmation Hearings on the Nomination of Anthony M. Kennedy To Be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 100th Cong. 41, 88 (1987) [hereinafter *Confirmation Hearings*].

446. *See* Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42.

447. *See* Kennedy, *supra* note 444, at 7 (discussing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. 24 (1981) (quoting Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, ¶ 1, amended by Protocol No. 11, Nov. 4, 1950, 213 U.N.T.S. 221)).

448. Lawrence v. Texas, 539 U.S. 558, 573 (2003) (citing *Dudgeon*, 45 Eur. Ct. H.R. at 24).

449. Kennedy, *supra* note 444, at 9–14.

450. *Id.* at 13.

> there is a zone of liberty, a zone of protection . . . where the individual can tell the Government: Beyond this line you may not go.[451]

As Kennedy had written in 1986: "I am particularly gratified to meet . . . my Canadian colleagues. We share the commitment to a rule of law; and it is a great privilege for me to further my understanding of the constitutional process by sharing in these discussions."[452]

Alongside other biographical evidence about foreign and international law,[453] Kennedy's discussion of gay rights in 1986 suggests that European and Commonwealth law provided important context for all of the Supreme Court precedents that led up to *Windsor*. In turn, as future debates over same-sex marriage expand to encompass different forms of sexual liberty and LGBT equality, *Windsor*'s doctrinal meaning may be illuminated by analyzing comparable developments in the European and Anglophone world.

A second approach to Kennedy's biography concerns his generational link to the legal-process movement. As a Harvard student from 1958 to 1961, Kennedy learned law at the epicenter of this school of thought.[454] Legal-process jurisprudence—as compared with legal realism or Warren-era rights protection—focused on achieving institutional legitimacy through the division of labor among various levels of government and different kinds of legal actors.[455]

Such themes were apparent in Kennedy's speech. As he elaborated the "dictates" of judicial restraint, Kennedy explained that "the judicial method" requires judges "to decide specific cases, from which general propositions later evolve."[456] Judges need not resort to unenumerated rights as "a necessary antidote to the potential excesses of a democratic majority."[457] "[T]he political branches themselves" are more important, incorporating "checks of bicameralism, the executive veto, and the division of sovereignty between state and federal

451. *Confirmation Hearings*, *supra* note 445, at 86 (emphasis added).

452. Kennedy, *supra* note 444, at 1.

453. *E.g.*, Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (Kennedy, J.) (noting "the overwhelming weight of international opinion against the juvenile death penalty").

454. *See, e.g.*, HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958); HERBERT WECHSLER & HENRY M. HART, JR., FEDERAL COURTS AND THE FEDERAL SYSTEM (1st ed. 1953).

455. For later applications of legal-process ideas, see ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962), and JOHN HART ELY, DEMOCRACY AND DISTRUST 4–5 (1980).

456. Kennedy, *supra* note 444, at 5.

457. *Id.* at 2.

government."[458] Time and again, Kennedy stressed courts' limited role in pursuing social ideals and assuring social benefits. He claimed that activist judicial conduct undermines courts' own legitimacy while it also "erodes the initiative" of responsible political actors.[459] With respect to *Bowers* and sodomy, Kennedy therefore concluded that:

> Georgia's right to be wrong in matters not specifically controlled by the Constitution is a necessary component of its own political processes. Its citizens have the political liberty to . . . make decisions that might be wrong in the ideal sense, subject to correction in the ordinary political process.[460]

This notion of compromising substantive justice in favor of systemic credibility was a hallmark of that conservative generation of legal-process scholarship.[461]

A similar focus on institutional arrangements led one modern commentator to call *Windsor* an act of "mad genius," and perhaps from a legal-process perspective it was.[462] *Windsor* produced the narrowest judicial opinion possible and yielded a bare minimum of constitutional equality. The Court granted flexibility to political branches, while simultaneously invoking structural ideas of decentralized federalism to define who counts as "legally married." Without clarifying the substantive law of same-sex marriage, *Windsor* took its constitutional stand on the mild institutional thesis that states should decide marriage issues, not Congress. The *Windsor* opinion thus echoed Kennedy's earlier belief that "*[t]he judicial method* . . . is the surest safeguard of liberty,"[463] as opposed to expansive recognition of unenumerated rights. From this point of view, *Windsor* might support judicial reliance on notions of constitutional structure—however hazy or ill-conceived—if courts could thereby dodge or delay adjudicating new forms of individual rights.

A third approach to Kennedy's biography would cast him as the muddled, center-right compromiser that one might expect from an immediately post-Bork judicial nominee. Perhaps there is no deep principle undergirding *Windsor*'s half-steps—neither international legal opinion nor legal-process jurisprudence. Perhaps *Windsor*'s paragraph

458. *Id.*
459. *Id.* at 20–22.
460. *Id.* at 14.
461. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
462. Gerken, *supra* note 409, at 587.
463. Kennedy, *supra* note 444, at 4–5 (emphasis added).

about United States history could be viewed as its author's closeted autobiography:

> [U]ntil recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. . . . [M]arriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight.[464]

In this sense, Kennedy's stepwise rulings about LGBT rights might approximate what the author believed at the time—an "evolution" in hindsight, but something more chaotic in actual lived experience.

Confusion and paradox were also themes of Kennedy's 1986 speech. In a partial defense of unenumerated rights, Kennedy insisted that "[i]t forts constitutional dynamics, and it defies the pre[ce]dential method to announce in a categorical way that there can be no unenumerated rights."[465] Yet he immediately replied that "it is imprudent as well to say that there are broadly defined categories of unenumerated rights, and to say so apart from the factual premises of decided cases."[466] True to his word, Kennedy's speech offered no general criteria or standards for determining when or why unenumerated rights might comport with his "dictates of judicial restraint."[467]

Kennedy was similarly vague in his confirmation hearings. "[T]he great question in constitutional law is [sic]: One, where is that line [of constitutional liberty] drawn? And, two, what are the principles that you refer to in drawing that line."[468] Without providing any reassurance or clarification, Kennedy reiterated how courts proceed in defining constitutional liberty: "There is a line. It is wavering; it is amorphous; it is uncertain. But this is the judicial function."[469] In 1986, Kennedy almost celebrated constitutional unpredictability: "I am unconcerned

464. United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).
465. Kennedy, *supra* note 444, at 5.
466. *Id.*
467. *Id.*
468. *Confirmation Hearings*, *supra* note 445, at 86.
469. *Id.*; *see also* Stuart Taylor, Jr., *Speeches Offering Insight into Judge Kennedy*, N.Y. TIMES, Dec. 1, 1987, at A10.

that there is a zone of ambiguity, even one of tension, between the courts and the political branches . . . . Uncertainty is itself a restraint on the political branch, causing it to act with deliberation and with conscious reference to constitutional principles."[470]

Some modern commentators might characterize this sort of "incomplete theorization" as desirable, while others might acknowledge without praise a politically centrist Justice who led a politically centrist Court toward coherence with politically centrist public opinion.[471] Irrespective of normative judgments, this last interpretation of Kennedy's biographical context suggests that *Windsor* was ambivalent in its reasoning and implications because its author was as well. And the opinion might be narrowly and clumsily drawn because, for better and for worse, such stumbling incrementalism had become Kennedy's thirty-year habit in the dynamic field of same-sex rights.

c. Contemporary Reactions

Contemporary observers' reactions are a third set of originalist material that describes *Windsor*'s understood meaning when it was decided. And although the recent sources discussed herein may feel more like "news" than "history," their role concerning precedential interpretation is quite similar to what we have seen with *Swift* and *Erie*.

Windsor was a widely anticipated, front-page story with consistent coverage across print and electronic venues as a landmark decision that would have an immediate and huge impact.[472] Journalists compared the decision to the nation's first legislation protecting sexual orientation, to President Obama's decision to support same-sex marriage, and even to

470. Kennedy, *supra* note 444, at 22.

471. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED AND SHAPED THE MEANING OF THE CONSTITUTION (2010); MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2012); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

472. Gerard Bradley, *Great Expectations*, SCOTUSBLOG (June 26, 2013), http://www.scotusblog.com/2013/06/great-expectations/ [http://perma.cc/3B8W-TSVW]; *see, e.g.*, Adam Nagourney, *Court Follows Nation's Lead*, N.Y. TIMES, June 27, 2013, at A1; Cheryl Wetzstein, *Supreme Court Hands Double Win to Gay-Marriage Backers*, WASH. TIMES, June 26, 2013, at 1; Dana Beyer, *Musings on* Windsor *and* Perry *and a Better Day for America*, HUFFPOST GAY VOICES (June 28, 2013), http://www.huffingtonpost.com/dana-beyer/musings-on-windsor-and-pe_b_3516169.html [http://perma.cc/Z24U-NCC5]; Judith E. Schaeffer, *Justices Uphold Constitution's Promise for Me*, USA TODAY, June 26, 2013. *But see* Editorial, *A Supreme Bungle: The Supreme Court Divorces America from Its Cherished Values*, WASH. TIMES, June 27, 2013.

Brown v. Board of Education.[473] After the Court's ruling, the national press covered public celebrations and supportive demonstrations, which yielded dramatic visual images and personal stories.[474]

Even *Hollingsworth*'s decision to deny standing was viewed as a victory for marriage equality because it left intact a district court judgment favoring same-sex marriage.[475] California officials proclaimed that judgment to be legally effective across the state, thereby delivering a massive political victory for same-sex equality in America's most populous state.[476]

Legal commentators were slightly more conflicted about *Windsor*, but substantive criticism was modest.[477] Almost all academics viewed *Windsor* as a way station toward full protection for same-sex marriage,[478] and almost no one challenged that result as incorrect. Instead, the prevailing intellectual questions were how and whether to enlist *Windsor*'s equality and liberty arguments in other constitutional battles over race, gender, and sexual orientation.[479]

To assess *Windsor*'s original meaning, one must remember that the Court's judicial text did not appear in a vacuum. Public and legal commentators had struggled for months to understand what the unannounced decision might mean.[480] Kennedy wrote *Windsor* against that discursive backdrop, and like every other Justice, he was also an occupant of the same political and cultural world that would receive and interpret the Court's ultimate decision.

The complex relationship between authors and audiences is familiar from "ordinary meaning originalism" in constitutional

473. Bradley, *supra* note 472.

474. *E.g.*, Ryan J. Reilly & Sabrina Siddiqui, *Supreme Court DOMA Decision Rules Federal Same-Sex Marriage Ban Unconstitutional*, HUFFPOST POL. (June 26, 2013, 3:03 PM), http://www.huffingtonpost.com/2013/06/26/supreme-court-doma-decision_n_3454811.html [http://perma.cc/M6NN-6CKM].

475. Dylan Matthews, *The Supreme Court Ended Proposition 8. Here's What It Means*, WASH. POST (June 26, 2013), http://www.washingtonpost.com/news/wonkblog/wp/2013/06/26/the-supreme-court-ended-proposition-8-heres-what-that-means/ [http://perma.cc/GJ3B-JU8C].

476. Maura Dolan, *Couples Eager To Wed Will Need To Wait*, L.A. TIMES, June 27, 2013, at A1.

477. *E.g.*, Michael J. Klarman, Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127 (2013); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013); Yoshino, *supra* note 11, at 3076.

478. *E.g.*, Siegel, *supra* note 409, at 87.

479. *See* sources cited *supra* notes 28, 409, 477.

480. *See* sources cited *supra* note 390, 409, 472.

analysis.[481] Using similar methods in this context shows that the public, press, and legal community immediately minimized *Windsor*'s technical details and federalist limitations. The decision was viewed by the public as a major step toward the now-inevitable conclusion that same-sex marriage would be constitutionally protected. Given the breadth of that reaction, and the corresponding power of national cultural politics, the Court could not have been at all surprised.

3. Living Precedentialism: Developmental Meaning

But what *was* unexpected was *Windsor*'s broad and rapid application in state and federal courts. During the two years following *Windsor*, almost one hundred state and federal cases about same-sex marriage were filed in thirty-two states, and nearly every judicial decision ruled in favor of protecting same-sex marriage.[482] Even though *Windsor*'s text insisted that it did not decide anything with respect to state laws, and even as commentators braced themselves for the "next case" that would finish the job, state and federal judges across the country held that further instructions were unnecessary.[483] They believed that the *Windsor* Court had done what it did not dare to say, announcing and affirming constitutional principles that implied full legal protection for same-sex marriages notwithstanding federal- *or* state-law restrictions.

No federal court had protected same-sex marriage before the litigation in *Windsor* and *Hollingsworth* began, but a great many did so afterwards—citing *Windsor* at every turn.[484] One commentator has written that "[t]he pace of change on same-sex marriage, in both popular opinion and in the courts, has no parallel in the nation's

481. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105–06 (2001); *see also* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 608–10 (2004).

482. Erik Eckholm, *Court Upholds Marriage Bans in Four States*, N.Y. TIMES, Nov. 7, 2014, at A1; Adam Liptak, *In Same-Sex Marriage Calculation, Justices May See Golden Ratio*, N.Y. TIMES, Nov. 25, 2014, at A16; Campbell Robertson, *Federal Judge, Bucking Trend, Affirms Ban on Same-Sex Marriages in Louisiana*, N.Y. TIMES, Sept. 4, 2014, at A12; *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2608–11 (2015) (listing cases before and after *Windsor* that addressed the constitutionality of same-sex marriage).

483. *Compare* United States v. Windsor, 133 S. Ct. 2675, 2696 (2013), *with* sources cited *supra* note 482.

484. A Westlaw search for federal cases citing *Windsor* ("133 S. Ct. 2675") returned over 140 results when the Supreme Court granted certiorari in *Obergefell* on January 16, 2015.

history."[485] *Windsor*'s developmental history shows that the decision was both a product of that shift and a major catalyst reinforcing it. As once-hesitant judges surged forward to protect marriage equality, exceeding observers' expectations, it was obvious to everyone that *Windsor*—just like other iconic cases—meant a great deal more than one could read from the Court's slip opinions.

For a brief time, *Windsor* was an iconic case not so different from *Swift* or *Erie*. The Court had explicitly resolved one set of crucial questions, but its tantalizing and dubious reasoning led lawyers to wonder whether the decision signified more than the opinion explained. This is how *Windsor* became a focal point for constitutional debate: as a few interpreters read the case narrowly by relying on its text, and other interpreters read it broadly based on the decision's implied and understood meanings.[486]

B. Obergefell v. Hodges*: Iconic et Cetera*

After two short years, the Court wrote *Windsor*'s developmental meaning into *Obergefell*'s text. Not only did the Court endorse broad constitutional protection for same-sex marriage, as *Windsor* had implied, but the Court also cited as support lower-court decisions that had reached that same conclusion by interpreting *Windsor* nontextually.[487] The rapid feedback loop—from the *Windsor* decision, to other courts' expansion of *Windsor*, and then to *Obergefell*'s adoption of that expansion—is distinctive if not unique in the Supreme Court's history.[488] It is also an example of how an iconic precedent's meaning can diverge from the opinion's text.

Despite *Windsor*'s doctrinal and cultural importance during its moment, *Obergefell* suggests that the decision may not remain iconic for long. Such reformulation has occurred with many other leading Supreme Court cases: *Brown* absorbed the memory of *McLaurin v.*

485. Liptak, *Supreme Court To Decide Marriage Rights for Gay Couples*, *supra* note 390, at A1.

486. *See* sources cited *supra* note 390.

487. *Obergefell*, 135 S. Ct. at 2608–11.

488. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 905–06 (1996) (noting that the "most important changes to the Constitution" have often occurred through lines of opinions over extended periods of time); *cf.* JACK BASS, UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT'S *BROWN* DECISION INTO A REVOLUTION FOR EQUALITY (1981); ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–76 (2005).

Oklahoma in the context of segregation,[489] *Loving* overwhelmed *McLaughlin v. Florida* with respect to miscegenation,[490] and now *Windsor* may join *Romer* and even *Lawrence* as transitional cases on the doctrinal path to *Obergefell*.[491] *Windsor* remains the Court's most important holding about "animus," and it may yet imply broad protections based on sexual orientation.[492] But the decision's most enduring significance may be its role in producing and supporting *Obergefell*.

This Section proposes that even *Obergefell*'s decision will not end the doctrinal story. On the contrary, the interpretive patterns discussed in this Article will recur yet again. Lawyers, judges, and commentators will seek to interpret the newly iconic decision in *Obergefell*, which resolved doctrinal debates over same-sex marriage, but which raised unanswered questions concerning LGBT discrimination, polygamy, and other forms of constitutional liberty. Where the Court's *Obergefell* opinion is textually vague or unsatisfactory—as measured against whatever subsequent interpreters wish to learn from it—the decision's *implied meaning* and *understood meaning* will be identified using historical resources such as litigative context, judicial biography, and contemporary reactions. Over time, struggles about *Obergefell*'s implications will yield *developmental meanings* that differ from what the case meant at the start. Throughout this process, the decision's precedential force will attract strong attention and debate, much like *Erie*, *Marbury*, *Brown*, *Windsor*, and so many other precedential icons. Although many historical materials surrounding *Obergefell* have not yet emerged, one can already see that the same interpretive patterns will structure legal struggles over what that decision means.

1. Textualism: Declared Meaning

Jim Obergefell was just one of thirty plaintiffs whose suits were decided together by the Supreme Court, but his case presented especially notable facts.[493] Obergefell's partner, John Arthur, was in hospice care suffering from ALS when the Court decided *Windsor v.*

489. *See* Brown v. Bd. of Educ., 347 U.S. 483, 491–92 (1954) (citing McLaurin v. St. Regents for Higher Educ., 339 U.S. 637, 638 (1950)).

490. *See* Loving v. Virginia, 388 U.S. 1, 10 (1967) (citing McLaughlin v. Florida, 379 U.S. 184, 188 (1964)).

491. *See generally Obergefell*, 135 S. Ct. at 2584.

492. For other examples in the Court's "animus" line of precedent, see *Romer v. Evans*, 517 U.S. 620, 632 (1996), and the cases cited in Justice O'Connor's opinion in *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment).

493. *Obergefell*, 135 S. Ct. at 2593–95.

United States. That same day, Obergefell leaned over and proposed to Arthur with a hug and a kiss.[494] Because same-sex marriage was illegal in Ohio, and because Arthur's mobility was so limited, the couple's wedding occurred in a medical transport plane as it sat on the tarmac in Maryland.[495] Three months later, Arthur died in Ohio, and Obergefell filed suit so that the death certificate would reflect his status as a surviving spouse.[496] Obergefell challenged Ohio's failure to recognize his out-of-state marriage on due process and equal protection grounds, while plaintiffs in other cases constitutionally challenged governmental refusals to marry them in their own home states.[497]

The Supreme Court ruled in favor of all the *Obergefell* plaintiffs by a vote of five to four, and as with *Windsor*, Justice Kennedy wrote the majority opinion.[498] Entirely absent were *Windsor*'s tortured arguments about federalism and conflicts of law.[499] Instead, *Obergefell* exclusively concerned the relationship between constitutional liberty and equality.

The Court held that marriage is part of the liberty "to define and express" one's "identity."[500] Acknowledging a historical "understanding that marriage is a union between two persons of the opposite sex," the Court based its conclusion on four enumerated reasons that "marriage is fundamental."[501] First, as a matter of individual autonomy, the choice to marry—like "contraception, family relationships, procreation, and childrearing"—"shape[s] an individual's destiny" and "self-definition," while also leading to "other freedoms, such as expression, intimacy, and spirituality."[502] Second, as a bilateral commitment, the right to marriage "dignifies couples" in their mutual loyalty, while the practical "companionship and understanding" of

494. *See* Stav Ziv, *How Jim Obergefell's Fight for His Dying Spouse Legalized Gay Marriage in America*, NEWSWEEK (June 26, 2015, 12:57 PM), http://www.newsweek.com/jim-obergefell-man-behind-supreme-courts-same-sex-marriage-decision-347314 [http://perma.cc/TA9X-4ZUF].

495. *Obergefell*, 135 S. Ct. at 2595.

496. *Id.*

497. *E.g.*, Brief for Petitioners at 12, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14–556).

498. *Obergefell*, 135 S. Ct. at 2593, 2608.

499. *See supra* notes 410–414 and accompanying text (discussing such arguments in *Windsor*).

500. *Obergefell*, 135 S. Ct. at 2593; *see id.* at 2597 ("[T]hese liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.").

501. *Id.* at 2599.

502. *Id.*

married life "responds to the universal fear that a lonely person might call out only to find no one there."[503]

Third, the Court described marriage as crucial for bearing and rearing children. In addition to providing "permanency and stability," the Court characterized marriage as a symbol to children about "the integrity and closeness of their own family and its concord with other families in their community."[504] Fourth, the Court celebrated marriage as "a keystone of our social order" and "a building block of our national community."[505] This is why marriage as a "public institution" entails significant advantages under federal law and a massive number of state-law benefits.[506]

Having defined "the fundamental right to marry" based on these function-oriented principles, the Court held that excluding same-sex marriage "demeans or stigmatizes" individuals, "disparage[s] their choices and diminish[es] their personhood," and therefore denies their constitutional liberty.[507] After all, the Court declared, the petitioners' "immutable nature dictates that same-sex marriage is their only real path to this profound commitment."[508]

Alongside the Court's four points about constitutional liberty, *Obergefell* also noted the inequality of treating same-sex couples

503. *Id.* at 2600.

504. *Id.* (quoting Windsor v. United States, 133 S. Ct. 2675, 2694–95 (2013)).

505. *Id.* at 2601.

506. *Id.* (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)) ("The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order."). There is some irony in the *Windsor* Court citing *Maynard* because that case upheld a legislatively imposed divorce, thereby confirming that "[m]arriage . . . has always been subject to the control of the legislature." *Maynard*, 125 U.S. at 205.

507. *Obergefell*, 135 S. Ct. at 2602.

508. *Id.* at 2594; *see also id.* at 2596 ("Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable." (citing Brief for American Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 7–17, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14–556))). Notably, the cited brief never actually used the word "immutable" to describe sexual orientation. *See* Brief for American Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 7 ("Sexual orientation refers to an enduring disposition to experience sexual, affectional, or romantic attractions to men, women, or both."). *Compare* Brief for Petitioners at 45, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14–556) ("[T]he broad medical and scientific consensus is that sexual orientation 'is an immutable . . . characteristic rather than a choice.' " (quoting Baskin v. Bogan, 766 F.3d 648, 657 (7th Cir. 2014))), *with id.* at 45 n.9 ("There is no requirement that a characteristic be immutable in a literal sense in order to trigger heightened scrutiny."), *and id.* at 46 ("[O]ne should not be forced to choose between one's sexual orientation and one's rights as an individual—even if such a choice could be made.").

differently from opposite-sex couples.[509] Thus, the Court concluded that prohibiting same-sex marriage violates both due process and equal protection:

> Rights implicit in liberty and . . . equal protection . . . are not always co-extensive, . . . [yet] each may be instructive as to the meaning and reach of the other. . . . This interrelation of the two principles furthers our understanding of what freedom is and must become.[510]

Obergefell produced a much broader result than *Windsor*, and the Court addressed issues of liberty and equality more directly than it had done two years earlier. Yet *Windsor* and *Obergefell* resemble other iconic cases insofar as the Court's basic holdings—invalidating first DOMA and then state same-sex marriage bans—raised collateral doctrinal questions that are both important and open to interpretation.

In *Obergefell*, for example, the Court double-fortified its constitutional analysis by simultaneously relying on liberty and equality. But the Court did not explain how far either of those principles should extend. Instead, the Court augmented doctrinal uncertainty by emphasizing that attitudes, institutions, and constitutional decisions can sometimes change dramatically.[511] The

509. *Obergefell*, 135 S. Ct. at 2599 ("This is true for all persons, whatever their sexual orientation. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." (citation omitted)); *id.* at 2600 ("[S]ame-sex couples have the same right as opposite-sex couples to enjoy intimate association."); *id.* at 2601–02 ("There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage . . . . [E]xclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society."); *see also id.* at 2600 ("Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability [that] marriage offers, their children suffer the stigma of knowing their families are somehow lesser.").

510. *Id.* at 2602–03 (citations omitted).

511. *E.g.*, *id.* at 2595 ("[D]evelopments in the institution of marriage over the past centuries . . . . worked deep transformations in its structure affecting aspects of marriage long viewed by many as essential."); *id.* at 2596 ("[N]ew dimensions of freedom become apparent to new generations . . . ."); *id.* (describing twentieth-century experiences with the rights of gays and lesbians as including "a quite extensive discussion . . . in both governmental and private sectors and . . . a shift in public attitudes toward greater tolerance"); *id.* at 2598 (explaining that, with respect to much constitutional law, "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present. The nature of injustice is that we may not always see it in our own times"); *id.* ("The Court, like many institutions, has made assumptions defined by the world and time

Court specifically denied, "both with respect to the right to marry and the rights of gays and lesbians," that rights should be "defined by who exercised them in the past."[512] And after issuing that seemingly antiprecedential proclamation, the Court gave little guidance about what kinds of "new insights" or "understandings" might arise concerning liberty or equality in future cases.[513]

The Court's declared meaning in *Obergefell* permits several textual interpretations. Perhaps the case should apply to many forms of LGBT rights, thereby highlighting the Court's references to sexual orientation as "immutable."[514] Under that scenario, every state-imposed effort to "demean," "stigmatize," "harm," or otherwise discriminate based on sexual orientation might be presumptively unconstitutional.[515] This could be called a "heightened scrutiny" interpretation of *Obergefell*, although the Court did not use that technical term.[516]

Or maybe *Obergefell* is a case just about marriage, with no immediate implications for LGBT equality in housing, employment, public accommodations, or elsewhere. This approach would emphasize the Court's claim that marriage has "transcendent" if not "unique" importance.[517] This "marriage-only" interpretation of *Obergefell* might plausibly apply to opposite-sex polygamy under the Constitution before it would invalidate other kinds of discrimination against gays and lesbians.

A third possibility is that *Obergefell* represents an expansion of liberty in widely various contexts. Marriage is certainly not the only individual decision that affects one's "autonomy," "dignity," "identity," or "self-definition."[518] And *Obergefell*'s dismissive approach to *Washington v. Glucksberg* may be suggestive.[519] The Court in *Glucksberg* had rejected some plaintiffs' claimed right to assisted suicide, thereby requiring that any kind of protected constitutional

of which it is a part." (citation omitted)); *id.* at 2603 ("[N]ew insights and societal understandings can reveal unjustified inequality.").

512. *Id.* at 2602.

513. *Id.* at 2596.

514. *Id.*

515. *Id.* at 2601–02.

516. *Cf. supra* notes 423–424 and accompanying text (describing the absence of heightened-scrutiny review in *Windsor*).

517. *Obergefell*, 135 S. Ct. at 2593–94.

518. *Id.* at 2598–99 (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954–55 (Mass. 2003)).

519. *Id.* at 2602.

liberty must incorporate a conservative and "careful description" of fundamental rights.[520] In *Obergefell*, the Court explained, without at all endorsing *Glucksberg*, that whereas the Court's earlier approach "*may have* been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing *other fundamental rights*, including marriage and intimacy."[521]

2. Originalism: Implied and Understood Meanings

As a textual matter, the Court's *Obergefell* opinion is chock-full of newly articulated principles, broadly construed precedents, and history's transformation by new ideas. The practical importance of the Court's protection for same-sex marriage is obvious, but the decision's *precedential meaning* remains unclear. From the opinion's text, *Obergefell* might be a pivotal case for LGBT equality, the fundamental right to marry, constitutional liberty including assisted suicide, or all of these at once; it also could be a case that protects same-sex marriage and nothing more.

Comparable to other iconic precedents, *Obergefell*'s text alone cannot answer important questions about the decision's meaning. We shall see that lawyers and judges in the aftermath are already arguing over whether *Obergefell*—like *Windsor*—means more than it said. And important evidence for such debates will encompass implied and understood meanings from the decision's originalist context.

a. Lawyers

There are many superficial similarities between *Windsor* and *Obergefell*, including, in both contexts, similar constitutional arguments and a concentration of legal resources. The constitutional landscape entirely changed, however, in the years between the two lawsuits. When the plaintiffs originally sued in *Windsor* and *Hollingsworth*, many observers thought that seeking constitutional protection for same-sex marriage would result in a dangerous appeal to a socially conservative Court.[522] By comparison, the plaintiffs and lawyers in *Obergefell* were engaged in something closer to a mop-up project.

520. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

521. *Obergefell*, 135 S. Ct. at 2602 (emphasis added).

522. *See* ROBERTA KAPLAN WITH LISA DICKEY, THEN COMES MARRIAGE: UNITED STATES V. WINDSOR AND THE DEFEAT OF DOMA 117–18 (2015) (discussing concerns within the LGBT community that litigation would set back the movement); Douglas NeJaime, *The View From Below: Public Interest Lawyering, Social Change, and*

Immediately in the summer of 2013, the cultural force of *Windsor*'s victory and *Hollingsworth*'s semi-victory was so great that even nonlawyers could feel the decisions' influence.[523] By the time the Sixth Circuit denied the claims of Obergefell and other plaintiffs, their lawyers were so confident of Supreme Court success that they did not seek en banc review from the court of appeals.[524] Such confidence also helps explain why the *Obergefell* litigants—unlike those in *Windsor*—were all committed to a "fifty-state solution," whereas the cautious lawyers who litigated *Windsor* also advocated "eight-state" and "one-state" solutions.[525] Arguments that same-sex marriage represented "the right side of history" were certainly prevalent in 2013,[526] but two years later, it seemed that such historical progress was fully ripe for application in the Supreme Court.

Evidence of *Obergefell*'s implied meaning based on the litigating lawyers' conduct supports a narrow view of the decision's textual ambiguities: protecting same-sex marriage to be sure, but not polygamy, general LGBT equality, or broad multicontextual liberty.

Adjudication, 61 UCLA L. REV. DISCOURSE 182, 191, 195 (2013) (discussing LGBT groups who urged that Proposition 8 not be challenged in federal court for fear of what the Supreme Court might do); Margaret Talbot, *A Risky Proposal*, NEW YORKER, Jan. 18, 2010, at 40 (quoting statement of William Eskridge) ("A question that so evenly but intensely divides the country is not one that should be decided by the courts nationwide . . . . It is just not something that this Supreme Court is going to deliver on at this point."); *On The Media*: *Plaintiff Shopping* (WNYC radio broadcast Oct. 9, 2015) (quoting statement of Kris Perry, the named plaintiff in *Hollingsworth*) ("[W]e were semi-panicked the entire time over not prevailing and being the posterchildren of a failed effort that, you know, despite every effort being made to do a good job, not persuading a judge.").

523. *E.g.*, *supra* note 494 and accompanying text.

524. *See* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2015). Appellate advocates ordinarily seek justice for their clients in any tribunal, and conventional wisdom might have viewed a petition for en banc review followed by a petition for certiorari as offering two chances to win instead of just one. On the other hand, the Sixth Circuit did have five judges appointed by a Democratic President, as compared with ten appointed by a Republican President, including eight appointed by George W. Bush. *See Judges of The Court—Sixth Circuit*, 772 F.3d, at X–XI (2015) (listing names, geographical locations, and appointment dates of Sixth Circuit judges serving at the time); 2 ALMANAC OF THE FEDERAL JUDICIARY, at 6th Cir. i–126 (Susan Alexander ed., 2015) (profiling federal judges sitting on the Sixth Circuit Court of Appeals).

525. *Cf. supra* notes 433–434 and accompanying text (discussing the different litigative approach taken in *Hollingsworth*). The only potential fallback position in *Obergefell* concerned the claim in Obergefell's own case that, even if unwilling states were not themselves required to recognize same-sex marriage, they at least must recognize same-sex marriages that were properly solemnized in other states.

526. *E.g.*, Michelle Boorstein & Annie Gowen, *Scouting World Divided on Reconsideration of Gay Ban*, WASH. POST, Jan. 29, 2013, at A3; *Opinion Shift on Gay Marriage Hard for Justices To Ignore*, LEGAL MONITOR WORLDWIDE, June 17, 2013.

Thus, for example, no brief in *Obergefell* argued for protecting polygamy or other currently illegal forms of marriage.[527] No brief argued for physician-assisted suicide, prostitution, or any other expansive constitutional liberty.[528] And although both sides understood the potential impact of applying "intermediate scrutiny" to sexual-orientation discrimination, the Court's decision to avoid any form of heightened scrutiny arguably proved that *Obergefell* itself did not endorse that result.[529]

b. Judges

Justice Kennedy's *Obergefell* opinion—even more than his prior judicial work—cemented his status as the Court's dominant author of LGBT rights. Since *Bowers v. Hardwick*, Kennedy has written four majority opinions in such cases, one Justice wrote a single concurrence, and no other Justice has written any opinion endorsing claims regarding sexual orientation.[530] Correspondingly, though one cannot yet prove the fact, Kennedy's opinions about LGBT rights will almost certainly be the most memorable legacy from his long judicial career. Extending this Article's earlier biographical analysis to include *Obergefell* yields even more insights than would have been possible two years earlier.

To consider Kennedy's four opinions concerning LGBT rights as an aggregate embodiment of their author's judicial approach reveals a deeper pattern to supplement *Obergefell*'s textual vagueness. In 1996, Kennedy wrote for the Court in *Romer v. Evans*, invalidating under equal protection a statewide ban on antidiscrimination laws protecting gays and lesbians.[531] The Court did not determine whether statutes that disadvantage gays and lesbians require heightened constitutional scrutiny across the board. Instead, Kennedy wrote that the particular state provision at stake was "inexplicable by anything but animus

527. *See, e.g.*, Brief for Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14–556); Brief for Respondents, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14–556).

528. *See, e.g.*, sources cited *supra* note 527.

529. *See id.*; *cf. Obergefell*, 135 S. Ct. 2584 (declining even to mention constitutional tiers of judicial scrutiny); Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment) ("When a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

530. *Obergefell*, 135 S. Ct. at 2584; United States v. Windsor, 133 S. Ct. 2675 (2013); *Lawrence*, 539 U.S. 558 (majority opinion); *id.* at 579 (O'Connor, J., concurring in the judgment); Romer v. Evans, 517 U.S. 620 (1996).

531. *Romer*, 517 U.S. at 620.

toward the class it affects" and thus failed even rational basis review.[532] A major question that remained was whether *Romer*'s equality ruling could be reconciled with *Bowers*, which had upheld a state "homosexual sodomy" ban against a constitutional challenge on liberty grounds.[533]

In 2003, Kennedy's majority opinion in *Lawrence v. Texas* answered that open question from *Romer* by holding that sodomy laws targeting "Homosexual Conduct" violate constitutional liberty.[534] The Court did not, even as an alternative holding, apply *Romer*'s "animus" principle under equal protection.[535] *Romer* thus came to be known as a limited, vague precedent about equal protection that later propelled the Court toward broader doctrinal conclusions about on liberty. Nevertheless, readers will note that even Kennedy's *Lawrence* opinion ended with a series of "I'll Never" scenarios that the Court explicitly refused to address—presumably because most of them were categorically unprotected by the Constitution:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition [e.g., marriage] to any relationship that homosexual persons seek to enter.[536]

The same equality-to-liberty pattern of *Romer* to *Lawrence* was repeated, over a much faster timeframe, on the road from *Windsor* to *Obergefell*. *Windsor*'s narrow invalidation of DOMA was almost entirely based on equal protection, despite vague references to liberty and constitutional federalism.[537] Just like *Romer*'s equal protection ruling, Kennedy's *Windsor* opinion claimed that the challenged law was "motived by an improper animus or purpose," and the Court therefore

532. *Id.* at 631–32.

533. Bowers v. Hardwick, 478 U.S. 186 (1986).

534. *Lawrence*, 539 U.S. at 564 (majority opinion).

535. *Id*. at 574–75 (describing the equal protection argument as "tenable," but declining to endorse it as substantively correct). Justice O'Connor would have preferred to invalidate the Texas statute on equality grounds because it was based on nothing more than "mere moral disapproval" which like *Romer*'s "bare . . . desire to harm" was categorically insufficient. *Id.* at 580, 585 (O'Connor, J., concurring in the judgment). Because the Court chose not to endorse that position, Justice O'Connor concurred only "in the judgment." *Id.* at 579.

536. *Id.* at 578 (majority opinion).

537. *See supra* Section II.A.1.

refused to consider any other constitutional issue, including state restrictions on same-sex marriage.[538] Much like *Lawrence* following *Romer*, *Obergefell*'s broader liberty analysis resolved the constitutional issue that *Windsor* had dodged through narrow reliance on "animus" and equal protection.

With Kennedy's judicial biography as an interpretive lens, this pattern embodies *Obergefell*'s implied meaning from its author's perspective. For twenty years, Kennedy has used equality as a doctrinal wedge that he himself has later cited as precedent for broader judicial intervention based on liberty. This is not the structural-institutional thinking that dominated legal-process scholarship, but it has yielded analogous results.[539]

Windsor declared that equal protection sometimes makes liberty "all the more specific and all the better understood and preserved."[540] But perhaps that was less a comment on the inherent nature of liberty or equality, and more a memoir of how Kennedy himself has used equal protection principles to delay broad judicial decisions and to observe the reactions of other political and cultural actors. This could explain why *Obergefell* repeatedly cited public "discussion" of same-sex couples and their status.[541] And it was this slow-paced two-step of equality and liberty, over the course of two decades, that finally brought Kennedy and the Court to acknowledge in *Obergefell* "the urgency" of demands for LGBT liberty and equality.[542]

As though encountering such issues for the first time, Kennedy's *Obergefell* opinion mentioned the political harm that would result if someone like Obergefell were not listed on his partner's death certificate, if two lesbians were unable to exercise full rights as co-parents, or if other plaintiffs had to wait or travel to obtain a legally valid marriage.[543] For modern interpreters, this last tension between *Obergefell*'s text and Kennedy's biographical background—between the decision's declared and implied meanings—may be the most interesting of all.

538. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013); Romer v. Evans, 517 U.S. 620, 632 (1996).

539. *Cf. supra* notes 454–471 and accompanying text (describing Justice Kennedy's connection with legal-process jurisprudence).

540. *Windsor*, 133 S. Ct. at 2695.

541. Obergefell v. Hodges, 135 S. Ct. 2584, 2596–97, 2605 (2015).

542. *Id.* at 2594.

543. *Id.* at 2601.

As a textual matter, the Court's opinion described the slow march of doctrinal history with a melancholy tone: "Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen."[544] A textualist might conclude from such language that the *Obergefell* Court had repented its mistakes and that litigants alleging some unspecified category of "dignitary wounds" should therefore expect quicker justice in the future. But such conclusions would ignore the fact that it was Kennedy himself who wrote the very same doctrinal history that his *Obergefell* opinion seemed to lament. If one were truly concerned with "dignitary wounds," then the Court—and Kennedy in particular—could have criticized *Bowers* and sodomy laws in 1996 (*Romer*), could have undermined DOMA in 2003 (*Lawrence*), could have cast doubt on state same-sex marriage laws in 2013 (*Windsor*), and even in 2015 (*Obergefell*) could have criticized countless episodes of discrimination against LGBT persons, couples, and families outside the marriage context.[545]

Obergefell correctly states that the Supreme Court, "like many institutions, has made assumptions defined by the world and time of which it is a part."[546] But the Court, and especially the swing-voting Justice Kennedy, has played important roles in *shaping* its world and time. In moments of legal dispute—such as *Romer*, *Lawrence*, *Windsor*, and *Obergefell*—the Court's choice about what kind of "assumptions" become precedents can make all the difference, as has been true for courts throughout our nation's debate-riddled history.

These features of Kennedy's biography make it more difficult to view *Obergefell* as a broad precedent that implicitly supports polygamy or physician-assisted suicide.[547] Although both of those practices have plausible connections to the Court's textual principles of "autonomy,"

544. *Id.* at 2606.

545. One cannot predict whether any of Kennedy's liberal-progressive peers would have joined him in reaching such conclusions, but it is likely that even a lone concurrence by Kennedy would have accelerated the judicial vindication of constitutional rights that were in fact announced years or decades later.

546. *Obergefell*, 135 S. Ct. at 2598.

547. With respect to physician-assisted suicide, however, one should take notice of *Gonzales v. Oregon*, 546 U.S. 243, 255–70 (2006). In that case, Kennedy's opinion for the Court upheld Oregon's Death with Dignity Act, 1995 Or. Laws ch. 3 (codified as amended at OR. REV. STAT. § 127.800–.897 (2013)), based on a vague amalgamation of administrative law and federalism. *Gonzales*, 546 U.S. at 255–70.

"commitment," "families," "society," and "dignitary wounds," neither context has generated the kind of public "discussion" and support that *Obergefell* cited as an important precursor to judicial intervention. Nor have they prompted any equality-based warm-up cases similar to *Romer* and *Windsor*.[548]

By comparison, it seems possible that *Obergefell* could entail broader constitutional protection for sexual orientation. Although some textualist interpreters will rely on the Court's unique attention to marriage as a precedential limit, Kennedy's shift from *Lawrence* to *Windsor*, and from *Windsor* to *Obergefell*, demonstrates a notable willingness to turn pregnant silence into affirmative doctrine. Applying similar logic, *Obergefell*'s focus on marriage may soon be replaced by broader visions of "dignity," "identity," and "self-definition" that encompass some blend of equality and/or liberty in the workplace, housing, public accommodations, or elsewhere—especially if such constitutional arguments include sufficient "discussion" and "debate" to inspire new forms of "understanding" and "insight."[549]

548. A case concerning a polyamorous reality television family is currently on appeal to the Tenth Circuit after a federal district judge held unconstitutional the portions of Utah's criminal polygamy law prohibiting multiple cohabitation, although the state was allowed to retain its ban on multiple marriage licenses. Brown v. Herbert, 43 F. Supp. 3d 1229, 1233 (D. Utah), *cert. granted*, 10th Cir. No. 14–4117 (Sept. 25, 2014). Unsurprisingly, the Browns cite *Obergefell* throughout their brief, asserting that the Court has rejected both the criminalization of private relationships and also legal barriers that are grounded in moral and social biases. Brief of Appellees at 16–18, Brown v. Herbert, No. 14–4117 (10th Cir. filed Aug. 26, 2015) (citing *Obergefell*, 135 S. Ct. at 2584).

In a case on appeal to the New Mexico Supreme Court, the state's Court of Appeals declined to extend *Obergefell* to the context of physician-assisted suicide, stating that the doctrine of judicial restraint requires the exercise of utmost care when extending substantive due process to new rights. Morris v. Brandenburg, No. 33,630, 2015 WL 4757633, at *12 (N.M. Ct. App. Aug. 11, 2015), *cert. granted*, N.M. No. S-1-SC-35478 (Aug. 31, 2015). Currently, physician-assisted suicide is legal only in Oregon, Vermont, and Washington, and it is a valid defense to homicide in Montana. *Id.* at *2.

549. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2596–99, 2602–05 (discussing past and future classifications of marriage). One statute that is particularly likely to be challenged in the future is Arkansas's Intrastate Commerce Improvement Act, which states that "a county, municipality, or other political subdivision of the state shall not adopt or enforce an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law." ARK. CODE ANN. § 14-1-403 (2015). At least five Arkansas municipal or county ordinances that "prohibit certain employers (and others) from discriminating on the basis of sexual orientation or gender identity" have been enacted to date, and a September 1, 2015, opinion from the state's Attorney General concluded that such ordinances are unenforceable under section 14-1-403. Ark. Op. Att'y Gen. No. 2015–088, 2015 WL 5179158.

c. Contemporary Reactions: The History of Now

For now, this is where analysis of *Obergefell*'s context must end, as the decision's historical arc begins to merge completely with its ongoing present. It is too soon for an article like this one to assess reactions to *Obergefell* that indicate the decision's understood meaning.[550] Indeed, this Article is one of the contemporary reactions that future interpreters might use to apply *Obergefell*'s understood meaning for their own struggles over the iconic case.

Although the content of *Obergefell*'s understood meaning cannot yet be known—and even less so its developmental meaning—legal interpreters will certainly confront the same kinds of historical materials and methods that we have seen with respect to *Swift*, *Erie*, and *Windsor*. A basic pattern will reappear with *Obergefell* and any other iconic case. Whenever adjudicative power gathers around an important precedent, and the Court's self-explanation seems inadequate or incomplete, this Article's methodology will help interpreters clarify and further complicate interpretive debates over precedential meaning.

There can never be an abstract guarantee of interpretive resolution, nor even assurance that any sequence of interpretive materials will be persuasive.[551] On the contrary, just as with statutes and constitutions, interpretive methodologies concerning precedents can at most yield greater understanding and self-consciousness with respect to the case-driven advocacy that underlies so many legal disputes.[552]

III. CONCLUSIONS: TURNING THE KALEIDOSCOPE

In the course of exploring links between law and history, this Article also has vital implications for the professional categories of legal practice and legal history. Despite occasional overlap, practitioners and historians of law are often different people, in

550. *See generally* sources cited *supra* note 390.

551. *Cf.* RODGERS, *supra* note 10, at 16 ("Should someone try to sell you a piece of political goods as an authentic encapsulation of the American political faith, the wise course is to run for cover. We have been too conflict-ridden a church to have a creed.").

552. *Compare Obergefell*, 135 S. Ct. at 2598, 2604–06 (citing Supreme Court precedents that have "expressed principles of broad[] reach" to show that the Court is "[r]esponding to a new awareness"), *with id.* at 2614, 2619–20 (Roberts, C.J., dissenting) (contesting the majority's interpretation of its cited judicial decisions, and arguing that the "Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning").

different environments, with different employment imperatives, and different standards of success. Thus, for example, some lawyers who read this Article will experience its historical details as a burdensome weight, even as historians reading the same words might scoff at the cursory treatment of a complicated past.[553] Notwithstanding such divergent reactions and dispositions, I suggest that legal practice and legal history are not as separate as one could suppose, and I further believe that the greatest work in each field will necessarily involve significant engagement with the other.

It would be quite impossible to explain the full nature of "law" and "history" in the space that remains, yet three metaphors may be useful for at least a brief sketch.[554] Consider law as a field of study that is performed with a microscope, as lawyers place preselected authorities onto glass slides and bring details into focus. This model of legal analysis prizes meticulous attention and comprehensive examination, but it also depends on a sharply limited field of view, with observable objects that are especially near and easy to manipulate. In practice, this model of legal interpretation relies almost entirely on the examination of published and easily accessible texts.[555]

By comparison, history might be viewed as exploration by telescope, using old light from distant stars to describe events that happened long ago and far away. Particular historians look at different parts of the sky, with different goals and tools. But just as no one can see the cosmos all at once, an important historian's task is to document and interrelate particular sets of observations, in the hope of producing better astronomical maps and general theories.

Interpreting iconic cases fits neither of these models very well; instead, it is more like looking through a kaleidoscope.[556] The tube is pointed at something in the world, but there is no hope of seeing that

553. For every impatient lawyer's complaint that "no one really cares about *Swift* anymore," a historian might ask "who can say anything about *Obergefell* except to express one's own politics?"

554. I offer these metaphors with due hesitation. Like historians, legal audiences tend to "feel more comfortable in prose. They order things sequentially and argue from effect to cause." Robert Darnton, *The Symbolic Element in History*, 58 J. MOD. HIST. 218, 220 (1986). The use of any metaphor requires the author to hope and trust that readers will find them meaningful, *id.* at 222, and it should be obvious that if a metaphor succeeds, that success is properly credited to the reader as much as the author.

555. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 120 (1984).

556. *Cf.* PURCELL, BRANDEIS, *supra* note 30, at 296 (noting, in a very different context, "*Erie*'s kaleidoscopic quality").

external object as it actually is.[557] Instead, kaleidoscopes are filled with plain objects, such as colored flakes or fluids.[558] As the kaleidoscope turns, mirrored reflections create patterns and make these interior objects seem more magnificent than they would otherwise. Kaleidoscopic images of iconic precedents are based in reality, and they overlap with one another. The images are always derived from shared materials, but the images change subtly and substantially without repeating, so there is no single arrangement that can claim objective or timeless superiority over the rest.

The kaleidoscopic metaphor captures many truths about iconic precedents, but it overlooks others. Most important, although many precedential interpreters "turn the kaleidoscope" to refigure or displace existing interpretations of iconic cases, historians and lawyers reinterpret iconic precedents for reasons greater than the amusement of dancing colors and shimmering light.

Historians interpret iconic precedents in the pursuit of professional and intellectual progress.[559] The goal for such academics is to say something creative and thoughtful, often by developing or unseating other historians' work.[560] Nuance, sophistication, and expertise are highly valued, and relationships between legal events and other historical evidence are exceedingly important.[561] That is why some historians would supplement this Article's categories with even more sources of meaning, including a decision's social effects, cultural presumptions, or religious background. In every instance, historians' interpretations are marked by an unshaken focus on the past, which also embodies a corresponding emphasis on the forward march of time.

By contrast, lawyers turn the kaleidoscope of iconic cases to advance their interests, their clients' interests, and sometimes the legal system's interests. Legal audiences are not purely intellectual, and they do not admire complexities for their own sake. On the contrary,

557. This is the sense in which precedential icons do not have scientifically indisputable meanings.

558. These are cultural forces that create precedential meaning outside of a decision's unobservably essential or objective reality.

559. *Cf.* Friedman, *supra* note 18, at 253 ("Every generation looks at history through its own lens. Something new is constantly getting discovered—new batches of material and, more significant, new ways of looking at old or neglected material.").

560. *Id.* at 253 ("Nothing in life stands still; not even the past. Historians are constantly reworking, rethinking, reexamining old assumptions, turning over new rocks, closing off old tunnels and caves, digging up long-buried cities. The process of revision is always going on, and reevaluation, in general, is very healthy.").

561. *See* Tomlins, *supra* note 18, at 323.

professional imperatives induce judges and lawyers to *use* precedents, and this creates pressure to seek interpretations of iconic cases that are themselves *usable*. Simplicity, legibility, and intercontextual portability are at a premium.[562] This is why lawyers interpret or misinterpret *Marbury* to prioritize all judicial interpretations of the Constitution, *Brown* to proscribe all racial discrimination, and *Erie* to require state substantive law in all diversity cases.[563] Lawyerly interpretations of iconic cases—and other authorities—tend to favor smooth surfaces, simple holdings, and distortive abstractions from the messiness of life's extralegal experience.

The goals and professional imperatives of historians and lawyers are especially interesting because neither modality can be fully separated from the other when it comes to iconic precedents. On one side, historians cannot fully describe iconic cases without accounting for those decisions' *functionality* in a precedential system. Iconic cases are always written, read, understood, and applied in the context of a professional legal culture; thus, such cases' meanings cannot be abstracted from their legally operative, oversimplifying *function as precedents*.

By similar coin, lawyers who wish to simplify and operationalize iconic precedents cannot entirely supplant the past's complexity in pursuing present and future policies. Doing so would contradict the basic premise of a *precedential* legal system: that the law should "stand by" decisions *from the past*.[564] Iconic cases can always be overruled, narrowed, massaged, or adjusted. But if the interpretation of an iconic decision were to lose all contact with that precedent's historical reality, then that interpretation itself would be inaccurate, inauthentic, and therefore illegitimate *as a matter of legal doctrine*.

The rule of law is not only about creating forward-looking doctrines that are accessible, transferrable, simple, and cheap. Legal interpretation also requires a connection to the past events that create and embody legal authority. Constitutions and statutes are two important examples of concentrated, anchored legal power that is derived from past events; iconic precedents are a third. Where current legal mandates depend on appeals to prior judicial precedent, historical

562. *See supra* notes 21–23 and accompanying text.

563. *See, e.g.*, LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1 (1991).

564. *Stare decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Latin 'to stand by things decided.' ").

analysis is unavoidable, and it cannot be brushed aside just because it is messy. The historian's call for nuance must confront the lawyer's demand for answers, but a lawyer's oversimplified distortion risks exposure as unpersuasive and literally unbelievable in the face of historical critique.

The mutual compromises of history and law that surround iconic precedents can be frustrating or inspiring. Either way, such shared sacrifices expose the profound truth that law's precedential system is not today—and has never been—governed purely by forward-looking policy or backward-looking history. It has always been an uneasy hybrid, and that mixture itself is the product of perpetual debates within a complex legal culture that is partly inherited and partly manufactured by each successive generation of lawyers and judges.

This Article's account of legal precedent may seem complex, and that is absolutely the point. Too many lawyers, including this author,[565] have assumed or pretended that the singular meaning of an iconic case like *Erie* can be read exclusively from its judicial text, though *Brown* should serve as an overwhelming counter-example.[566] To discern the meaning of iconic precedents, no less than to interpret statutes and constitutional provisions, can require elaborate effort, and it can also generate substantial conflict—both as a matter of substance and technique.

In the field of constitutional interpretation, Justice Souter has criticized a "fair reading model" which assumes that "deciding constitutional questions should be a straightforward exercise of reading fairly and viewing facts objectively."[567] Similar phenomena are even more apparent with the interpretation of judicial precedents, and the

565. *E.g.*, Green, *Repressing* Erie, *supra* note 30.

566. *Compare* Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24 (1959) ("Certainly the [*Brown*] opinion is most obscure in its crucial elements—e.g., is inequality a 'fact'? Whatever it is, how do judges determine it? Moreover, the opinion does not appear to articulate any grounds for disposing of the arguably quite different issues—segregated beaches, golf courses, buses, and parks—subsequently resolved per curiam in apparent reliance on *Brown*." (footnotes omitted) (citing first Baltimore v. Dawson, 350 U.S. 877 (1955); then citing Holmes v. Atlanta, 350 U.S. 879 (1955); then citing Gayle v. Browder, 352 U.S. 903 (1956); and then citing New Orleans Parks Ass'n v. Detiege, 358 U.S. 54 (1958))), *with id.* at 30–31 ("The fateful national consequences of *Brown v. Board of Education* flow from the opinion and judgment actually rendered. . . . [And the] judgment in the segregation cases will as the decades pass give ever deeper meaning to our national life. It will endure as long as our Constitution and the democratic faith endure.").

567. David H. Souter, *Harvard University's 359th Commencement Address*, 124 HARV. L. REV. 429, 430 (2010).

impulse toward a simple "fair reading" methodology is the same in both contexts. "[B]ehind most dreams of a simpler Constitution," and similar dreams of simple judicial precedents, "there lies a basic human hunger for the certainty and control that the fair reading model seems to promise. And who has not felt that same hunger?"[568] However, with iconic cases, the Constitution, and many other legal materials, such "certainty generally is illusion and repose is not our destiny."[569]

At the very heart of our legal order, the most urgent and vital question is how judges and lawyers in "an indeterminate world" can maintain what Souter calls "a state of trust," believing that some "way will be found leading through the uncertain future" even as the law's future-oriented trajectory is anchored by precedents from the near and distant past.[570] This Article's interpretive methodology hopes to indirectly influence how lawyers and judges chart such paths forward. At the very least, a better understanding of precedential interpretation should help legal agents to recognize the dilemmas they face and the techniques that are available on the way.

568. *Id.* at 436.
569. *Id.*
570. *Id.*