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TURNING THE KALEIDOSCOPE: TOWARD A THEORY OF INTERPRETING PRECEDENTS

CRAIG GREEN*

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...
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.

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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...interwoven 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. 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. 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. 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. 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. Vague and authoritative precedents, however, often require every bit as much interpretation as vague and


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 simultaneously unclear with respect to some question of great importance.\footnote{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.}

This Article explores how sophisticated lawyers interpret iconic precedents and illustrates why those methods are important.\footnote{“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.} 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.\footnote{Tiersma, supra note 1, at 1278.} 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.\footnote{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.”).} At different points
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.\footnote{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.\footnote{12} If thousands of ordinary decisions were erased from research databases, hardly anyone but specialists would care or even notice.\footnote{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).


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. 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.” 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.

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. An iconic

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14. As Bourdieu 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.

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. 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. 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. 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. If a decision is opaque or understood solely by marginal elites, that precedent can have only limited effect. 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


Obergefell v. Hodges, which invalidated state restrictions on same-sex marriage. Windsor and Obergefell addressed the greatest civil rights issue in a generation, but in both circumstances the Court’s explanation left unresolved important ambiguities. 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. 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.

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

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

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31. See supra note 10 (explaining what makes such precedents “iconic”).
32. Bridwell & Whitten, supra note 30, at 123.
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

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.”  

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.”  

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.”  

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.

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.”  

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.”  

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.  

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

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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.” \(^{58}\) \textit{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, \textit{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 \textit{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 \textit{Swift}, for example, details wrote the Court’s opinion in \textit{Prigg v. Pennsylvania}, 41 U.S. (16 Pet.) 539 (1842), which came rather close to that conclusion:

\begin{quote}
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.
\end{quote}

\textit{Prigg}, 41 U.S. (16 Pet.) at 611 (emphasis added). For political reasons and otherwise, it may have been vital for \textit{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, \textit{e.g.}, \textit{NEWMYER, supra} note 33, at 346–47, 354 (documenting Justice Story’s role in developing the law surrounding slavery).


\(^{59}\) Perhaps ironically, Justice Catron’s concurrence showed most clearly the Court’s expectation that state courts would change their minds in response to \textit{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.” \textit{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.” \textit{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

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.”

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.

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. Unstable banks and securities prompted many
commercial actors to demand cash instead of accepting credit. 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.

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.” 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.

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... If 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.”).
67. Id.
Fessenden also discussed federal courts’ reputation among international investors, who had been crucial to the 1837 Panic. 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.”\(^72\)

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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.” 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.

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. 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.” 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.” According to Dana, Congress never adopted English common law, much less some kind of imaginary “uniform” common law. 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.

Dana argued that the Rules of Decision Act “express[ed] all that was necessary for the adoption of the state laws.” 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.
battle between law and economics. 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

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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

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] grafted 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. 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.

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. 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. More than anyone, Story understood the multilayered and polycentric structure of nineteenth-century common law, and that experience was certainly important in Swift. Story’s
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 “conflict[ion]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

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\(^{101}\) 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.


\(^{105}\) 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. In the Jacksonian era that Story occupied, such nationalist views were controversial, and the response to his work was correspondingly mixed.

Even as Story urged all judges—federal, state, and English—to support transatlantic commerce, his constitutional commentaries assigned federal courts a privileged position. 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. 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.

In *Swift*, Story read the Rules of Decision Act much like vague constitutional provisions that left important unresolved issues for the
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{116} Law, economics, and constitutional politics were bound together in this one

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

\textsuperscript{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.

\textsuperscript{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)).

\textsuperscript{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

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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).


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.” 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.”

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. Nor did contemporaries view Swift as a judicial usurpation that violated separation of powers. 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. 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*, 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*, 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. 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. 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.

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

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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).


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.\textsuperscript{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.\textsuperscript{133} By 1842, New York was America’s greatest city, with vastly more international trade than anywhere else in the country.\textsuperscript{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?\textsuperscript{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 agree, the legal center of American finance unapologetically did not.\textsuperscript{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

\textsuperscript{132} Id. at 111–12.

\textsuperscript{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).

\textsuperscript{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 tripe 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.”).

\textsuperscript{135} See, e.g., Grocers’ Bank v. Penfield, 69 N.Y. 502 (1877).

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.

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. 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

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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

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140. GILMORE, supra note 15, at 61.
141. See infra Section I.B.
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

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


149. Id. at 206–07.


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


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

\(^{156}\) 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.’”

Although Swift’s general common law had never entered such political minefields, the public silence that accompanied Gelpcke—outside of Iowa—is impressive. Only one sentence can be found in newspapers announcing the decision, 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. Political battles over municipal debt never focused their attacks on federal general common law itself until 1873, after an entirely separate financial panic. 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.

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 Gilded-Era America than anywhere in the world, and such accidents affected many aspects of public life. In 1862, the Supreme Court applied federal law to such cases, and the Iowa court did not identify the reference for its quotation, but the most likely source is the Bible. Matthew 24:6 (King James).

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).

Supreme Court of the United States, DAILY N. T. 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.

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).

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.).

Ross, supra note 144, at 237–38.

general common law to resolve *Chicago City v. Robbins*, which concerned a pedestrian who was injured beside a construction site. 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: “[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.”

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. (This was the nationally significant “fellow-servant rule.”) The Court unanimously agreed that general common law should decide the issue, but they split 5–4 on the merits. 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. 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.

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. In that year, the majority opinion in *Baltimore...
& 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.”

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.

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.” 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.”

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.” This latter statement contradicted numerous judicial authorities, including Field’s opinion in Ross itself.

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).


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.\textsuperscript{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.”\textsuperscript{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)); \textit{id.} at 390–91 (citing Wharton’s treatise on the law of negligence); \textit{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. \textit{We agree with them}...” (emphasis added)).

\textsuperscript{184} \textit{Id.} at 393–95; cf. \textit{supra} notes 74–81 and accompanying text (describing similar arguments from \textit{Swift}).

\textsuperscript{185} \textit{Baugh}, 149 U.S. at 397–99 (Field, J., dissenting). For other examples of Field’s extreme assertions of states’ rights in his \textit{Baugh} dissent, see \textit{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 \textit{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—indeed independence in their legislative and independence in their judicial departments.\footnote{186 Id. at 401.}

This dramatic renunciation, however, is difficult to square with the rest of Field's opinion in \textit{Baugh} itself, which concludes with a four-page defense of \textit{Ross} based exclusively on federal general common law.\footnote{187 Id. at 408–11.} Furthermore, Field showed no qualms about applying general common law in any subsequent case—any more than Justice Miller did after \textit{Gelpcke}.\footnote{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).} During their own time, the \textit{Gelpcke} and \textit{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 \textit{Swift} appeared in 1873—over thirty years after \textit{Swift}—and such arguments achieved very little popularity for at least another quarter-century after that.\footnote{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. \textit{Id.} at 85–87.} Some observers decried \textit{Swift}, others attacked \textit{Gelpcke}, and a few previewed arguments that would be featured much later in \textit{Erie}.\footnote{190 Id. at 85–100.}

Only a few historians have even noticed this florescence of anti-\textit{Swift} commentary, and its timing has never been adequately explained.\footnote{191 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 \textit{Swift} v. \textit{Tyson} device, which had over a long period been of great service, had ceased to work”).} The only causal factors mentioned in existing scholarship involve the Civil War or some kind of shift in legal thought,\footnote{192 See id. at 85–100.} but each of these theories has problems. The Civil War, for example, was never mentioned by \textit{Swift}'s nineteenth-century critics, and it seems temporally remote from writings that were authored decades later.\footnote{193 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.
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

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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.


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...”).


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.”

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.” 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.”

In Jensen, the Court refused to compensate a stevedore under a New York statute because the latter “conflict[ed] with the general maritime law.” 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.” 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.” 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 . . .”

Holmes’s most trenchant critique involved the Taxicab case of 1928. 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.
jurisdiction to litigate a contractual dispute. Applying “general law,” the Supreme Court enforced the contract under federal general common law and disregarded state precedent to the contrary. 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.”

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.” “But,” Holmes wrote with unbending confidence, “there is no such body of law.”

[Law 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.

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.”

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. 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.
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.” Holmesian attacks on federal general common law, however, discarded experience entirely and relied on conceptual analysis of “fallacies” and “brooding omnipresence.” 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. 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.

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. After an anti-*Swift* polemic and

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

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.”

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. 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. Statistics like these exacerbated concern that federal courts were manufacturing defendant-friendly doctrines that benefited national corporations and damaged local victims. 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.

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228. Id. at 154 n.3, 159–66.
229. Id. at 167.
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. 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. By 1938, Swift was indeed a “headless monster” in Holmesian academic circles. 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.

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. 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. 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.

235. See Freyer, Forums, supra note 30, at 148.
236. Purcell, Brandeis, supra note 30, at 105.
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

243. PURCELL, BRANDEIS, supra note 30, at 96.
244. Erie, 304 U.S. at 69; PURCELL, BRANDEIS, supra note 30, at 96–97.
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.
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. The Court also mentioned recent concerns about favoring out-of-state corporations, including manipulations of diversity jurisdiction (Taxicab) and tort standards (Robbins and Baugh).

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.

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. The Court quoted states-rights arguments from Justice Field’s Baugh dissent, relying on extreme “autonomy and independence of the states.” And the opinion concluded by referencing the Tenth Amendment without citation.

Section three blended Field’s arch-federalism with Holmes’s Black & White Taxicab dissent, though the two arguments were not at all similar. 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

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.
states.”

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. 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. The opposite was true in Erie. No lawyer had suggested that “the oft-challenged doctrine of Swift v. Tyson should be disapproved.” 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. And a Second Circuit panel that included Learned Hand and Thomas Swan had unanimously used federal general common law with casual confidence.

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? Did lower courts misread the federal general common law of contributory negligence? Exactly how settled was Pennsylvania’s rejection of the “permissive pathways” doctrine? 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.” For

266. Cf. WHITE, supra note 202, at 488.
268. Erie, 304 U.S. at 69.
269. Younger, supra note 30, at 1020–21.
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, . . . 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

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

\textbf{b. Judges}

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

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

\textsuperscript{283} GILMORE, supra note 15, at 61.
\textsuperscript{284} See supra note 137 and accompanying text.
\textsuperscript{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 \textit{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 \textit{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 \textit{Swift v. Tyson}”).
\textsuperscript{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 (“\textit{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 \textit{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 \textit{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 \textit{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 \textit{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 \textit{Erie} too closely, as the opinion’s botched language could muddy the constitutionally progressive truth that lies beneath.\(^{290}\) There is no denying that \textit{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 \textit{really meant}.\(^{292}\)

\(^{287}\) \textsc{Purcell, Brandeis}, \textit{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.” \textit{See id.} at 109, 113–14.

\(^{288}\) \textit{See id.} at 120–24, 190–91 (explaining Brandeis’s \textit{Erie} decision as a link between his ideas of judicial restraint and social progressivism).

\(^{289}\) \textit{Id.} at 140, 165.

\(^{290}\) \textit{See id.} at 296 (“The opinion’s relatively terse and misleading language compounded the normal problems of interpretation . . . .”); \textit{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.”); \textit{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.”); \textit{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.”); \textit{id.} at 163–64 (listing five possible rationales underlying the opinion).

\(^{291}\) \textit{See id.} at 114, 179, 182, 189 (drawing distinctions between Brandeis’s ideology and the \textit{Erie} opinion’s text).

\(^{292}\) \textit{See id.} at 6, 305 (urging readers to look past \textit{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. Purcell portrays Brandeis as a singularly personal link between Holmes’s critique of *Swift*’s theoretical “fallacies” and socially progressive constitutionalism. 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. 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.” 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.

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*. 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. *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. Freyer’s image of an eclectic Brandeis who “gathered his citations” describes a fastidious quote-clipper more than a visionary progressive prophet.

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

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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.”).


296. See infra Section I.B.3 (charting *Erie*’s developmental meaning).

297. FREYER, HARMONY, supra note 30.

298. Id. at 131–42.

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

300. FREYER, HARMONY, supra note 30, at 133.
importance. Bulky organizing labels—including Purcell’s “progressivism”—often do not fit particular individuals very well. 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].” 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].” 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.”

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.” Brandeis replied with Tenth-Amendment rhetoric concerning “rights” that were “reserved . . . to the several states.” And, indeed, it was the physically failing Justice Cardozo who made certiorari possible in the first place by granting the railroad a preliminary stay. 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).
308. Id.
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.
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. Most early commentators were also critical, if they bothered to mention Erie’s constitutional holding at all.

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. 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. Krock later wrote that his own

313. Id. at 202–03.
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 “transcendentally 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.”;


318. Younger, supra note 30, at 1029.
319. Jackson, supra note 275, at 609.
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. For decades, federal courts had been pilloried as subverting democratic control and economic health. 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.

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. Brandeis and Holmes had been dissenters on issues of federal general common law as recently as 1928. 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. Legal academics attacked the Court for shoddy reasoning, if not bad results. 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

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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.
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).


Ever since 1938, the Court has struggled to distinguish state “substantive” law from federal “procedural” law, yet the Court has never again relied on *Erie*’s indecipherably weak constitutional basis. 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.” 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.

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. 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.” 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.

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. Many post-war academics expressed confidence in their ability to design systems that, aided by properly examined facts,

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338. PURCELL, BRANDEIS, supra note 30, at 216–28 (collecting sources).
340. PURCELL, BRANDEIS, supra note 30, at 217.
could beneficially organize human life. Hart’s sweeping theories about American governance—and especially federal courts—amplely 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.” On the other hand, Hart did believe that full adjudicative creativity was appropriate only in federal cases that applied federal substantive law.

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

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,” 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.

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

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. 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.”

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.” 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.”

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. 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. 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.

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, *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. After 1938, however, diversity jurisdiction changed from a political hot button to a harmless oddity.

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. *Erie* ended the *Taxicab*-style application of flagrantly different substantive law to identical cases in courthouses just blocks apart. 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


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.


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. *Erie* never needed a constitutional basis, 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. 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.”

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. 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. 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).


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


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. 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. 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.

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*. 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.

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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. 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. They had seen Congress and President Roosevelt promote a constitutionally transformative agenda for federal governance. And Roosevelt had dramatically threatened separation of powers by trying to alter the number of Justices in order to serve his political ends.

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. 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.

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

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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).


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. 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. 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.

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. 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

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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….Courts’ 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.
\(^{395}\) 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).
411. Windsor, 133 S. Ct. at 2681, 2692.
412. Id. at 2692–93.
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. 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. 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.”

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. 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.

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

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 “motivated 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. 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. Same-sex marriage was a fierce political battleground, and Windsor seemed like a case that, alongside Hollingsworth v. Perry, 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. 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. Windsor’s companion case, Hollingsworth, directly challenged whether a state could exclude same-sex couples.

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425. See supra notes 7, 10 and accompanying text (discussing what qualifies cases as “iconic”).
from its legal definition of marriage. Hollingsworth had its own sympathetic plaintiffs, its own extraordinary lawyers, and its own flock of amicus briefs. 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.

Most importantly, Windsor and Hollingsworth offered a distinctly 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.” 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.” Or the Court could have applied heightened constitutional scrutiny to invalidate all state barriers against same-sex marriage—a “fifty-state solution.”

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430. Hollingsworth, 133 S. Ct. at 2661.
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,\textsuperscript{435} and Hollingsworth ruled five to four that the litigants lacked standing to pursue their appeal.\textsuperscript{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.\textsuperscript{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 \textit{and also useful} as a focal point for constitutional debate.\textsuperscript{438}

\textbf{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.\textsuperscript{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.\textsuperscript{440} His opinion in Lawrence protected sodomy, but refused to address same-sex marriage.\textsuperscript{441} In Windsor, Kennedy led the Court even closer to protecting same-sex marriage across the board, yet once again his opinion stopped short.\textsuperscript{442}

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

\footnotesize{\textsuperscript{435} United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) (“This opinion and its holding are confined to [state-recognized] lawful marriages.”).}
\footnotesize{\textsuperscript{436} Hollingsworth, 133 S. Ct. at 2652–53.}
\footnotesize{\textsuperscript{437} Id.; id. at 2668 (Kennedy, J., dissenting); Windsor, 133 S. Ct. at 2682.}
\footnotesize{\textsuperscript{438} See, e.g., sources cited supra note 409.}
\footnotesize{\textsuperscript{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, \textit{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 . . . .”).}
\footnotesize{\textsuperscript{440} See Romer, 517 U.S. at 636 (Scalia, J., dissenting).}
\footnotesize{\textsuperscript{441} Lawrence, 539 U.S. at 578.}
\footnotesize{\textsuperscript{442} Windsor, 133 S. Ct. at 2696.}
three weeks after *Bowers v. Hardwick* was decided in 1986, Judge Kennedy spoke to the Canadian Institute for Advanced Legal Studies in an address entitled “Unenumerated Rights and the Dictates of Judicial Restraint.” The speech was featured in Kennedy’s confirmation hearings after the Senate rejected arch-conservative Robert Bork, 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. 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.” Kennedy would much later cite this decision to justify a similar result under the United States Constitution. 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.

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. . . .” 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

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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*].
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

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 &
455. For later applications of legal-process ideas, see Alexander Bickel, The
Least Dangerous Branch: The Supreme Court at the Bar of Politics 16
456. Kennedy, supra note 444, at 5.
457. Id. at 2.
government.\textsuperscript{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.\textsuperscript{459} With respect to \textit{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.\textsuperscript{460}

This notion of compromising substantive justice in favor of systemic credibility was a hallmark of that conservative generation of legal-process scholarship.\textsuperscript{461}

A similar focus on institutional arrangements led one modern commentator to call \textit{Windsor} an act of “mad genius,” and perhaps from a legal-process perspective it was.\textsuperscript{462} \textit{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, \textit{Windsor} took its constitutional stand on the mild institutional thesis that states should decide marriage issues, not Congress. The \textit{Windsor} opinion thus echoed Kennedy’s earlier belief that “[t]he judicial method... is the surest safeguard of liberty,”\textsuperscript{463} as opposed to expansive recognition of unenumerated rights. From this point of view, \textit{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 \textit{Windsor}’s half-steps—neither international legal opinion nor legal-process jurisprudence. Perhaps \textit{Windsor}’s paragraph

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{458} Id. \\
\item\textsuperscript{459} Id. at 20–22. \\
\item\textsuperscript{460} Id. at 14. \\
\item\textsuperscript{461} See, e.g., Herbert Wechsler, \textit{Toward Neutral Principles of Constitutional Law}, 73 HARV. L. REV. 1 (1959). \\
\item\textsuperscript{462} Gerken, \textit{supra} note 409, at 587. \\
\item\textsuperscript{463} Kennedy, \textit{supra} note 444, at 4–5 (emphasis added).
\end{itemize}
\end{footnotesize}
about United States history could be viewed as its author’s closeted autobiography:

[Un]til 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 favors 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

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.


Brown v. Board of Education. After the Court’s ruling, the national press covered public celebrations and supportive demonstrations, which yielded dramatic visual images and personal stories. 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. 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. Legal commentators were slightly more conflicted about Windsor, but substantive criticism was modest. Almost all academics viewed Windsor as a way station toward full protection for same-sex marriage, 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.

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. 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.
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.
analyses. 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. 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.

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. 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

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. 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.

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. 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. 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. 

486. See sources cited supra note 390.
Oklahoma in the context of segregation, Loving overwhelmed McLaughlin v. Florida with respect to miscegenation, and now Windsor may join Romer and even Lawrence as transitional cases on the doctrinal path to Obergefell. Windsor remains the Court’s most important holding about “animus,” and it may yet imply broad protections based on sexual orientation. 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. Obergefell’s partner, John Arthur, was in hospice care suffering from ALS when the Court decided Windsor v.

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).
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United States. That same day, Obergefell leaned over and proposed to Arthur with a hug and a kiss.\footnote{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].} 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.\footnote{495. \textit{Obergefell}, 135 S. Ct. at 2595.} Three months later, Arthur died in Ohio, and Obergefell filed suit so that the death certificate would reflect his status as a surviving spouse.\footnote{496. Id.} 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.\footnote{497. \textit{E.g.}, Brief for Petitioners at 12, \textit{Obergefell} v. Hodges, 135 S. Ct. 2584 (2015) (No. 14–556).}

The Supreme Court ruled in favor of all the \textit{Obergefell} plaintiffs by a vote of five to four, and as with \textit{Windsor}, Justice Kennedy wrote the majority opinion.\footnote{498. \textit{Obergefell}, 135 S. Ct. at 2593, 2608.} Entirely absent were \textit{Windsor}'s tortured arguments about federalism and conflicts of law.\footnote{499. \textsuperscript{500} See supra notes 410–414 and accompanying text (discussing such arguments in \textit{Windsor}).} Instead, \textit{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.”\footnote{500. \textit{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.”).} 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.”\footnote{501. Id. at 2595.} 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.”\footnote{502. Id.} Second, as a bilateral commitment, the right to marriage “dignifies couples” in their mutual loyalty, while the practical “companionship and understanding” of
married life “responds to the universal fear that a lonely person might call out only to find no one there.”

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.” Fourth, the Court celebrated marriage as “a keystone of our social order” and “a building block of our national community.” This is why marriage as a “public institution” entails significant advantages under federal law and a massive number of state-law benefits.

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. After all, the Court declared, the petitioners’ “immutable nature dictates that same-sex marriage is their only real path to this profound commitment.”

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 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. 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.\footnote{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.")} 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.\footnote{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 . . .").} The
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.” 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.

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.” Under that scenario, every state-imposed effort to “demean,” “stigmatize,” “harm,” or otherwise discriminate based on sexual orientation might be presumptively unconstitutional. This could be called a “heightened scrutiny” interpretation of Obergefell, although the Court did not use that technical term.

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. 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.” And Obergefell’s dismissive approach to Washington v. Glucksberg may be suggestive. 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. 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.”

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. By comparison, the plaintiffs and lawyers in Obergefell were engaged in something closer to a mop-up project.

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. 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. 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. Arguments that same-sex marriage represented “the right side of history” were certainly prevalent in 2013, 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.

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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.
Thus, for example, no brief in Obergefell argued for protecting polygamy or other currently illegal forms of marriage. No brief argued for physician-assisted suicide, prostitution, or any other expansive constitutional liberty. 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.

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. 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. 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...
toward the class it affects” and thus failed even rational basis review.\textsuperscript{532} A major question that remained was whether \textit{Romer}’s equality ruling could be reconciled with \textit{Bowers}, which had upheld a state “homosexual sodomy” ban against a constitutional challenge on liberty grounds.\textsuperscript{533}

In 2003, Kennedy’s majority opinion in \textit{Lawrence v. Texas} answered that open question from \textit{Romer} by holding that sodomy laws targeting “Homosexual Conduct” violate constitutional liberty.\textsuperscript{534} The Court did not, even as an alternative holding, apply \textit{Romer}’s “animus” principle under equal protection.\textsuperscript{535} \textit{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 \textit{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.\textsuperscript{536}

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

\textsuperscript{532}. \textit{Id.} at 631–32.
\textsuperscript{534}. \textit{Lawrence}, 539 U.S. at 564 (majority opinion).
\textsuperscript{535}. \textit{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 \textit{Romer}’s “bare . . . desire to harm” was categorically insufficient. \textit{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.” \textit{Id.} at 579.
\textsuperscript{536}. \textit{Id.} at 578 (majority opinion).
\textsuperscript{537}. \textit{See supra} Section II.A.1.
refused to consider any other constitutional issue, including state restrictions on same-sex marriage.\textsuperscript{538} Much like \textit{Lawrence} following \textit{Romer}, \textit{Obergefell}'s broader liberty analysis resolved the constitutional issue that \textit{Windsor} had dodged through narrow reliance on “animus” and equal protection.

With Kennedy's judicial biography as an interpretive lens, this pattern embodies \textit{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.\textsuperscript{539}

\textit{Windsor} declared that equal protection sometimes makes liberty “all the more specific and all the better understood and preserved.”\textsuperscript{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 \textit{Obergefell} repeatedly cited public “discussion” of same-sex couples and their status.\textsuperscript{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 \textit{Obergefell} “the urgency” of demands for LGBT liberty and equality.\textsuperscript{542}

As though encountering such issues for the first time, Kennedy's \textit{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.\textsuperscript{543} For modern interpreters, this last tension between \textit{Obergefell}'s text and Kennedy's biographical background—between the decision's declared and implied meanings—may be the most interesting of all.

\textsuperscript{539} Cf. supra notes 454–471 and accompanying text (describing Justice Kennedy's connection with legal-process jurisprudence).
\textsuperscript{540} \textit{Windsor}, 133 S. Ct. at 2695.
\textsuperscript{542} Id. at 2594.
\textsuperscript{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.” 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.

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.” 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. 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.
“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.
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. 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. 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.

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.\textsuperscript{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.\textsuperscript{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 prides 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.\textsuperscript{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.\textsuperscript{556} The tube is
pointed at something in the world, but there is no hope of seeing that

\textsuperscript{553} For every impatient lawyer’s complaint that “no one really cares about Swift
anymore,” a historian might ask “who can say anything about \textit{Obergefell} except to express
one’s own politics?”

\textsuperscript{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, \textit{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, \textit{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.


\textsuperscript{556} \textit{Cf.} \textit{Purcell, Brandeis, supra} note 30, at 296 (noting, in a very different
context, “\textit{Erie’s kaleidoscopic quality}”).
external object as it actually is. Instead, kaleidoscopes are filled with plain objects, such as colored flakes or fluids. 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. The goal for such academics is to say something creative and thoughtful, often by developing or unseating other historians’ work. Nuance, sophistication, and expertise are highly valued, and relationships between legal events and other historical evidence are exceedingly important. 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. 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. 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. 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.
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, 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. 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.” 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.”).)
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.