Expressing Faith in and Giving Credit to State Courts: The Erie Doctrine and Interjurisdictional Preclusion

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ABSTRACT

The Full Faith and Credit Clause and statute require federal and state courts to give the same effect to a state court’s judgment as would the state court that rendered the judgment. Thus, the provisions promote national unity and prevent litigants from resorting to other courts after incurring adverse judgments. While the full faith and credit provisions do not acknowledge exceptions, the Supreme Court has long recognized that exceptions to them exist. However, the Court has not set forth the limits of many of these exceptions. Absent Supreme Court guidance, state and federal courts have considered and applied various novel full faith and credit exceptions.

The Erie Doctrine requires federal courts sitting in diversity jurisdiction to apply the substantive laws of their forum states unless compelled to do otherwise by a federal provision. This requirement ensures that the “accident” of diverse parties will not result in different outcomes in federal court than in state court when a matter is governed by state law. The effect of another court’s judgment is a substantive matter with the potential to determine a dispute’s outcome. Therefore, Erie suggests that a federal court sitting in diversity should apply its forum state’s preclusion law, which is informed by the full faith and credit provisions. However, federal courts generally consider the full faith and credit provisions, and possible exceptions to them, without regard to forum-state law. In doing so, they create the possibility of differing outcomes between state and federal courts in diversity cases—Erie problems.

Part One considers the two bases for a federal court sitting in diversity jurisdiction applying state preclusion law—the full faith and credit statute and the Erie Doctrine. Part Two analyzes the possible exceptions to the full faith and credit provisions and considers the Erie problems that these exceptions could give rise two. Part Three proposes two ways to resolve these Erie problems without greatly encroaching on federal judicial power.

INTRODUCTION

Consider a case in which a federal court sitting in diversity jurisdiction decides a state-law claim, where there is no applicable substantive federal law, based not on applicable state law, but instead on its own extra-textual rule of decision. Such an outcome would seem like a classic example of the general common law-based outcomes that the Supreme Court put to rest in Erie Railroad Co. v. Tompkins. However, general


2 304 U.S. 63 (1938).
federal common law lingers in one dim crevice of the law—the exceptions to the Full Faith and Credit Clause\(^3\) and its enabling statute.\(^4\)

In most instances, the Constitution precludes a state court from re-adjudicating a claim previously brought in and decided by the court of another state. It does so by requiring that states give “full faith and credit” to the “judicial proceedings” of their sister states. “Full faith and credit” entails giving the same effect to another state’s judgment as would a court of the state rendering the judgment. The Full Faith and Credit Act imposes the same obligation on federal courts. Although the Supreme Court has long recognized that there are exceptions to this full faith and credit obligation, neither the constitutional provision nor the federal statute suggest what those exceptions are, or even acknowledge their existence. Instead, the exceptions stem from the common law that predates the Constitution, and as such, the full faith and credit provisions’ precise scope is more than a bit hazy.

*Erie* requires a federal court sitting in diversity jurisdiction to apply the substantive law of its forum state. Whether another court’s judgment is entitled to full faith and credit is undoubtedly a substantive issue. Therefore, *Erie* suggests that a federal court sitting in diversity should follow the conclusions of its forum state’s courts as to the full faith and credit provisions’ scopes. Failure to do so is almost certain to result in the very problems that the *Erie* doctrine seeks to avoid. Nevertheless, lower federal courts currently show no willingness to do so.

The following expands upon this issue and offers solutions to it. Part One considers the two bases for a diversity court’s applying full faith and credit law—the statutory basis and the *Erie* basis. Part Two considers the various instances in which the application of full faith and credit is not certain, and then gives examples of the types of *Erie* problems likely to result if a diversity court resolves these ambiguities without following forum-state law. Part Three proposes two solutions to these likely *Erie* problems—crafting a diversity jurisdiction exception to the full faith and credit statute and holding unconstitutional a diversity court’s failure to follow forum-state full faith and credit law.

**PART ONE: *Erie* and the Full Faith and Credit Statute—Complementary or Competing Obligations?**

I. **Federal Courts’ Statutory Full Faith and Credit Obligation**

The Full Faith and Credit Clause ("the Clause") reflects the Framers’ desire to promote national unity by requiring the courts of one state to give effect to, without reconsidering the merits of, the judgments and judicial opinions of the courts of another

\(^3\) U.S. Const., art. IV, § 1.

state.\textsuperscript{5} Modeled on a similar Articles of Confederation provision, the Clause supplanted the existing common law rules of interstate judgment recognition, known as “private international law.”\textsuperscript{6} Under the common law, state courts treated the judgments of their sister states no differently than they did the judgments of foreign states—they were merely prima facie evidence subject to collateral attack.\textsuperscript{7} As the economies of the once disparate colonies, and then states, became increasingly interconnected, this system made debt collection cumbersome, wreaking havoc on the young republic’s vulnerable financial condition.\textsuperscript{8} The Clause remedied this problem by requiring that states give “full faith and credit” “to the public acts, records, and judicial proceedings of every other state.”\textsuperscript{9}

In addition to imposing this affirmative requirement on the states, the Clause grants Congress the power to “prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”\textsuperscript{10} Ostensibly pursuant to this legislative authorization, early Congresses enacted what came to be known as the Full Faith and Credit Act, requiring that

the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States . . . and the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or


\textsuperscript{6} \textit{See} Articles of Confed., Art. 4, § 1; \textit{see also} Corwin, \textit{supra} note 5, at 371; Whitten, \textit{supra} note 5, at 269–74 (1998).

\textsuperscript{7} \textit{Id.}

\textsuperscript{8} Yablon, \textit{supra} note 5, at 147–48. Debtors often moved to colonies, and later states, that had enacted “tender laws,” which required that creditors accept paper currency to satisfy a debt. \textit{Id.} at 148. Professor Yablon noted that in 1782, Virginia enacted a statute that permitted “debts to be paid in hemp, tobacco, and flour, with the county courts determining their value.” \textit{Id.} (citing A.G. Roeber, \textit{FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE}, 1680-1810, at 171 (1981)). Debtors also moved to colonies, and later states, that had enacted innovative bankruptcy codes. Yablon, \textit{supra} note 5, at 150. For example, Rhode Island allowed a bankrupt debtor to discharge his debt by petitioning the legislature. \textit{Id.} at 150 n.106 (citing Peter J. Coleman, \textit{The Insolvent Debtor in Rhode Island 1745-1828}, 22 WM. & MARY L. Q., 413, 415–16 (1965)); \textit{see also} Corwin, \textit{supra} note 5, at 371.

\textsuperscript{9} \textit{See} U.S. CONST. Art. IV, Sec. I.

\textsuperscript{10} \textit{Id.}
usage in the courts of the state from whence the said records are or shall be
taken.\footnote{Act of May 26, 1790, ch. 11, 1 Stat. 122. In 1804, Congress enacted a second provision to make clear that the 1790 act applied to the “public acts, records, office books, and judicial proceedings” of the United States territories and other land subject to American control. Act of March 27, 1804, ch. LVI, 2 Stat. 298.}

This provision is now codified at chapter 28, section 1738 of the United States Code (“section 1738”).\footnote{28 U.S.C. § 1738.} Although section 1738 closely tracks the Clause’s language, it does add something novel to interjurisdictional preclusion law. The Clause itself requires only that state courts extend full faith and credit to the judicial actions of other states. However, the Court has long held that “every court within the United States. . . .” includes lower federal courts, and therefore the states’ constitutional full faith and credit obligation applies to federal courts via statute.\footnote{See Kremer v. Chemical Const. Co., 456 U.S. 461, 483 n.24 (1982) (“Section 1738 was enacted to implement the . . . Clause, and specifically ensure that federal courts, not included within the constitutional provision, would be bound by state judgments.” (citations omitted)); Am. Surety Co. v. Baldwin, 287 U.S. 156, 166 (1932); see generally Barbara Atwood, State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit, 58 Ind. L.J. 59, (1982) (“Section 1738, unlike its originating clause in the Constitution, imposes the full faith and credit obligation on federal as well as state courts.”); Peter Degnan, Federalized Res Judicata, 85 Yale L. J. 741, 744 (1976) (“The nearly contemporaneous enactment of this ‘implementing statute’ suggests there was an unexpressed assumption that if federal courts inferior to the Supreme Court were created . . . the power to prescribe what effect those courts must give to state court judgments was at least inferentially included in the congressional authority.”).}

In its earliest decisions construing the full faith and credit provisions, the Court held that they require a second court, subject to a few exceptions described in Part Two, to treat another court’s judgment in the same way that the rendering court would treat it in an action brought in that court.\footnote{See Hampton v. M’Connell, 16 U.S. (3 Wheat.) 234, 234 (1818); Mills v. Duryee, 7 Cranch. 481, 484–85 (U.S. 1813).} Thus, when a prior state judgment is at issue in a federal case, the federal court, regardless of its basis for jurisdiction, may not determine the effect of the state judgment pursuant to the federal common law of preclusion. Rather, it must borrow the preclusion law of the state rendering the judgment.\footnote{See, e.g., Kremer, 456 U.S. at 466–67.}

II. \textit{Erie}: A Second Basis for A Federal Court’s Applying State Preclusion Law

In 1938, the Court decided \textit{Erie}, holding that, absent a controlling federal statutory or Constitutional provision, federal courts should resolve substantive issues pursuant to the laws of their forum states.\footnote{304 U.S. at 78. The constitutional basis for the \textit{Erie} decision is discussed in detail in Part Three, infra.} The Court held unconstitutional the practice first condoned in \textit{Swift v. Tyson},\footnote{41 U.S. 1, 12–13 (1842).} where federal courts sitting in diversity jurisdiction (“diversity courts”) developed general common law rules to resolve matters
that did not raise federal issues. In *Erie*, the Court sought to end the forum-shopping caused by *Swift*, whereby parties manipulated their claims in order to avail themselves of hospitable federal forums.

The Court then proceeded to clarify a diversity court’s obligation to apply forum-state law. In *Klaxon v. Stentor Electric Manufacturing Co.*, the Court held that application of forum-state law means application of the forum state’s choice of law rules—if a state court in the district court’s forum would resolve a dispute pursuant to another state’s laws, then the district court should do likewise. In *Guaranty Trust v. York*, the Court held that a state rule is substantive, and therefore should be applied in a diversity case, when failure to apply it would result in either inequitable outcomes between a diversity court forum-state court or forum shopping.

Application of federal preclusion rules to determine a judgment’s effect in a subsequent diversity action could result in a different outcome than the one that would result had a case been adjudicated in state court. Therefore, *Guaranty Trust* requires diversity courts to apply forum-state preclusion law. However, if the earlier decision came from a non-forum-state court and is subject to the full faith and credit requirement, then the forum-state court would be obligated to determine the judgment’s effect by looking to the rendering state’s preclusion law. *Klaxon* makes clear that the diversity court must do the same. Thus, *Erie* and its progeny appear to provide a second, non-statutory basis for a diversity court to look to the law of the rendering state, whether the court’s forum or another, to determine the effect of an earlier judgment. What these decisions left unclear is whether this second basis eclipses a diversity court’s section 1738 requirement, whether the section 1738 requirement takes precedence, or whether it matters at all.

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18 Id.; see also, e.g., Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 374 (1893) (the liability of an employer for the safety of its employees was “a matter of general law” to be resolved by the Court “exercis[ing] its own judgment uncontrolled by the decisions of the courts of the several states”).
19 304 U.S. at 74–75 (“[Swift] made rights enjoyed under the unwritten ‘general law’ vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen. Thus, the doctrine rendered impossible equal protection of the law.”).
20 313 U.S. 487 (1941).
21 Id. at 496.
23 Id. at 108–12. The Court would subsequently characterize avoiding such inequitable outcomes and forum-shopping as *Erie*’s “twin aims.” See *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).
24 The Court first suggested as much in *Heiser v. Woodruff*, 327 U.S. 726 (1946), holding in dicta that “the rule of res judicata applied in diversity of citizenship cases, under the doctrine of [Erie], can[not] be other than that of the state in which the federal court sits.” Id. at 731 (citations omitted); see also *Kuehn v. Garcia*, 608 F.2d 1143, 1147 (8th Cir. 1979) (“Both collateral estoppel and res judicata are issues of substantive law requiring the application of state common law.”).
25 313 U.S. at 496. For the principle that the Clause and section 1738 inform and become a part of a state’s choice of law rules, see the cases cited at note 283, infra.
In a few cases decided shortly after *Erie*, the Court suggested that it considered either the first or third statements true. First, the Court applied the preclusion law of the district court’s forum in a diversity matter, but did not state its basis for doing so.\(^26\) Seven years later, the Court held that *Erie*, without regard to section 1738, obligated a district court to apply its forum’s preclusion law when a forum-state judgment was at issue in a diversity case.\(^27\) Finally, the Court cited *Erie* and held that a district court had to extend full faith and credit to a divorce decree rendered by a state other than its forum when the Clause would require a forum-state court to do so.\(^28\) However, in none of these cases was it clear that *Erie* comprised a part of its holding. As a result, the questions surrounding *Erie*’s overlap with section 1738 linger.

### III. Lower Federal Courts’ Inconsistent Approaches in Diversity Cases

In the decades after *Erie*, lower federal courts apparently decided that the third answer was the correct one—that it did not matter where a diversity court looked for its full faith and credit obligation. Generally, when a judgment at issue in a diversity case had been rendered by a court in the district court’s forum, circuit courts cited *Erie* for the district court’s obligation to apply forum-state law.\(^29\) However, when a judgment at

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\(^27\) Angel v. Bullington, 330 U.S. 183, 192 (1947); see 330 U.S. at 196 (Reed, J. dissenting) (“The Court reaches the conclusion that res judicata should apply by an application of *Erie* . . . .”).


\(^29\) E.g., Murphy v. Landsburg, 490 F.2d 319, 322 n.4 (3d Cir. 1973) (“Because jurisdiction is based on diversity of citizenship, we apply the law of Pennsylvania with respect to a plea of res judicata or collateral estoppel” based on a Pennsylvania judgment.); Ritchie v. Landau, 475 F.2d 151, 154 (2d Cir. 1973) (“In a diversity action in federal court the state law is controlling on the question of the applicability of the collateral estoppel doctrine to a given set of circumstances.”); Breeland v. Sec. Ins. Co. of New Haven, Conn., 421 F.2d 918, 921 (5th Cir. 1969) (“Because this is a diversity case, the law of the state where the District Court sat controls questions of res judicata and estoppel” in deciding “whether the prior [forum-state court] criminal conviction . . . is conclusive of the fraud issue in this civil case.”); Hackler v. Indianapolis and Se. Trailways, Inc., 437 F.2d 360, 362 (6th Cir. 1971) (“Our first inquiry is whether federal or state law determines the applicability of the doctrine of collateral estoppel in a diversity case . . . . [S]tate law must be applied . . . .”); Mackris v. Murray, 397 F.2d 74, 75 (6th Cir. 1968) (“Substantive Michigan law controls resolution of the legal question” of the collateral estoppel effect of a Michigan court’s judgment.); Cawfield v. Fidelity & Cas. Co. of N.Y., 378 F.2d 876, 878 (5th Cir. 1967) (“We observe at the outset that under Louisiana law, which governs this diversity action, the doctrine of res judicata plainly does not apply to the instant case.”); Graves v. Associated Transport, 344 F.2d 894, 896–97 (4th Cir. 1965) (*Erie* obligated the court to determine whether Virginia courts adhered to the mutuality requirement for collateral estoppel); Kimmel v. Yankee Lines, 224 F.2d 644, 645 (3d Cir. 1955) (“Since this is a diversity case we look to Pennsylvania law” to determine whether a Pennsylvania court’s judgment “resolved the issue of negligence making it res judicata.”); Blum v. William Goldman Theatres, 174 F.2d 914, 915 (3d Cir. 1949) (“Jurisdiction in the case at bar rests upon diversity of citizenship. [Therefore] both the lower court and this tribunal must follow the law and policy of Pennsylvania in respect to a plea of res judicata.”) (applying state law to determine the effect of a federal diversity court judgment); *Standard Accident Ins. Co. v. Dorion*, 170 F.2d 206, 207–08 (1st Cir. 1948) (applying Massachusetts law to determine the effect of a Massachusetts judgment “since th[e] cause was removed from the Superior Court for Worcester County, Massachusetts on the grounds of diversity of citizenship”); *R.J. Reynolds Tobacco Co. v. Newby*, 153 F.2d 819, 821 (9th Cir. 1946) (Idaho rules of preclusion determined the effect of an earlier federal diversity judgment because
issue came from some other state, circuit courts often cited section 1738 for the district court’s obligation to apply the rendering state’s preclusion law, without noting that the full faith and credit provisions would obligate a forum-state court to do likewise.30 This practice was not consistent though, and in a few instances, federal courts cited Erie and extended full faith and credit to a non-forum state’s judgment through the lens of forum-state law.31

Although both bases are equally applicable regardless of the source of the judgment, these courts generally did not state reasons for their varying analyses. The most likely explanation is probably mere convenience. When the judgment at issue came from some state other than the forum, granting full faith and credit via Erie required two steps—looking to forum-state law, and then applying rendering state law at the direction of forum-state law. On the other hand, direct application of section 1738 required only one step—looking to the law of the rendering state. Regardless of the means used, the outcome was the same. A second explanation lies in the fact that these federal courts did not feel beholden to state courts when considering an issue like the interstate judgment recognition, which the Constitution explicitly federalizes (of course they neglected Congress’s having federalized the recognition of forum-state judgments as well).32

Although lower courts generally failed to consider the source of their full faith and credit obligation in diversity matters, the academic community did not. In 1965, a

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30 E.g., Hazen Research, Inc. v. Omega Minerals, Inc., 497 F.2d 151, 153 (5th Cir. 1974) (holding that section 1738 required district court in Alabama to give full faith and credit to judgment rendered by Colorado court); Clyde v. Hodge, 413 F.2d 48, 49–50 n.2 (1969) (noting that Ohio law controlled the effect that the district court in Pennsylvania should give to an Ohio judgment “notwithstanding the fact that the district court was sitting in Pennsylvania”); Holm v. Shilensky, 388 F.2d 54, 55–56 (2d Cir. 1968); Wayside Transp. Co. v. Marcell’s Motor Express, Inc., 284 F.2d 868, 871 (1st Cir. 1960).

31 E.g., Varone v. Varone, 359 F.2d 769, 771–72 (7th Cir. 1966) (Michigan court’s divorce decree was enforceable in Illinois federal diversity case because Illinois courts were required to extend full faith and credit to the decree and Erie required the district court to follow Illinois law); Hardy v. Bankers Life & Cas. Co., 232 F.2d 205 (7th Cir. 1956) (Erie required district court in Illinois to apply Illinois preclusion law to determine the preclusive effect of a Minnesota divorce decree; Illinois case law established that its courts would adopt Minnesota law to determine the decree’s preclusive effect); Behrens v. Skelly, 173 F.2d 715, 717 (3d Cir. 1949); Pallen v. Allied Van Lines, Inc., 181 F. Supp. 394, 395–96 (S.D.N.Y. 1963). In one notable decision, the District of Massachusetts held that in a diversity case “the substantive rules of collateral estoppel are governed by the law of Massachusetts” and therefore held that a Connecticut judgment was not preclusive because Massachusetts required strict mutuality to invoke collateral estoppel. Eisel v. Columbia Packing Co., 181 F. Supp. 2d 298, 299 (D. Mass. 1960). However, the court ignored the fact that, had the case been filed in state court, the state court would have determined the Connecticut judgment’s effect pursuant to Connecticut, not Massachusetts, law.

32 Two courts suggested as much. See Hazen Research, 497 F.2d at 154 n.1 (“Congress has . . . federalized all relevant legal questions.”); Holm, 388 F.2d at 56 n.2 (because full faith and credit was based upon a “federally-created right[] and [duty],” the court determined the Clause’s application “as a matter of, and according to federal law”).
commentator argued that the Clause and section 1738 supersede Klaxon’s command that a diversity court apply forum-state choice of law rules. Thus, federal courts sitting in diversity were not bound by their forum-state courts’ interpretations of the full faith and credit provisions, as “[q]uestions of the full faith and credit applicable to another state’s judgments are federal questions.” Eleven years later, Professor Peter Degnan echoed this argument, suggesting that section 1738’s requirement that federal courts apply the law of the rendering state to determine a judgment’s preclusive effect is “unrelated to the Erie doctrine.”

Shortly thereafter, the Supreme Court decided a series of cases in which it reiterated the general principle that section 1738 requires federal courts to apply state, rather than federal, law to determine a state judgment’s preclusive effect in a subsequent federal case. Each of these cases arose under federal question jurisdiction, and required the Court to choose between applying federal or state preclusion law, rather than the preclusion law of one state or another. Nevertheless, in these decisions’ wake, perhaps influenced by the scholarly critiques, lower federal courts began to hold that section 1738, without regard to Erie, provides the exclusive source of their full faith and credit obligation, even in diversity cases.

34 Id. at 97–98. The author noted that this approach could cause divergent outcomes between state and federal courts sitting in diversity, as described in Part Two. Id. However, the author suggested that these problems should not be concerning because “full faith and credit is a federal question, the federal court . . . could ignore [its forum] state’s policy of refusing to enforce without regard to Erie or Guaranty Trust and give full faith and credit to [another state’s judgment].” Id.
35 Degnan, supra note 13, at 750–51.
37 In one case, a circuit court cited Professor Degnan’s thesis in applying section 1738 exclusively. Fed. Deposit Ins. Co. v. Eckhardt, 691 F.2d 245, 247 (6th Cir. 1982) (“It appears that the emerging rule is that the preclusive effect of a valid judgment is to be determined by the law of the system which rendered the judgment.”).
38 Diversity courts now usually apply section 1738 exclusively when giving effect to judgments rendered by their forum states’ courts. See, e.g., Sheffield v. Sheriff of Rockland Cnty. Sheriff Dep’t, 393 F. App’x 808, 811 (2d Cir. 2010) (unpublished) (citing Migra, 465 U.S. at 81); O’Connor v. Pierson, 568 F.3d 64, 69 (2d Cir. 2009) (citing Migra, 465 U.S. at 81); Wingard v. Emerald Venture Fla., 438 F.3d 1288, 1293 (11th Cir. 2006); Canal Capital Corp. v. Valley Pride Pack, Inc., 169 F.3d 508, 513 (8th Cir. 1999) (“In a diversity case, a federal court is required by section 1738 to apply state law to questions of issue preclusion.”); Brotherhood Mut. Ins. Co. v. DeLauter, 156 F.3d 1228, 1998 WL 432482, at *1 (6th Cir. 1998) (unpublished table opinion) (“The Full Faith and Credit Statute, section 1738, requires a federal court exercising diversity jurisdiction to a prior state adjudication the same effect in federal court as it would have in the courts of that state.”); Jones v. Sheehan, Young & Culp, P.C., 82 F.3d 1334, 1338 (5th Cir. 1996); E.D. Sys. Corp. v. Sw. Bell Tele. Co., 674 F.2d 453, 457 (5th Cir. 1982). In at least one case,
PART TWO: WHY IT MATTERS HOW A DIVERSITY COURT EXTENDS FULL FAITH AND CREDIT

I. The Exceptions to Full Faith and Credit that Give Rise to the Erie Problem

If Congress or the Court had conclusively defined the full faith and credit provisions’ scopes, then a diversity court’s choice between applying Erie or section 1738 directly would be mostly insignificant. After all, the obligation of a federal court to extend full faith and credit to a state court’s judgment is coextensive with the obligation of one state to extend full faith and credit to another state’s judgment. Therefore, if there was never any question as to whether the court owed full faith and credit to a judgment at issue in a diversity case, then it would largely not matter whether the diversity court applied the full faith and credit provisions to that judgment through section 1738 directly, or pursuant to Erie by adopting the full faith and credit obligation imposed on forum-state courts.

However, neither Congress nor the Court has defined the provisions’ scopes with great specificity. With one exception, Congress has not enacted legislation specifically stating what types of judgments are entitled to full faith and credit and what types of judgments are not.39 Meanwhile, the Court has made clear that the full faith and credit provisions do not give rise to “an inexorable and unqualified command.”40 Instead, the Court has recognized exceptions to the provisions, which are “implied from the nature of our dual system of government, [and based upon

the lower court erroneously held that its obligation to give effect to state court judgments came from Article IV itself. See Davidson v. Capuano, 792 F.2d 275, 277–78 (2d Cir. 1982) (“The full faith and credit clause of the Constitution requires a federal court to give the same preclusive effect to a state court judgment as would be given in the state in which it was rendered.”) (citing Migra, 465 U.S. 75); but see e.g., Dillon v. Select Portfolio Screening, 630 F.3d 75, 80 (1st Cir. 2011) (“Under federal law, a state court judgment receives the same preclusive effect as it would receive under the law of the state in which it was rendered.”); Andrew Robinson Int’l. v. Hartford Fire Ins. Co., 547 F.3d 48, 51 (1st Cir. 2008); Am. Home Assurance Co. v. Pope, 487 F.3d 590, 600 (8th Cir. 2007); Am. Fin. Life Ins. Co. & Annuity Co. v. Young, 7 F. App’x 913, *2 (10th Cir. 2001) (unpublished); Nanninga v. Three Rivers Elec. Co-Op, 236 F.2d 902, 905–06 (8th Cir. 2000); Original Appalachian Artworks v. S. Diamond Assoc., 44 F.3d 925, 930 (11th Cir. 1995) (“Because this is a diversity case, the application of judicial estoppel is governed by state law.”).

When the judgment at issue is one rendered by a non-forum-state court, diversity courts are now uniform in their application of section 1738 exclusively. E.g., In re Genesys Data Tech., 204 F.3d 124, 127–28 (4th Cir. 2000) (citing Kremer, 456 U.S. at 466) (“[A] federal statute directs federal courts to afford state court judgments full faith and credit); Tennessee ex rel. Sizemore v. Surety Bank, 200 F.3d 373, 378 (5th Cir. 2000) (“Because [the inquiry into the preclusive effect of the Tennessee judgment] is a question of federal constitutional law, the district court [sitting in Texas in a diversity matter] need not apply the law of the forum state.”); Doctor’s Assoc.’s, Inc. v. Distajo, 66 F.3d 438, 441–42 (2d Cir. 1995); Gates Learjet Corp. v. Duncan Aviation, 851 F.2d 303, 305 (10th Cir. 1988) (citing Marrese, 470 U.S. at 380–81; Migra, 465 U.S. at 81; Kremer, 456 U.S. at 466 n.6, 481–82).

39 Congress has acted to make clear that the Clause and section 1738 do not require the interstate recognition of same sex marriages. See 28 U.S.C. § 1738C (2006). That statute is discussed in Part Three, infra. Nevertheless, Congress undoubtedly has the power to clarify the Clause’s scope. See Brainerd Currie, Full Faith and Credit, Chiefly to Judgments: A Role for Congress, 1964 SUP. CT. REV. 89 (1964).

40 Pink v. A.A.A. Highway Express, 314 U.S. 201, 210 (1941).
recognition] that consistently with the full faith and credit clause there may be limits to
the extent to which the policy of one state, in many respects sovereign, may be
subordinated to the policy of another.”41

The Court has described some of these exceptions with particularity and other
courts are not in doubt as to the exceptions’ applicabilites. For example, the Court has
made clear that full faith and credit should not be extended to judgments rendered by a
court that did not have jurisdiction over the parties, unless the court fully and
adequately resolved jurisdictional matters in its opinion.42 Additionally, “[a] state court
judgment generally is not entitled to full faith and credit unless it satisfies the
requirements of the Fourteenth Amendment’s Due Process Clause.”43 To satisfy this
requirement, a litigant must have been given a “full and fair opportunity to litigate”
issues decided in the judgment.44

The Court has left most exceptions’ boundaries much more ambiguous. Moreover, it has merely hinted at the existence of some exceptions. Absent Supreme
Court guidance, state courts have independently construed the nature of these
exceptions. Unsurprisingly, the state courts have not come to unanimous agreement
regarding the extent of their full faith and credit obligations.

The disputed and undefined nature of the full faith and credit provisions’ scopes
makes relevant a diversity court’s choice between applying Erie or section 1738 to a
prior state court judgment. When a state court would determine that another state’s
judgment is not owed full faith and credit, but a diversity court in that state determines
that section 1738 requires it to give full faith and credit to the judgment, an Erie
problem results—the federal court has applied different substantive law than would the
forum-state courts.45 This is true because, while decisions of the Supreme Court

41 Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 273 (1935) (collecting cases). Professor Currie described the
state of the Court’s precedent as to exceptions to the Clause for judgments as leaving “unsolved many problems that
Congress has the power to solve.” Currie, supra note 39, at 90.
(“Durfee stands . . . for the proposition that a state court’s final judgment determining its own jurisdiction ordinarily
qualifies for full faith and credit, so long as the jurisdictional issue was fully and fairly litigated in the court that
rendered the judgment.” (emphasis removed)); Haddock v. Haddock, 201 U.S. 562 (1906).
dissenting in part); see also Kremer, 456 U.S. at 482–83; McDonald v. Mabee, 243 U.S. 90, 92 (1917). This
exception is really not an exception at all, but instead rests upon the principle that a state may not enforce or grant
preclusive effect to its own judgments when those judgments do not comport with the Due Process Clause;
therefore, a second forum need not do so either when giving the effect to the judgment that the first forum would
give to it. See Kremer, 456 U.S. at 482–83 & n. 23. For a discussion of other well-settled exceptions, see ROBERT C.
CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 217–21
(2001); 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND
PROCEDURE § 4467 (2d ed. 2002).
44 See Kremer, 456 U.S. at 482 n.23; see also Sherrer v. Sherrer, 334 U.S. 343, 348 (1948).
45 See Guaranty Trust, 326 U.S. at 109 (“In essence, the intent of [Erie] was to insure that, in all cases where a
federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the
construing the Clause and section 1738 are binding on state and lower federal courts, a decision of the lower federal court is not binding on a state court.\textsuperscript{46}

In most instances, the problem could be mitigated if the Court (or Congress) more coherently defined the bounds of a given exception, as federal and state courts are equally bound by the Supreme Court’s full faith and credit precedent.\textsuperscript{47} Moreover, the “Court is the final arbiter of the extent of the [full faith and credit] exceptions.”\textsuperscript{48} However, the Court’s interest in the full faith and credit provisions has been sporadic; after more than two centuries, there is more confusion than there is certainty as to their scopes. Additionally, there are some exceptions that do not lend themselves to easy clarification or that result in \textit{Erie} problems, regardless of the Court’s clarifications.\textsuperscript{49}

Therefore, so long as exceptions to the Clause and statute exist, or state courts perceive them to exist, \textit{Erie} necessitates that a diversity court apply its forum-state courts’ constructions of the Clause and statute. Otherwise, both of the “twin aims of the \textit{Erie} litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.”\textsuperscript{46}

\textsuperscript{46} The Seventh Circuit made this point in \textit{United States ex rel. Lawrence v. Woods}, holding.

The Supreme Court of the United States has appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal. On the other hand, because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.

342 F.2d 1072, 1075–76 (7th Cir. 1970); \textit{see also Lockhart v. Fretwell}, 506 U.S. 364, 376 (1993) (Thomas, J. concurring) (The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court’s interpretation of federal law give way to a (lower) federal court’s interpretation. In our federal system, a state trial court’s interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.); \textit{Evans v. Thompson}, 518 F.3d 1, 8 (1st Cir. 2008) (“State courts are not bound by the dictates of lower federal courts, although they are free to rely on the opinions of such courts when adjudicating federal claims.” (emphasis in original)); \textit{Maquoir v. Phillips}, 144 F.3d 348, 361 (5th Cir. 1998) (“Louisiana state courts are not bound by Fifth Circuit precedent when making a determination of federal law.”); \textit{Bromley v. Crisp}, 561 F.2d 1351, 1354 (10th Cir. 1977) (en banc) (“State Courts are fully entitled to decide federal questions when presented to them . . . [and state courts] may express their differing views on . . . federal questions until we are all guided by a binding decision of the Supreme Court.”); \textit{Owsley v. Peyton}, 352 F.2d 804, 805 (4th Cir. 1965) (“Though state courts may for policy reasons follow the decisions of the Court of Appeals whose circuit includes their state, they are not obligated to do so.” (citation omitted)); \textit{People v. Barber}, 799 P.2d 936, 940 (Colo. 1990); \textit{People v. Kokoraleis}, 132 Ill. 2d 235, 292–94 (1989). \textit{Cf. Steffel v. Thompson}, 415 U.S. 452, 482 (1974) (Rehnquist, J. concurring) (“State authorities may choose to be guided by the judgment of a lower federal court, but they are not compelled to follow the decision by threat of contempt or other penalties.”).

\textsuperscript{47} \textit{See Riley v. New York Trust Co.}, 315 U.S. 343, 349 (1942) (“By the Constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of the national jurisprudence, and therefore federal questions cognizable here.”).


\textsuperscript{49} This is particularly true of the public policy exception, as described in Part Two, II., \textit{infra}. If a second forum is in fact able to disregard a first forum’s judgment based on its own overriding public policy, then an \textit{Erie} problem will always result when the federal court in the second forum grants full faith and credit to a judgment in a diversity action, without considering whether that judgment falls into its forum state’s public policy exception.
rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws” are defeated.\(^{50}\)

Forum shopping results when a litigant decides to bring an action in a first forum based on the effect that she anticipates a favorable judgment in the first forum to have in a second forum.\(^{51}\) Consider a plaintiff who knows that the law of a first state is more favorable to her claim than the law of the second state. However, she also knows that if she brings her claim in the first state and recovers, she will need to bring an enforcement action in the second state to collect against the defendant. The plaintiff also knows that the second state will hold that the first state’s judgment is not entitled to full faith and credit. If the plaintiff and the defendant are both residents of the second state, then the plaintiff will not go to the trouble of bringing her claim in the first state, despite the increased likelihood of her being able to recover there, as the second state’s full faith and credit analysis would prevent her from ever actually collecting on the claim. However, if the plaintiff and the defendant are from different states, then the plaintiff can bring the subsequent enforcement action as a diversity case in the second state’s federal court. There, she can take advantage of the federal court’s applying its own interpretation of section 1738 and enforcing the first state’s judgment when the second state would not do so. Therefore, the accident of diversity of citizenship allows the plaintiff to bring her claim in a more favorable forum than she otherwise would have had access to. The example also demonstrates inequitable administration of the laws. The plaintiff who is not a resident of the second state will be able to recover under the more favorable law of the first state, whereas a similarly situated plaintiff who happens

\(^{50}\) See Hanna, 380 U.S. at 467.

\(^{51}\) In Hanna, the Court held that forum shopping concerns were not present when the application of the federal rule instead of the state rule would not “wholly bar recovery,” but would merely alter the way that process was served. 380 U.S. at 469. The Court concluded that a reasonable litigant would not choose a forum based upon the forum’s process service rules. See id. One commentator interpreted Hanna to “require us to ask whether a predictable difference in outcome caused by applying a federal rule different from state law could be significant enough to lead a party to choose a federal forum over a state forum at the outset of the litigation.” Patrick Woolley, The Sources of Federal Preclusion Law After Semtek, 72 U. Cin. L. Rev. 527, 548 (2003). This same commentator suggested that in the context of preclusion law, the Erie concern should be whether the application of a federal rule in a subsequent action in a different forum would cause a reasonable party to choose one forum over another at the outset of litigation. Id. at 549. The following adopts that concern in considering forum shopping—asking to what extent will application of a federal rule of full faith and credit in a subsequent diversity action influence where a party brings an initial suit, when that party anticipates being involved in subsequent litigation.

For a general discussion of the effect of preclusion rules on litigation behavior, see Howard M. Erichson, Interjurisdictional Preclusion, 96 Mich. L. Rev. 945, 946–64 (1998). Erichson concludes that preclusion rules generally have the greater effect on litigation strategies in the initial forum, and therefore “the litigation-related interests of the initial forum” are usually most significant. Id. at 961. Accordingly, he argues that a choice of preclusion law analysis should generally be weighted towards the interests of the initial forum. See id. The following does not contest that general proposition, although its analysis is geared towards the interests of the second forum. This is the case, however, because it focuses on the unique instances in which the second forum’s interests arguably outweigh those of the initial forum.
to be a resident of the second state (when the defendant is also a resident of that state) would not be able to do so.

The following discusses the various uncertain exceptions to the Clause and section 1738. Without attempting to resolve these exceptions, it describes them and demonstrates the ways in which the uncertainties have led or could lead to differing outcomes in diversity cases between state and federal courts.

a. Compulsory counterclaims

Courts disagree as to whether the full faith and credit provisions require a second forum to enforce a first forum’s compulsory counterclaim rules when enforcing a first forum’s judgment. The majority of state courts that have considered the issue hold that the Clause requires them to enforce such rules by dismissing claims that would have been compulsory counterclaims in the first forum and were not brought in the earlier action. In Pacificare, the California appellate court held that the Clause required it to enforce a Missouri compulsory counterclaim rule because California and Supreme Court authority favored “expansive application of the full faith and credit clause in order to fulfill the clause’s purpose . . . .” and federal courts had held that full faith and credit required the enforcement of such rules. Most of the circuit courts that have considered the issue agree that the section 1738 requires the enforcement of a state’s compulsory counterclaim rules.

However, some courts have reached the opposite conclusion. In Van Pembrook v. Zero Manufacturing Co., the Court of Appeals of Michigan held that the Clause did not

52 See, e.g., R.S. v. Pacificare Life & Health Ins. Co., 128 Cal. Rptr. 3d 1, 7 (2011); Nottingham v. Weld, 237 S.E.2d 621, 623 (Va. 1989) (“[W]e think the better view is that the forum court must look to the original court’s construction of its compulsory counterclaim rule, and accord it full faith and credit.”); Alliance, Inc. v. Macola, Inc., No. CA980327, 2000 WL 1269665, at *4 (Mass. Supp. May 12, 2000) (unpublished) (“As a result, this court must give full faith and credit to the default judgment rendered against [plaintiff] in [the Ohio] court and may not entertain relitigation of compulsory counterclaims in this court.”). Cf. O’Neal, Booth and Wilkes, P.A. v. Andrews, 712 P.2d 1327, 1329 (Mont. 1986) (applying Florida’s compulsory counterclaim rule when the plaintiff’s claim was compulsory under the Florida and Montana rules). Most state courts have also held that they are required to enforce Rule 13 Federal Rules of Civil Procedure and refuse to hear claims that would have been compulsory in an earlier federal action. See, e.g., Schoeman v. N.Y. Life Ins. Co., 726 P.2d 1, 6 (1986); London v. Philadelphia, 194 A.2d 901, 902 (Pa. 1963); McDonald’s Corp. v. Levine, 439 N.E.2d 475, 485–86 (Ill. App. 1982). However, as stated, the source of these courts’ obligation to apply federal law is not the Clause or section 1738.


so obligate it, citing the differing rationales behind the Clause and compulsory counterclaim rules.\textsuperscript{56} The court noted that “[t]he purpose behind the [Clause] as applied to judicial proceedings is to avoid relitigation in other states of adjudicated issues,” whereas “[t]he rationale behind the . . . compulsory counterclaim rule is to avoid multiplicity of suits and to facilitate the proper and expeditious disposal of litigation.”\textsuperscript{57} It concluded that because the other state’s “local interest in judicial economy” was “separate and distinct from the national interest in avoiding the relitigation of adjudicated claims,” the Clause did not require it to enforce the compulsory counterclaim rule.\textsuperscript{58} The court also provided an alternative basis for its holding, concluding that the rule was a legislative act and not an “inherent part of the judgment” at issue, and therefore was not entitled to full faith and credit.\textsuperscript{59} The Fifth Circuit reached the same conclusion in Chapman v. Aetna Finance Co.\textsuperscript{60} That court also noted the distinction between the policies supporting the full faith and credit provisions and those supporting the state compulsory counterclaim rule at issue, and concluded that “fulfillment of [the Clause’s intended purpose] does not depend on extraterritorial application of essentially procedural res judicata rules.”\textsuperscript{61} The federal court also characterized the compulsory counterclaim rule as “a legislative act [rather] than . . . an element of [the] judicial proceedings” producing the alleged preclusive judgment.\textsuperscript{62} Additionally, the Sixth Circuit has applied Rule 13(a) of the Federal Rules of Civil Procedure to determine whether claims were compulsory in a previous state action, implicitly rejecting the premise that section 1738 requires application of the state, rather than federal, compulsory counterclaim rule to determine the effect of a state judgment.\textsuperscript{63}

\textsuperscript{56} Id. at 67–68.
\textsuperscript{57} Id. at 68 (quotation omitted) (citing Sutton, 342 U.S. at 407); \textit{but see} Wright, Miller & Cooper, supra note 43, at § 4467, 44–45 & n. 70 (“Failure to comply with a compulsory counterclaim rule in one state probably should preclude an action on that claim in another state, since the purpose of such rules is not only procedural convenience for the first court but also to gain the repose values inherent in settling all related accounts between the parties.”).
\textsuperscript{58} Van Pembrook, 380 N.W.2d at 68.
\textsuperscript{59} Id. The court reached this conclusion by comparing the compulsory counterclaim rule to statutes of limitations, which it noted were “not ordinarily entitled to full faith and credit in foreign jurisdictions.” Id.; \textit{see} Wells, 345 U.S. at 516–18.
\textsuperscript{60} 615 F.2d 361 (5th Cir. 1980), \textit{overruling recognized in}, DuBroff v. DuBroff, 833 F.2d 557, 561 (5th Cir. 1987).
\textsuperscript{61} 615 F.2d at 363.
\textsuperscript{62} Id. at 364. In an interesting footnote, the court emphasized that its holding rested entirely on section 1738, as the case had been brought under federal question jurisdiction. \textit{Id}. at 363 n.6. The court emphasized that its analysis was “inapposite to diversity cases, in which entirely different considerations obtain.” \textit{Id}. (citation omitted). This statement suggests that the court was aware that \textit{Erie} might provide a separate and indeed greater obligation to apply a state’s preclusion law than section 1738. However, the court subsequently concluded that \textit{Migra} overruled Chapman. See DuBroff, 883 F.2d at 561; \textit{see also} Cuervo Resources, 876 F.2d at 436–37.
\textsuperscript{63} \textit{See} Bluegrass Hosiery, Inc. v. Speizman Indus., Inc., 214 F.3d 770, 772 (6th Cir. 2000). In \textit{Bluegrass Hosiery}, the court applied Rule 13(a) to determine whether the claims at issue were compulsory counterclaims in a prior Kentucky action; the court did not apply Kentucky Rule of Civil Procedure 13.01, however this may have been because the two provisions are substantially similar. \textit{Compare} Fed. R. Civ. P. 13(a), \textit{with} Ky. R. Civ. P. 13.01.
This difference of opinion creates the potential for an *Erie* problem. A federal court might conclude that it is obligated to apply the compulsory counterclaim rule of a state other than its forum state pursuant to section 1738. Meanwhile, the courts of its forum state considering the question might adopt or have adopted the reasoning of *Van Pembrook* and *Chapman*. Thus, an *Erie* problem would result when a diversity court bars a state-law claim because the claim was compulsory in an earlier proceeding in a different state, when its forum state’s courts would not do likewise. A problem could also result when a federal court applies Rule 13(a) instead of the compulsory counterclaim rule of the state rendering judgment, as the Sixth Circuit did in *Bluegrass Hosiery*, when the courts of its forum state would apply the rendering state’s compulsory counterclaim rule as a matter of full faith and credit. In that case, the federal court might consider the claim as not barred by Rule 13(a), when application of the rendering state’s rule would bar the action. Accordingly, different outcomes would result between state and federal court.

This exception presents a specific opportunity for forum-shopping. Consider a defendant sued in Indiana state court. The defendant has his own claim against the plaintiff that is a compulsory counterclaim under Indiana’s rule. However, the defendant would prefer to assert the claim in a separate action in Michigan because he thinks that Michigan law would be more favorable. If the defendant and the plaintiff are both residents of Michigan, then the defendant can decline to bring his claim as a counterclaim in the Indiana proceeding, bring the claim in a new action in Michigan, and know that the Michigan court will not enforce the Indiana compulsory counterclaim rule. However, if the parties are diverse, then the plaintiff can remove the Michigan action to federal court, and argue that full faith and credit requires the federal court to enforce the Indiana compulsory counterclaim rule. The option of the federal forum allows the plaintiff to bring the Indiana action solely to induce the defendant to litigate his claim under Indiana law, and forego the more favorable Michigan law. Thus, the presence of diverse parties and the differing outcomes between state and federal court allows both parties to engage in forum-shopping.

b. Limitations-based dismissals

In *Sun Oil Co. v. Wortman*, the Court held that the full faith and credit provisions do not require a state to enforce other states’ statutes of limitations. Accordingly, so long as a court has jurisdiction, it may entertain claims brought under another state’s laws, even when those claims would have been time-barred had they

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64 Notably, the California appellate court carefully considered *Van Pembrook* and labeled its reasoning “plausible, but ultimately not persuasive.” See 128 Cal. Rptr. 3d at 5–6.
63 See *Van Pembrook*, 380 N.W.2d at 68.
65 Id. at 722.
been brought in the other state’s courts.\textsuperscript{68} The Court based this conclusion on the long-stated premise that full faith and credit does not prevent a state from applying “its own procedural rules to actions litigated in its courts.”\textsuperscript{69} Based on long-standing authority, the Court then held that statutes of limitations are procedural rules.\textsuperscript{70}

Some courts read \textit{Sun Oil} for the proposition that they are not obligated to extend full faith and credit to other forums’ limitations-based dismissals. These courts have reasoned that extending full faith and credit to such judgments is effectively enforcing the rendering state’s statute of limitations. For example, in \textit{Advect, Inc. v. Wachtel},\textsuperscript{71} after dismissing the plaintiff’s claims based on Connecticut’s statute of limitations, the Connecticut court declined to issue an injunction preventing the plaintiff from bringing the same claims in New York, a state with a longer statute of limitations.\textsuperscript{72} The court reasoned that while the Connecticut judgment was res judicata as to the plaintiff raising its claims in a subsequent Connecticut action, it would not preclude it from doing so in a jurisdiction with a longer statute of limitations, since New York courts were not obligated to apply Connecticut’s statute of limitations.\textsuperscript{73} The Supreme Court of Mississippi reached the same conclusion in refusing to give full faith and credit to a Louisiana court’s limitations-based dismissal, holding that the dismissal was not entitled to full faith and credit because the Louisiana court had not decided the issues on the merits.\textsuperscript{74} Finally, the Seventh Circuit agreed with this view, holding that section 1738 did not require the Illinois district court to give preclusive effect to a Minnesota state court’s dismissal of a claim on limitations grounds because, regardless of how Minnesota courts might treat the dismissal, “Minnesota [had] no interest in barring further litigation in another forum, state or federal.”\textsuperscript{75}

\begin{footnotes}
\item[68] Id.
\item[69] Id. at 722–23 (quoting \textit{Pac. Employers Ins.}, 306 U.S. at 501).
\item[70] Id. at 723 (citing \textit{McElmoyle}, 13 Pet. at 327–28). In \textit{Sun Oil}, the Court characterized the \textit{McElmoyle} Court as holding that “the Constitution does not bar application of the forum State’s statute of limitations to claims that in their substance are and must be governed by the law of a different State. 486 U.S. at 722; see 13 Pet. at 327–28.\textsuperscript{71}
\item[71] 668 A.2d 367 (Conn. 1995).
\item[72] Id. at 370–71.
\item[73] Id. at 372 & n.8 (citing \textit{Sun Oil}, 486 U.S. at 729).
\item[74] \textit{Lee v. Swain Bldg. Materials Co. of New Orleans, Inc.}, 529 So.2d 188, 190 (Miss. 1988). The Court’s opinion appears to be quite broad. The court did not rest its decision on \textit{Sun Oil}. See id. Instead, it relied on an early Supreme Court decision in which the Court had held that a Virginia court’s limitations-based dismissal of a breach of contract suit did not prevent a party bringing suit based upon the same claim in Kentucky when the contract had been made and performed in Kentucky. \textit{Bank of U.S. v. Donnally}, 33 U.S. 361, 362 (1834). In \textit{Donnally}, the Court did not appear to articulate a general exception applicable to all limitations dismissals; instead, it held that the Clause did not trump the common law rule that “that the nature, validity and interpretation of contracts, are to be governed by the laws of the country where the contracts are made, or are to be performed.” \textit{Id.} However, the \textit{Lee} court appeared to read \textit{Donnally} for a general exemption for full faith and credit for all procedural dismissals. See 529 So. 2d at 190.
\item[75] \textit{Reinke v. Boden}, 45 F.3d 166, 170–72 (7th Cir. 1995). The court did seek to discern the effect that a Minnesota court would give to the judgment, but concluded that “Minnesota did not intend such a radical role for its court rule” as to bar further litigation in other forums. \textit{Id.} at 172. Therefore, the court did not technically find a full faith and
\end{footnotes}
Some states have reached the opposite conclusion. In *Sautter v. Interstate Power Co.*, the Court of Appeals of Minnesota considered whether it was obligated to give preclusive effect to a federal court’s dismissal based on Iowa’s two-year statute of limitations for personal injuries. The Minnesota suit duplicated the Iowa federal case, except that the plaintiff filed the suit well within Minnesota’s six-year statute of limitations. The court noted that confusion existed as to whether *Sun Oil* required it to extend full faith and credit to the limitations-based dismissal; it did so, however its action was policy-driven. The court found it significant that the parties were Iowa residents and the accident giving rise to the claim had occurred in Iowa, making it “an Iowa case.” Other states have joined the *Sautter* court in holding that limitations-based dismissals are still entitled to the same preclusive effect in a subsequent forum as they would have in the rendering forum.

Diversity courts have generally agreed. In *Austin v. Super Valu Stores, Inc.*, the Eighth Circuit noted that the district court’s forum state, Minnesota, would probably treat a Louisiana court’s limitations-based dismissal as entitled to full faith and credit, except that the plaintiff filed the suit well within Minnesota’s six-year statute of limitations. The court noted that confusion existed as to whether *Sun Oil* required it to extend full faith and credit to the limitations-based dismissal; it did so, however its action was policy-driven. The court found it significant that the parties were Iowa residents and the accident giving rise to the claim had occurred in Iowa, making it “an Iowa case.” Other states have joined the *Sautter* court in holding that limitations-based dismissals are still entitled to the same preclusive effect in a subsequent forum as they would have in the rendering forum.

Diversity courts have generally agreed. In *Austin v. Super Valu Stores, Inc.*, the Eighth Circuit noted that the district court’s forum state, Minnesota, would probably treat a Louisiana court’s limitations-based dismissal as entitled to full faith and credit, but its result was an effective application of one, since Minnesota courts could not have an authoritative opinion as to the judgment’s preclusive effect outside of Minnesota. See *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 270 (1980) (holding that a rendering state may only take an interest in determining the extraterritorial effects of its judgments indirectly by precisely establishing judgments’ intraterritorial effects).

The Sixth Circuit also suggested without deciding that a limitations-based dismissal may not be entitled to full faith and credit. See *Lamb Enterprises v. Kiroff*, 549 F.2d 1052 (6th Cir. 1977). That court refused to issue an injunction preventing a plaintiff from proceeding with an action in Ohio after a court in the District of Columbia had dismissed the same claim on limitations grounds, holding that there had been “no judicial resolution . . . of the question whether the District of Columbia dismissal on statute of limitations grounds precludes the Ohio court action on principles of full faith and credit or res judicata.” *Id.* at 1058.

76 567 N.W.2d 755 (Minn. Ct. App. 1997).
77 *Id.* at 756–59. Because the case dealt with a federal judgment’s preclusive effect, the case did not technically implicate the Clause. However, the analysis is no different than if it had raised full faith and credit issues.
78 *Id.* at 756–59.
79 567 N.W.2d at 760 & n.3 (“We observe that the authorities and jurisdictions are not uniform in deciding whether to apply res judicata to previous sister state statute of limitations dismissals.”).
80 *Id.* at 760.
81 *Id.* at 760. The court also noted that Minnesota had since repealed its six-year statute of limitations, which further suggested that the old statute of limitations, although applicable to the claim, should not be enforced at the expense of granting full faith and credit to the Iowa dismissal. *Id.* n.4. The court emphasized that “[h]ad the [parties] been Minnesota residents or had the accident occurred here, we would be faced with quite different and perhaps compelling facts.” *Id.* at 761. The court distinguished its decision from *Reinke*, holding that Iowa had a much greater interest in the enforcement of the dismissal than Minnesota did in that case. *Id.* at 760–61. The court did not make clear to what extent its decision rested on the specific facts before it. *See id.* However, the court of appeals has subsequently treated *Sautter* as announcing a generally-applicable rule of full faith and credit. See *Larsen v. Mayo Fdn.*, No. C6-01-759, 2001 WL 1608950, at *2 (Minn. Ct. App. Dec. 18, 2001) (unpublished). Nevertheless, the Supreme Court of Minnesota has not addressed the issue.
84 31 F.3d 615 (8th Cir. 1994).
but held that this was not a relevant consideration. Based upon its own construction of section 1738, the court held that the Louisiana judgment was entitled to full faith and credit, and that section 1738 required it to look to Louisiana law directly, without regard to Erie principles, to determine the judgment’s effect. Other federal courts have reached the same conclusion largely without considering how their forum states’ courts might read Sun Oil.

Two Erie problems could arise from this uncertain exception. The first involves the inequitable outcome of a plaintiff, having had his claim dismissed by a state court based on that state’s statute of limitations, being unable to recover on the claim in another state having a longer statute of limitations and recognizing the Sun Oil exception when the defendant is able to remove the case to federal court under diversity jurisdiction and the federal court does not adopt the exception. The second involves possible forum shopping. Consider a plaintiff who concludes that Wisconsin would treat the merits of her claim more favorably than the alternative forum, Illinois. However, the plaintiff is not sure if Wisconsin courts would consider her claim timely, while she is confident that it would be timely in Illinois. The plaintiff knows that an Illinois court would give full faith and credit to a Wisconsin court’s limitations-based dismissal; however, she also knows that federal courts in the Seventh Circuit will not do

85 Id. at 618. While the court thought that Minnesota law supported its decision, Minnesota courts had actually not yet spoken to the issue, and would not do so until Sautter. The Minnesota case that the court relied on in Austin addressed the preclusive effect of a Minnesota court’s limitations-based dismissal, not a dismissal of an action based on a different state’s shorter statute of limitations. Id.; see Nitz v. Nitz, 456 N.W.2d 450, 452–53 (Minn. Ct. App. 1990).

86 31 F.3d at 618 (citing Semler, 575 F.2d at 927).

87 In Seavy v. Chrysler Corp., 930 F. Supp. 2d 103 (S.D.N.Y. 1996), the district court held that a New York state court’s limitations-based dismissal precluded it from hearing a case originally filed in the District of Minnesota and then transferred, even though Minnesota substantive law governed the dispute. Id. at 106; see Ferens v. John Deere Co., 494 U.S. 516, 524–25 (1990) (a transferee court applies the substantive law of the transferor court in a transferred diversity action). While the court noted that Minnesota courts would be obligated to give full faith and credit to the New York dismissal, it reached this conclusion not in reliance on Minnesota courts’ interpretation of the full faith and credit provisions, but instead on its own independent conclusion as to whether an exception existed for limitations-based dismissals. See 930 F. Supp. 2d at 106, 108. The court held that cases suggesting that such an exception existed were premised upon the rendering state not treating its own limitations-based dismissals as preclusive, rather than an exception to full faith and credit. Id. at 108.

88 If the Minnesota court’s decision in Sautter was limited somewhat by to facts, as the court suggested, then this scenario could play out in Minnesota when a Minnesota court would conclude that Minnesota has a greater interest in allowing the claim to proceed and the first forum had a minimal interest in barring the claim.
so. She will decide to bring the claim first in Wisconsin only if she and the defendant are not residents of the same state, and she is assured a federal forum for her claim in the event that the Wisconsin court considers the claim untimely.

c. Tribal court judgments

The next potential exception to full faith and credit involves an area that the Court has never directly addressed—whether section 1738 requires state and federal courts to extend full faith and credit to the judgments and decisions of tribal courts. The issue has been subject to much debate. The question is whether tribal courts are courts of a “Territory” within the meaning of section 1738, thereby entitling their judgments to full faith and credit. The only guidance that the Court has provided comes from its 1855 decision in United States, to use of Mackey v. Cox. In Mackey, the Court was asked to construe a District of Columbia statute that provided for an estate administrator validly appointed under the laws of “any of the United States or the territories thereof” to maintain an action on behalf of that estate in a District of Columbia court. The issue was whether Mackey, a Cherokee appointed pursuant to tribal law as the administrator of a fellow Cherokee’s estate, fell under the statute. The case turned on whether the Cherokee tribe was a “territory” within the statute’s meaning.

89 Illinois courts have not yet addressed this issue; however, this is the rule in the Seventh Circuit. See Reinke, 45 F.3d at 170–72.

90 Commentators and courts generally agree that the Clause’s language alone does not provide a basis for giving full faith and credit to tribal court judgments; however, the word “territories” in section 1738 might. See Part Three argues that Congress lacks the power, under the Clause, to require states to extend full faith and credit to types of judgments not covered by the Clause, like tribal court judgments. See Part Three, II., b., i. infra. If this is indeed the case, then the debate over whether Congress intended tribal court judgments to be included in the section 1738 “territories” mandate is moot. Instead, states are never required to enforce such judgments as a matter of full faith and credit, and instead are free to consider enforcement of such judgments based on whatever comity-based principles they wish. However, the debate over whether section 1738 includes a tribal court judgment mandate remains relevant because, as yet, courts have not considered the constitutional question. As long as some courts construe, perhaps erroneously, section 1738 as requiring them to give full faith and credit to tribal court judgments Erie problems will ensue.

91 See, e.g., Craig Smith, Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions Revisited, 98 CAL. L. REV. 1393 (2010); Kelly Stoner & Richard A. Orona, Full Faith and Credit, Comity, or a Federal Mandate?: A Path that Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders, 34 N.M. L. REV. 381 (2004); Diana B. Garonzik, Note, Full Reciprocity from Tribal Courts From a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act, 45 EMORY L. J. 723 (1996).

92 See 28 U.S.C. § 1738. Commentators have offered various policy-based reasons for not giving full faith and credit to tribal court judgments, including: concerns over the legal expertise and political independence of tribal courts; the limited appellate process that most tribal courts offer; the refusal of tribal courts to grant full faith and credit to state and federal court decisions. See generally Garonzik, supra note 91, at 745 n.101.

93 59 U.S. 100 (1952).

94 Id. at 101.

95 Id.

96 Id. 102.
The fact that they are under the constitution of the Union, and subject to acts of congress regulating trade, is a sufficient answer to the suggestion. They are not only within our jurisdiction, but the faith of the nation is pledged for their protection . . . . [T]he fact that the Cherokees enact their own laws, . . . appoint their own officers, and pay their own expenses, . . . is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign, but a domestic territory—a territory which originated under our constitution and laws.97

Although the Mackey Court did not construe section 1738, several states have held that the Court’s conclusion that tribes are “territories” is applicable in the section 1738 context.98 Accordingly, these courts have held that the statute obligates them to extend full faith and credit to tribal courts’ decisions.99 The Eighth Circuit reached the same conclusion first in Mehlin v. Ice,100 a decision which remains valid in that circuit.101 Other states have held that Mackey is not applicable to section 1738,102 and then have concluded that tribal courts are not courts of “territories.” In Brown v. Babbit Ford,103 the Court of Appeals of Arizona examined the history of federal-tribal relations, and reasoned that tribal lands had passed from tribal sovereignty to federal sovereignty, without ever having been “territorial.”104 An Oregon court reasoned that tribal courts’ limited abilities to affect the rights of non-tribe members placed them on a

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97 Id. at 103.
98 A judge of the Court of Appeals of New Mexico in a dissenting opinion first articulated this view, arguing that a Navajo court’s award of a penalty for wrongful repossession against a non-Na97
99 See Jim v. CIT Fin. Servs., 533 P.2d 751, 752–53 (N.M. 1975) (“We agree with the dissenting opinion of Judge Hernandez insofar as held that the laws of the Navajo Tribe of Indians are entitled by Federal law to full faith and credit in the courts of New Mexico because the Navajo Nation is a ‘territory’ within the meaning of that statute.” (citations omitted)); see also Sheppard v. Sheppard, 655 P.2d 895, 902 (Idaho 1982); Matter of Adoption of Buehl, 555 P.2d 1334, 1342 (Wash. 1976). Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), supported the Sheppard court’s view. In Martinez, the Court suggested in dicta that Mackey had relevance in the full faith and credit context. Id. at 66 n.21.
100 56 F. 12,16–19 (8th Cir. 1893).
102 In New York ex rel. Kopel v. Bingham, 211 U.S. 468, 474–75 (1909), the Court cited with approval a district court’s decision holding that Cherokee courts were not “territorial courts” for the purposes of the federal extradition statute, see Ex Parte Morgan, 20 F. 298, 305 (W. D. Ark. 1883). 211 U.S. at 474–75.
104 Id. at 196–97 (“Indian reservations have never been considered as a ‘territory’ within the meaning of the laws of the United States, but simply they are the home of the Indians.”). See also Mexican v. Circle Bear, 370 N.W.2d 737, 743–44 (S.D. 1985) (Henderson, J. concurring) (“Therefore, I am willing to give unto the judicial decision of this tribal judge all due deference and respect, as I have heretofore set forth, but not out of any recognition that the ‘Sioux Nation’ is an independent nation within the United States of America.”).
status below territorial courts, and therefore exempted their decisions from full faith and credit.105

The two federal circuit courts that have weighed in have also declined to extend full faith and credit to tribal court judgments. In Wilson v. Marchington,106 a diversity action brought by a tribe member against a non-tribe member to enforce a tribal court’s personal injury judgment, the Ninth Circuit held that because Congress had enacted legislation extending full faith and credit to specific tribal court judgments in limited circumstances, section 1738 did not impose such a general requirement as to all tribal court judgments.107 The court rejected the argument that it was required to consider whether Montana, the district court’s forum state, would enforce the tribal court judgment, because “the quintessentially federal character of Native American law, coupled with the imperative of consistency in federal recognition of tribal court judgments, by necessity require[d] that the ultimate decision governing the recognition and enforcement of a tribal judgment by the United States be founded on federal law.”108 In Burrell v. Armijo,109 the Tenth Circuit did not explicitly hold that section 1738 did not apply to tribal court judgments; however, it analyzed the preclusive effect of a tribal court’s decision in a subsequent section 1983 action pursuant to comity principles.110 The court subsequently repeated this analysis, holding that tribal court convictions should be considered based on comity principles, when they are relevant in federal sentencing.111

The Erie problems likely to ensue in this context are striking. The two circuit courts that cover the states with the most tribal courts112 have held, or at least indicated, that tribal court judgments are not owed full faith and credit in federal court. However, state courts located within these circuits have reached the opposite conclusion.113 Accordingly, the subsequent enforceability of a tribal court judgment often will depend

106 127 F.3d 805 (9th Cir. 1997).
108 Id. at 813 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (holding that Erie did not require resort to state law in diversity actions implicating significant foreign relations interests).
109 456 F.3d 1159 (10th Cir. 2006).
110 Id. at 1172–73; see also 456 F.3d at 1176 (McConnell, J. concurring) (noting that the court had not yet specifically decided whether section 1738 extended to tribal court judgments.”).
111 See United States v. Shavanaux, 647 F.3d 993, 998–99 (10th Cir. 2011).
112 There are seventy-five tribal courts in the states comprising the Ninth Circuit, totaling 43% of the 175 tribal courts in the United States. See Bureau of Justice Statistics, United States Dep’t of Justice, Census of Tribal Justice Agencies in Indian Country, 2002, at 3. There are forty-four tribal courts in the states comprising the Tenth Circuit, totaling 25% of the total number of tribal courts. Id. Collectively, 68% of the tribal courts are in the states of the Ninth and Tenth Circuits.
113 Compare, e.g., Jim, 533 P.2d at 752–53, with Burrell, 456 F.3d at 1172–73.
on whether the parties are diverse.\textsuperscript{114} For example, a New Mexico resident having obtained a judgment in Navajo tribal court against an Arizona resident could seek to enforce the judgment in New Mexico state court which would extend full faith and credit to the judgment, only to have the defendant remove the case to federal court, where the judgment would be subject to reexamination. However, had the judgment been against a resident of New Mexico, the enforcement action would not have been removeable, and the state court would have enforced it without reexamination.\textsuperscript{115} While the Ninth Circuit cited the federal interest in matters of tribal sovereignty to justify this inequitable outcome, the court failed to consider the way that its decision interrupted the delicate and important relationships between state and tribal courts that share overlapping jurisdictions. The state cases cited suggest that the federal interest is hardly unique. Moreover, it is not entirely clear that the \textit{Erie} problem created by the Ninth and Tenth Circuits advances federal-tribal relations. Congress has granted tribes limited jurisdiction to resolve tribe-important legal matters.\textsuperscript{116} By creating uncertainty as to whether tribal court judgments will be enforced in other courts, these federal courts effectively push litigants away from the tribal courts, thus thwarting congressional policy.

A second \textit{Erie} problem also could result from the fact that some states enforce tribal court judgments as a matter of statute, setting specific requirements for the enforceability of certain tribal court judgments.\textsuperscript{117} Courts of states with such statutes have held that the statutes provide exclusive grounds for tribal court judgments’ enforcement—judgments not meeting the statutory standards are not entitled to alternative enforcement under section 1738.\textsuperscript{118} An \textit{Erie} problem could then result when a federal court holds that its own interpretation of section 1738 is conclusive as to the enforceability of a tribal court judgment, without considering whether a state statute might provide an alternative basis for enforcement. Doing so would produce not only \textit{Erie} problems, but result in the federalism-defying result of a federal court ignoring the

\textsuperscript{114} Due to the limited ability of tribal courts to enforce judgments against non-tribal members, subsequent enforcement actions are often necessary. \textit{See}, e.g., \textit{Jim}, 533 P.2d at 752; \textit{Goins}, infra note 114, at 208.

\textsuperscript{115} The \textit{Erie} problems likely to result from the Ninth Circuit’s decision in \textit{Wilson} were identified and considered by one commentator. \textit{See} Stephanie Moser \textit{Goins}, Comment, \textit{Beware the Ides of Marchington: The \textit{Erie} Doctrine’s Effect on Recognition and Enforcement of Tribal Court Judgments in Federal and State Courts}, 32 \textit{AM. INDIAN L. REV.} 189 (2007). This commentator suggested that the federal decision might be applicable on the states as a rule of federal common law, thereby preventing states from extending full faith and credit to tribal judgments. \textit{See id.} at 211. However, this conclusion ignores the non-binding nature of the circuit courts’ decisions on the state courts. \textit{See} note 46 \textit{supra} and accompanying text. \textit{Goins} also expressed concern with the likelihood that \textit{Wilson} would lead to forum shopping between state and federal courts. \textit{Goins}, \textit{supra}, at 208.


\textsuperscript{117} \textit{See}, e.g., 12 \textit{OKLA. STAT. ANN.} § 728 (2011); \textit{WIS. STAT.} § 806.245 (2012); \textit{WYO. STAT. ANN.} § 5-1-111 (2011).

\textsuperscript{118} \textit{See}, e.g., \textit{Barrett v. Barrett}, 878 P.2d 1051, 1053 (Okla. 1994).
stated policy of its forum state’s legislature in dismissing a state-created cause of action or allowing one to advance when the state legislature had provided for its dismissal.119

d. Penalty default judgments

The Court has never stated whether the Clause and section 1738 require a second forum to treat a first forum’s penalty dismissal as preclusive of a subsequent suit brought by the same party on the same claims in the second forum. Nevertheless, some courts have considered this issue and found an exception to the full faith and credit provisions in such instances.

In Turner-Adeniji v. Accountants on Call,120 the district court held that section 1738 did not require it to dismiss the plaintiff’s Title VII action even though the plaintiff had previously brought an identical claim in a forum-state court.121 As a discovery sanction, the state court had dismissed the action.122 The district court noted that there was little authority as to whether the dismissal was entitled to full faith and credit, and concluded that “the federalism concerns that enliven the full faith and credit doctrine are not implicated by a penalty dismissal.”123 The plaintiff’s inability to re-file in state court adequately advanced the state’s limited interest in the enforcement of the discovery rules that had given rise to the dismissal.124

However, other courts have declined to find such an exception.125 Some of these courts have not considered whether an independent exception for penalty dismissals exists, deciding only that such dismissals do not fall under the existing due process exception.126 Another court declined to craft a new exception for a “death penalty

119 These statutes often make the tribal court’s rendering full faith and credit to state decisions a condition precedent to the state courts’ doing so for tribal-court decisions. See, e.g., 12 OKLA. STAT. ANN. § 728. Accordingly, when the judgment in the federal action is from a tribal court that does not render full faith and credit to state-court decisions, the state has a valid interest in the dismissal of the state-created cause of action.
121 Id. at 646.
122 Id. In the absence of other courts’ guidance, the court relied on a treatise. See id. (citing WRIGHT, MILLER, & COOPER, supra note 43, § 4467, 44–45 & nn. 71–72). The treatise cited stated that “the only reason for precluding a second action [after a penalty dismissal] is that the first court must have effective sanctions to compel adherence to good procedure.” Id. The commentators suggested that the first forum “adequately protected [its interest in procedure] by the power to foreclose proceedings in its own courts.” Id.
123 Turner-Adeniji, 892 F. Supp. at 646. Perhaps in dicta, the court noted that its conclusion was “more compelling in the context of a Title VII discrimination case[,]” when granting preclusive effect to the state judgment would have meant barring a federal claim based upon a state procedural sanction. See id.
124 Id.
125 See, e.g., In re Nourbakhsh, 67 F.3d 798, 800 (9th Cir. 1995); In re Eadie, 51 B.R. 890, 891–93 (Bankr. Mich. 1985) (holding that Marrese suggested that the Court would consider penalty defaults subject to full faith and credit).
126 See Jaffe v. Grant, 793 F.2d 1182, 1187 (11th Cir. 1987) (holding that the plaintiff had a full and fair opportunity to litigate his claim in state court before the court dismissed the claim as a discovery sanction) (“[T]he determinative factor here is not whether the issue was litigated, but whether [the plaintiffs] had an opportunity to litigate the matter.” (emphasis in original)); see also In the Matter of Gober, Gober v. Terra + Corp., 100 F.3d 1195, 1201 (5th Cir. 1996).
sanction” in favor of a plaintiff, and then considered and rejected the plaintiff’s argument that the sanction fell under the existing exception for penal judgments.127

No court has replicated the interest-balancing used by the Turner-Adeniji court to determine whether a free-standing exception should exist for penalty dismissals. The issue remains unsettled and subject to judicial development in most jurisdictions. As a result, a diversity court’s granting preclusive effect to a non-forum state’s penalty dismissal, without regard to its forum state’s full faith and credit precedent, could lead to an Erie problem. Moreover, it would result in the perverse outcome of a state substantive right going unenforced out of deference to the internal judicial management interests of a different state, when the full faith and credit provisions might not require such a result.

e. Worker’s compensation awards

The uncertainty surrounding the preclusive effect of worker’s compensation judgments stems from a divided Supreme Court and the Court’s subsequent failure to articulate a coherent rule. In Magnolia Petroleum Co. v. Hunt, the Court first considered the full faith and credit owed to a worker’s compensation award. The case involved a Louisiana resident who had received and recovered such an award from a Texas company pursuant to the Texas worker’s compensation statute.128 The plaintiff’s injury had occurred in Texas.129 A Louisiana court, under that state’s statute, then awarded the plaintiff a second recovery for the same injury.130 The defendant-corporation argued that the Louisiana court should have dismissed the action because Texas’s worker’s compensation statute explicitly stated that awards under it precluded future recoveries.131 The Court agreed, holding that the Clause required the Louisiana court, in giving full faith and credit to the Texas judgment, to enforce the Texas statute’s exclusivity provision.132 However, in Wisconsin v. McCartin,133 the Court curtailed Magnolia’s the effect, holding that Magnolia only restricted a second state from issuing a

127 See Enviropower, LLC v. Bear, Stearns & Co., Inc., 265 S.W.3d 16, 19–22 (Tex. App. 2008). The first forum had, sua sponte, awarded Bear, Stearns & Co. the full amount demanded in its complaint after finding that Enviropower had intentionally withheld documents during discovery. Id. at 18. In concluding that the sanction at issue was not penal, the court held that such sanctions served the dual purpose of deterring bad conduct, and ensuring adherence to the forum’s procedural rules. Id. at 21. The court appears to have assumed that the first forum’s interest in adherence to its own procedural rules was a sufficient interest to justify a second forum’s giving full faith and credit to the judgment, in contrast to the Turner-Adeniji court’s conclusion.
128 320 U.S. at 432.
129 Id.
130 Id. 433–34.
131 Id. at 434–36.
132 Id. at 436–37. In reaching this conclusion, the Court distinguished the result from other cases which had held that a state was not required by the Clause to enforce another state’s worker’s compensation statutes. Id.; see Pacific Emp’r Ins. Co. v. Indus. Accident Comm’n, 306 U.S. 493, 502–05 (1939); Alaska Packers Ass’n v. Indus. Accident Comm’n, 294 U.S. 532, 544–50 (1935). The Court reasoned that when a worker’s compensation award, instead of a statute, was at issue, the heightened full faith and credit owed to judgments applied. See 320 U.S. at 437.
worker’s compensation award when the first state’s statute contained “unmistakable language . . . forbidding an employee from seeking alternative or additional relief under the laws of another state.”

In *Thomas v. Washington Gas Light Co.*, the Court revisited *Magnolia* and *McCartin*. A plurality of four justices held that *McCartin*’s permitting a state to dictate its judgments’ extraterritorial effects in a manner other than by prescribing the judgments’ interterritorial effects clashed with full faith and credit principles. The plurality held that stare decisis did not support “attempting to revive *Magnolia* or . . . attempting to preserve the uneasy coexistence of *Magnolia* and *McCartin*. Accordingly, the plurality considered the issue anew, holding that: the first forum issuing a worker’s compensation award did not have a compelling interest in “limiting the potential liability of businesses within the State[,]” the first forum’s interest in “providing adequate compensation to the injured worker” was served by allowing a subsequent suit in a second forum for the same injury; and the first forum’s “interest in the integrity of its tribunal’s determinations” was not defeated by allowing a subsequent suit in a second forum under that state’s laws since the first forum could not render preclusive determinations about a claimant’s rights provided by that state. Therefore, the plurality explicitly overruled *Magnolia* and *McCartin*—the Clause did not “preclude successive workmen’s compensation awards.” However, Justice White wrote a concurrence, with which three justices joined. In it, Justice White argued that the *McCartin* rule advanced the full faith and credit principle of finality, whereas the plurality’s approach injected a novel balancing rule into the Court’s full faith and credit jurisprudence, which, going forward, would prevent the Clause from being “a nationally unifying force.” Instead, the concurrence suggested that the case should be decided by applying *McCartin* and finding that the first state’s statute and determining lacked “unmistakable language.”

The Court did not extend *Thomas*’s interest-balancing approach in future full faith and credit cases. Its reasoning in *Thomas* remains something of an outlier. The strange analysis and the divided nature of the opinion have created unaddressed

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134 *Id.* at 628.
135 448 U.S. 261 (1980).
136 *Id.* at 271–72 (“To vest the power of determining the extraterritorial effect of a State’s own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Article IV of the Constitution to prevent.”).
137 *Id.* at 277.
138 *Id.* at 279–83. The *Thomas* plurality’s ad hoc interest-balancing approach has been significantly criticized by scholars. See, e.g., William A. Reppy, Jr., *The Framework of Full Faith and Credit and Interstate Recognition of Same-Sex Marriage*, 3 AVE MARIA L. REV. 393, 419–27 (2005).
139 448 U.S. at 286.
140 448 U.S. at 286 (White, J. concurring).
141 *Id.* at 288–89.
142 *Id.* at 289–90.
confusion among state and lower federal courts that the Court has not addressed. Several state courts hold that Thomas overruled McCartin, and that they are free to issue a worker’s compensation award, even when a plaintiff has previously recovered in a different state an award for the same injury. Other state courts disagree and hold that the Thomas plurality is precedental, and thus, “Thomas did not overrule either Magnolia or McCartin, the result of which is that we are still left with McCartin’s ‘unmistakable language’ rule.” Federal courts are equally split. In a diversity suit brought in the District of Montana alleging negligence under Montana law, the defendant offered as a conclusive defense a North Dakota worker’s compensation commission’s factual determination. On appeal, the Ninth Circuit rejected the defendant’s argument, holding that Thomas established that section 1738 did not require it to give full faith and credit to the North Dakota judgment. However, in a similar diversity action, this one brought under the second forum’s worker’s compensation law and then removed to federal court, the Fifth Circuit held that the concurring opinion in Thomas controlled, and that it was obligated to examine the first forum’s statute for “unmistakable language.”

These two federal cases demonstrate the two ways the confusion that Thomas caused can produce an Erie problem. Consider a worker who lives in Connecticut and is injured at her New York workplace. The worker decides to seek recovery for her injuries in New York and under New York law. A New York administrative panel awards benefits pursuant to a statute that contains “unmistakable language” precluding further recovery for the same injury. The worker then recovers for the same injury


145 Webb v. Tom Brown, Inc., 807 F.2d 783, 786 (9th Cir. 1987).

146 Id. The court based this conclusion on Montana’s potential interest in “applying its workers’ compensation scheme to fashion an award[,]” even though the case before it arose under Montana tort law, not Montana worker’s compensation law. See id. at 786. The court recognized that while it was not obligated to enforce the North Dakota statute’s exclusivity provision, Erie would obligate it to enforce the Montana worker’s compensation statute’s exclusive remedy provision if the plaintiff tried to recover under it. Id. at 787. Accordingly, the court remanded to determine whether “Montana [was] prepared to pay workers’ compensation.” Id. If it was, the court suggested that the Montana exclusive remedy clause “may, indeed, require dismissal of the litigation.” Id. The court’s reasoning, therefore, assumed that a Montana court would also hold that Thomas had overruled McCartin, however Montana courts still have not addressed this issue.

147 Kindle v. Cudd Pressure Control, Inc., 792 F.2d 507, 514 (5th Cir. 1986). The court concluded that Justice White’s opinion was binding because it rested on the narrowest grounds. Id. at 513–14 (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). In Garcia v. American Airlines, the First Circuit noted the uncertainty. See 12 F.3d 308, 310 n.3 (1st Cir. 1993).

under Connecticut’s worker’s compensation law; she is able to do so because Connecticut’s courts have held that *Thomas* overruled *McCartin*. However, her employer, a New York corporation, challenges the Connecticut award in federal court, under diversity jurisdiction. If the district court determines that *McCartin* is still valid, then it would hold that the New York recovery precluded the Connecticut action. However, if the worker’s employer had been a Connecticut corporation, then the corporation would have had to challenge the award in Connecticut courts, where the court would have held that the New York judgment was not entitled to full faith and credit.

The same result would ensue if the worker brought a second action in Connecticut under a negligence theory. In that case, even if the New York panel had declined to award benefits, the federal court could hold that the panel’s factual determinations giving rise to the denial should be given collateral estoppel effect. Accordingly, the worker would be barred from litigating issues resolved by a New York administrative panel in a Connecticut court when bringing a claim under Connecticut law. The litigant would be left without a claim, and the expansive state interests undergirding Connecticut’s tort law would have been made to yield to the narrow interests supporting the inter-jurisdictional exclusivity of New York’s worker’s compensation regime.

f. **Collateral estoppel effects of a default judgment**

Most state and federal courts hold that they are required by the full faith and credit provisions to give the same collateral estoppel effect to a another state’s default judgment as would the rendering state’s courts. However, a few federal courts have held that federal law or forum-state preclusion law dictates whether a non-forum state’s default judgment has collateral estoppel effect in a subsequent diversity action.

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149 See *Pimental*, 698 A.2d at 363.
151 The question is an open one in the Second Circuit.
152 Both examples also would give rise to forum shopping, as a litigant will invariably seek to bring an action for a second recovery in a forum that does not adhere to *McCartin*.
An *Erie* problem could result when a party is sued in one state, is subject to an adverse default judgment there, and sues the original plaintiff in another state. If the parties are not diverse, then the forum state court will look to the rendering state’s laws to determine whether the default judgment precludes relitigation of matters at issue in the previous action. However, if the parties are diverse, then the plaintiff can file in federal court, where the court might conclude that federal law does not require giving collateral estoppel effect to the default judgment; the court could then consider the merits of the claim.\(^{155}\)

\textbf{g. Penal judgments}

In *Wisconsin v. Pelican Insurance Co.*,\(^{156}\) the Court held that the full faith and credit provisions do not require a second forum to enforce a first forum’s penal judgments.\(^{157}\) Thus, the Court held that a Wisconsin judgment requiring a Louisiana corporation to pay a fine for failing to properly register was not entitled to full faith and credit in an enforcement action brought by the state, arising under the Court’s original jurisdiction.\(^{158}\) The Court concluded that the Wisconsin judgment was “penal” because it “compel[led an] offender to pay a pecuniary fine by way of punishment for [an] offense.”\(^{159}\)

The Court next considered the penal exception in *Huntington v. Attrill*.\(^{160}\) In *Huntington*, the Court held that it determines whether a judgment is penal by asking whether “the wrong sought to be redressed [by the judgment] is a wrong to the public or a wrong to the individual.”\(^{161}\) Applying this test, the Court determined that a New

\(^{155}\) This uncertainty undercuts the judicial power of a first forum. Consider a breach of contract action brought in Alabama state court by Party A, a resident of Alabama, against Party B, a resident of Georgia. Party B decides to forego litigating the Alabama action, and the Alabama court awards Party A a default judgment. Party B then brings a diversity action against Party A in the Northern District of Georgia, alleging breach of the same contract. The federal court applies Eleventh Circuit law and holds that the Alabama default judgment is not entitled to collateral estoppel effect; accordingly, Party B is able to litigate the merits of its claim. However, had Party B been an Alabama resident, then it would have contested the Alabama state court action, because it would not have been able to rely on diversity jurisdiction to avoid the collateral estoppel effect of a default judgment.

\(^{156}\) 127 U.S. 265 (1888).

\(^{157}\) *Id.* at 289–90. The Court cited private international law for this rule, holding that “[b]y the law of England of the United States the penal laws of a country do not reach beyond its own territory . . . ; and they must be administered in its courts only, and cannot be enforced by the courts of another country.” *Id.* (citing *The Antelope*, 10 Wheat 66, 123 (1825)).

\(^{158}\) *Id.* at 286–88, 299.

\(^{159}\) *Id.* The Court emphasized that a judgment could be penal even if it did not stem from a criminal action. *Id.* However, the Court also noted that judgments resulting from actions to enforce vested property interests, even judgments in favor of a state, were not penal. *Id.* at 295–97.

\(^{160}\) 146 U.S. 657 (1892).

\(^{161}\) *Id.* at 668. The Court emphasized that,

The test is not by what name the statute is called by the legislature or the courts of the state in which it was passed, but whether it appears, to the tribunal which is called upon to enforce it, to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person.

*Id.* at 683.
York judgment in favor of a creditor against a corporate officer was not penal and therefore was entitled to full faith and credit in a subsequent action in Maryland. The New York court had rendered its judgment pursuant to a statute that made an officer personally liable for corporate debts when the officer had signed a fraudulent stock certificate. The Court reasoned that the New York statute’s purpose was as much protecting creditors as it was punishing defrauding officers. When a statute had a penal and non-penal purpose, judgments rendered pursuant to it were entitled to full faith and credit. However, the Court did not foreclose the possibility that a judgment in favor of an individual could be penal, noting such could be the case when a party recovered a judgment “not in his individual interest, but in the interest of the whole community.”

The Court then expressed doubt about the very existence of the penal exception. In holding that a judgment in favor of a state for unpaid taxes was entitled to full faith and credit in another state, the Court stated that it “intimat[ed] no opinion whether a suit upon a judgment for an obligation created by a penal law, in the international sense [was entitled to] full faith and credit . . . outside of the state where imposed.” The Court subsequently recognized, without resolving, the doubt that it had cast over the penal exception. However, in Nelson v. George, the Court held that the Clause “does not require that sister States enforce a foreign penal judgment.”

Because Nelson involved an actual criminal conviction, many state courts conclude that there is no full faith and credit exception for civil verdicts reduced to judgments. However, most state courts hold that the penal exception remains viable

162 Id. at 676–78.
163 Id.
164 Id. at 681–82.
165 Id. at 682.
166 Id. see also Michael Finch, Giving Full Faith and Credit to Punitive Damages Awards: Will Florida Rule the Nation? 86 MINN. L. REV. 497, 543–51 (2002). Professor Finch emphasized that the Court’s extensive consideration of whether the New York judgment was penal further suggests that the Court considered it possible if not likely that a judgment in favor of an individual could be penal. Id.
167 M.E. White, 296 U.S at 279.
168 Id. The Court made this statement in holding that, although the tax judgment included a nominal penalty interest, this penalty did not make the judgment “penal,” and therefore Pelican was not on point.
169 Williams v. North Carolina, 317 U.S. 287, 294 n.6 (1942) (“It has been repeatedly stated that the full faith and credit clause does not require one state to enforce the penal laws of another. But the question of whether a judgment based on a penalty is entitled to full faith and credit was reserved in [Milwaukee County v. M.E. White Co.]” (citations omitted)).
171 Id. at 229. The Court applied the exception and held that California could determine what effect to give to a North Carolina court’s detainer of an inmate, who had been convicted in North Carolina but was presently serving a California sentence. Id.
172 E.g., City of Phila. v. Austin, 429 A.2d 568, 571 (N.J. 1981) (“We recognize that the reduction of the penalty to a civil judgment is a significant change in its status. That metamorphosis diminishes the penal nature of the claim and enhances the enforceability of the judgment under the Full Faith and Credit Clause.”); Overmeyer v. Eliot Realty,
as to judgments rendered pursuant to statutes having exclusively penal purposes. Additionally, the federal circuit courts that have recently considered the issue generally recognize the viability of a penal exception that exists outside of the criminal law context. Accordingly, *Erie* problems would ensue if a federal court determines that a civil judgment is penal and not entitled to full faith and credit, when a forum-state court would hold that there is no such exception.

A second set of *Erie* problems is likely to result from the Court’s rather nebulous definition of “penal.” This is particularly true in the collateral effects context. Most state courts hold that the penal exception exempts them from enforcing the collateral effects that a rendering state attaches to its own criminal judgments. For example, in *State v. Edmondson*, the Court of Appeals of New Mexico held that New Mexico courts could consider the defendant’s prior Texas conviction in determining whether he was a habitual offender under New Mexico law, even though a Texas court had set aside the Texas conviction and thus the conviction could not be considered for purposes of applying Texas’s habitual offender statute. In reaching this conclusion, the court expressed doubt about the Clause’s application to criminal matters at all, and held that even if the Clause did have application in a criminal context, “it would rarely, if ever, compel one state to be governed by the law of a second state regarding the punishment that can be imposed for a crime committed within the first state’s boundaries.”


173 *See Halwod v. Cowboy Auto Sales, Inc.*, 946 P.2d 1088, 1091 (N.M. Ct. App. 1997); *Williams v. Washington*, 581 S.W.2d 494, 495 (Tex. Ct. App. 1979); *Holbein v. Rigot*, 245 So. 2d 57, 59 (Fla. 1971). Recently, the Nevada Supreme Court held that a California judgment in favor of a city pursuant to California’s unfair and deceptive trade practices statute was penal. See *City of Oakland v. Desert Outdoor Advertising*, 267 P.3d 48, 54 (Nev. 2011). The city had based its claim on the defendant’s violation of a city ordinance by erecting a billboard. *Id.* at 49. The court considered the judgment penal because it rested on the ordinance violation, and a citizen would not have had standing to sue to enforce the ordinance. *Id.* at 54. The statute therefore was designed to “deter conduct deemed wrongful under California law.”

174 *See, e.g.*, *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1218–19 (9th Cir. 2006); *Abordo v. O’Dell*, 23 F. App’x 615, 616 (8th Cir. 2001) (per curiam) (unpublished).

175 Another set of *Erie* problems is possible if a court were to hold that a judgment awarding punitive damages was penal and therefore not entitled to full faith and credit. However, courts that have considered this issue are near-unanimous in holding that such judgments are not “penal” under *Huntington*, and therefore are entitled to full faith and credit. See generally Peter B. Kutner, *Judicial Identification of “Penal Laws” in the Conflict of Laws*, 31 OKLA. L. REV. 590, 608–22 (1978).


177 *Id.* at 860–61. (citing *Huntington*, 146 U.S. 657).

178 *Id.* at 860; see also *People v. Laino*, 87 P.3d 27, 32–38 (Cal. 2004) (holding that the Clause did not require it to recognize an Arizona court’s dismissal of the defendant’s Arizona conviction when applying California’s three strikes law); *State v. Langlands*, 583 S.E.2d 18, 20–21 & n.4 (Ga. 2003) (the Clause did not prevent a Georgia court from “according felony status in Georgia to out-of-state misdemeanor convictions in those instances where the Georgia statutes provides sufficient notice . . . that any out-of-state misdemeanor convictions that meet the specified statutory requirements will be deemed the equivalent of felony convictions in Georgia.”).
Federal courts appear to be unanimous in reaching the same conclusion. For example, in *Thrall v. Wolfe*, the Seventh Circuit held that the Internal Revenue Service had not acted unlawfully when, based on the plaintiff’s having sustained a Montana conviction, it denied the plaintiff’s application for a firearms dealing license, even though the governor of Montana had fully pardoned the plaintiff. The court reasoned that it should determine its full faith and credit obligation by analyzing “the policies underlying conflicting laws,” and then determined that allowing the federal government to consider the pardoned offense supported both the federal policy behind the statute at issue and the Montana pardon. In another case, a diversity court held that *Erie* only obligated it to give effect to the collateral effects that another state attributed to its criminal judgments if its forum-state courts would do so; because forum-state courts would have found an applicable exception to full faith and credit, so too did the federal court.

However, at least two state courts have reached contrary results. Courts in both Pennsylvania and New York have held that the full faith and credit provisions obligated them to exclude from evidence New Jersey criminal sanctions against corporations when a New Jersey court had attached conditions to its judgments providing that the judgments could not be evidence in subsequent civil proceedings (known as “civil reservations”). The New York court reasoned that any possible penal judgment exception did not apply because, by enforcing the civil reservations, the court was not enforcing New Jersey’s criminal law. However, these decisions appear to directly conflict with those of the courts that declined to enforce the collateral effects of other states’ criminal judgments.

Based on the prevailing view, it is likely that most diversity courts would not enforce civil reservations like New Jersey’s. However, Pennsylvania and New York courts consider themselves bound by full faith and credit to enforce collateral effects

179 503 F.2d 313 (7th Cir. 1974).
180 Id. at 314–16.
181 Id. at 316 (“Neither the inherent nature of a pardon nor full faith and credit require that a state pardon automatically relieve federal disabilities.”); see also *White v. Thomas*, 660 F.2d 680, 685–86 (5th Cir. 1981) (in a section 1983 action a Texas sheriff’s office did not violate the Clause for discharging a deputy sheriff based on the deputy’s failure to disclose a California criminal conviction when a California court had expunged the conviction from the deputy’s criminal record); *Bui v. Ashcroft*, No. Civ. A. 3:02-CV-1140, 2003 WL 251929, at *4 (N.D. Tex. Jan. 31, 2003) (unpublished) (holding that a Texas court’s setting aside a Texas state conviction did not prevent the attorney general from bringing deportation proceedings based on the Texas conviction) (“[A]ccording full faith and credit to a state judgment need not control the collateral consequences that flow from the judgment.” (quotation omitted)).
182 *Panko v. Endicott Johnson Corp.*, 24 F. Supp. 678, 681 (N.D.N.Y. 1938) (holding that New York law controlled whether a life sentence imposed by a Florida court made the plaintiff “civilly dead” and therefore unable to bring civil actions, therefore it was immaterial that Florida courts did not treat such plaintiffs as civilly dead).
184 *Farmland Dairies*, 489 N.Y.2d at 56–57.
like these. The courts would likely apply *Farmland Dairies* and *Troisi* to any case where the collateral effects of another state’s criminal judgment were at issue.\(^{185}\) Moreover, it is possible if not likely that state courts that have not yet considered the issue would look to Pennsylvania or New York for guidance and would then also hold that full faith and credit requires the enforcement of another state’s collateral effects of criminal judgments.\(^{186}\) Therefore, an *Erie* problem will result whenever a diversity court declines full faith and credit to a state criminal judgment’s collateral effects when the court’s forum-state courts would do otherwise. If the Southern District of New York, in a diversity action alleging negligence, declined to enforce a New Jersey civil reservation and admitted a New Jersey criminal sanction for the same conduct underlying the complaint, the plaintiff would be likely to prevail. However, if the plaintiff were unable to bring the suit in federal court, he would be left with a New York court’s enforcement of the New Jersey rule and would be unable to introduce such likely outcome-determinative evidence.

h. **Judgments that are contrary to a state’s public policy**

The last significant exception to the Clause is perhaps the most vexing and most constitutionally-dubious. Despite the Court’s repeated statements to the contrary, many state courts continue to hold that they are not required to extend full faith and credit to judgments of other states, when doing so would be contrary to the state’s public policy.

The Court has frequently held that the Clause does not require a second state to enforce the laws of a first state when doing so would contravene the second state’s public policy. \(^{187}\) However, the Court has repeatedly made clear that a state court has a much more exacting obligation to give full faith and credit to another state’s judgments. In a nineteenth century opinion, the Court held that the Mississippi courts could not decline full faith and credit to a Missouri court’s judgment which resulted from the plaintiff’s speculating on cotton futures, even though such speculating was illegal in

\(^{185}\) Tellingly, in a New York criminal action, the court applied the collateral effects of another state’s criminal judgment. *See People ex rel. Lesnowski v. Von Holden*, 435 N.Y.S.2d 620, 621–22 (N.Y. Sup. 1980) (holding that full faith and credit required a court calculating defendant’s credit for time-served in Florida to look to Florida law to determine the period of time the defendant had served after the Florida court found him guilty).

\(^{186}\) This happened in *Troisi*, where the court looked to *Farmland Dairies* in holding that full faith and credit required it to enforce the civil reservation. *See* 1998 WL 1108666, at *4.

\(^{187}\) *See, e.g.*, *Pac. Empls.*, 306 U.S. at 502 (“And in the case of statutes . . . the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.”) (holding that California could apply its own worker’s compensation law, rather than the law of Massachusetts, to adjudicate a claim arising from an injury suffered by a Massachusetts resident working in California for a Massachusetts corporation); *see also Nevada v. Hall*, 440 U.S. 410, 424 (1979) (holding that the Clause did not require a California court to apply Nevada’s sovereign immunity law in a California tort action brought by a California resident against Nevada for an injury suffered in California).
Mississippi.\textsuperscript{188} The Court reitered this point in \textit{Magnolia}, holding that it was not aware of “any considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to such a judgment outside the state of its rendition.”\textsuperscript{189} Finally, in a series of cases involving divorce decrees, the Court recognized a state’s significant local interest in governing domestic relationships; however, the Court held that this interest did not justify a state’s refusal to give full faith and credit to another state’s divorce decree.\textsuperscript{190}

However, in a few places, the Court left the door cracked such a free-standing public policy exception’s existence when the second state’s policy interests significantly contravene the first state’s interest in having its judgment given extraterritorial effect.\textsuperscript{191} In \textit{Magnolia}, the Court held that “there may be exceptional cases in which the judgment of one state may not override the laws and policy of another.”\textsuperscript{192} The Court more strongly endorsed such an exception in dicta in \textit{Pacific Employers}, stating that “there are some limitations on the extent to which a state may be required by [the Clause] to enforce even the judgment of another state in contravention of its own statutes or policy.”\textsuperscript{193}

The last time that the Court revisited the issue, though, it appeared to firmly close the door to whatever cracks it may have previously left. In \textit{Baker by Thomas v. General Motors Corp.},\textsuperscript{194} the Court held that its “decisions support no ‘roving public policy exception’ for the full faith and credit due to judgments.”\textsuperscript{195} The issue in the case was whether a Missouri diversity court considering a products liability action had to give full faith and credit to a Michigan court’s injunction preventing a former employee of the defendant-corporation from ever giving civil testimony against the corporation.\textsuperscript{196} The district court had declined to enforce the injunction after concluding that doing so

\textsuperscript{188} \textit{Fauntleroy v. Lum}, 210 U.S. 230, 237 (1908) (“But, as the jurisdiction of the Missouri court is not open to dispute, the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law.”).
\textsuperscript{189} 320 U.S. at 438.
\textsuperscript{190} See \textit{Sherrer}, 334 U.S. at 354–55 (“If in [the Clause’s] application local policy must at times be required to give way to national interests, such is part of the price of our federal system.” (quotation omitted)); \textit{Estin v. Estin}, 334 U.S. 541, 545–46 (1948) (“The situations where a judgment of one State has been denied full faith and credit in another State, because its enforcement would contravene the latter’s policy, have been few and far between. The [Clause] is not to be applied, accordian-like, to accommodate our personal predilections.” (citations omitted)).
\textsuperscript{191} See, e.g., \textit{Sherrer}, 334 U.S. at 355 (“This is not to say that in no case may an area be recognized in which reasonable accommodations of interest may properly be made. But as this Court has heretofore made clear, that area is of limited extent.”).
\textsuperscript{192} 320 U.S. at 438.
\textsuperscript{193} 306 U.S. at 502.
\textsuperscript{194} 522 U.S. 222 (1998).
\textsuperscript{195} \textit{Id.} at 233 (emphasis in original).
\textsuperscript{196} \textit{Id.} at 226–28. The Michigan court had issued the injunction pursuant to a settlement of an unrelated wrongful discharge action. \textit{Id.} at 227–28.
would contravene Missouri’s public policy. The Court held that the district court had properly declined to give full faith and credit to the injunction; however, the Court reached this conclusion on the narrow basis that one state court cannot issue an injunction attempting to control the course of litigation occurring in other states and involving parties that had not appeared before that state’s courts. The Court made clear that the district court had erred in relying on a general public policy exception.

Perhaps because the Baker Court ultimately declined to enforce the Michigan injunction, or perhaps because the Court has never expressly overruled its dicta suggesting a public policy exception’s possible existence (although it certainly came very close to doing so in Baker), many state courts, though not all, continue to recognize and apply such an exception. For example, in Reading & Bates Construction Co. v. Baker Energy Resources Corp., the Court of Appeals of Texas held that Texas courts did not have to enforce a Louisiana judgment domesticating a Canadian judgment when the plaintiff had only domesticated the Canadian judgment in Louisiana before seeking enforcement in Texas in order to avail himself of Louisiana’s more liberal international judgment recognition practices. The court held that it would “not permit a party to clothe a foreign country judgment in the garment of a sister state’s judgment and thereby evade [Texas’s] own recognition process.” In Donlan v. State, Several courts have held that there is no public policy exception to full faith and credit as to judgments. See, e.g., State v. Schmidt, 712 N.W.2d 530, 536–37 (Minn. 2006) (Minnesota courts had to give effect to a prior driving under the influence conviction rendered by a South Dakota court in applying a penalty enhancement, even though the South Dakota conviction had been uncounseled and Minnesota had policy of providing counsel in such cases); Cannon v. Cannon, 260 S.E.2d 19, 20 (Ga. 1979) (a North Carolina divorce decree including provision requiring parties to forego contesting divorce was enforceable in Georgia though such divorce-decree provisions were contrary to Georgia’s public policy); see also, e.g., Craven v. So. Farm Bureau Ins. Co., 117 P.3d 11, 14 (Colo. App. Ct. 2004).

197 Id. at 230. Significantly, in applying the public policy exception, the district court had recognized that the public policy interests of its forum state were the relevant consideration—not those of the federal judiciary or the state rendering the injunction. See id. The Eighth Circuit reversed the district court, but did so based on its conclusion that Missouri’s “equally strong policy in favor of full faith and credit” supported the conclusion that a Missouri court would extend full faith and credit to the injunction. 86 F.3d 811, 819 (1996). While the Court rejected the application of the exception, it did not hold that either court erred in resorting to the interests and law of the forum when considering the Clause’s application in a diversity case.

198 522 U.S. at 238 (“In sum, Michigan had no authority to shield a witness from another jurisdiction’s subpoena power in a case involving persons and causes outside Michigan’s governance.”).

199 Id. at 233.

200 Several courts have held that there is no public policy exception to full faith and credit as to judgments. See, e.g., State v. Schmidt, 712 N.W.2d 530, 536–37 (Minn. 2006) (Minnesota courts had to give effect to a prior driving under the influence conviction rendered by a South Dakota court in applying a penalty enhancement, even though the South Dakota conviction had been uncounseled and Minnesota had policy of providing counsel in such cases); Cannon v. Cannon, 260 S.E.2d 19, 20 (Ga. 1979) (a North Carolina divorce decree including provision requiring parties to forego contesting divorce was enforceable in Georgia though such divorce-decree provisions were contrary to Georgia’s public policy); see also, e.g., Craven v. So. Farm Bureau Ins. Co., 117 P.3d 11, 14 (Colo. App. Ct. 2004).


202 Id. at 704–15.

203 Id. at 715. A Kansas court recognized a public policy exception in a similar circumstance where a creditor had recovered a default judgment in a Kansas court and then successfully domesticated the default judgment in a Missouri court while the debtor’s motion to vacate the judgment was still pending in Kansas. See Tanner v. Hancock, 619 P.2d 1177, 1178–80 (Kan. Ct. App. 1980). When the creditor sought to enforce the Missouri judgment to prevent the Kansas court from considering the motion to vacate, the court held that the Missouri judgment was not entitled to full faith and credit, based upon a public policy exception. Id. at 1181.

204 249 P.3d 1241 (Nev. 2011).
the Supreme Court of Nevada gave Baker a curious reading, holding that the Baker Court had applied the Pacific Employers dicta and applied a public policy exception in holding that the injunction was not entitled to full faith and credit. Other state courts have recognized a public policy exception that exempted them from: enforcing another state’s custody decree when the second state court had facts before it not known to the first state court and those facts suggested that the second state court could better determine the children’s interests; enforcing another state’s adoption decree when the unwed, biological father of the child had not been given notice of the pending adoption or had an opportunity to appear before the court issuing the decree; and from giving preclusive effect to another state’s declaratory judgment that the other state’s law governed an insurance policy, when the declaratory judgment had only been obtained to foreclose pending litigation.

Some courts have attempted to obscure their finding a public policy exception by masking their holdings in broad readings of well established full faith and credit exceptions. For example, in Pecoraro v. Rostagno-Wallat, a Michigan appellate court held that, in a paternity action, it did not owe full faith and credit to a New York court’s order of filiation. The New York court had found that: it did not have personal jurisdiction over the spouse of the child at issue’s mother (the child’s presumed father under Michigan law); that the spouse was a necessary party to the action; but that, pursuant to a New York court rule, the action could proceed absent jurisdiction over the spouse because “justice required” allowing the party claiming paternity to maintain his New York action. The Michigan court held that because the New York court had explicitly found that it lacked personal jurisdiction over the spouse and had found that

205 Id. at 1233–34. Accordingly, the court held that Nevada was free to require the petitioner to register as a sex offender based upon offenses committed in California, even though a California administrative panel had terminated the requirement that the petitioner register in California. Id. at 1233. The court reasoned that, even if the administrative panel’s decision was a final judgment, it would not give the judgment full faith and credit because doing so would “interfere with [Nevada’s] preferred mechanism for protecting its populace.” Id. at 1233.


207 In re Riggs, 612 S.W.2d 461, 469 (Tenn. Ct. App. 1981) (“For this court to enforce the Georgia judgment, which is fraught with constitutional difficulties, and to deny the natural father due process of laws, would be repugnant to the Federal Constitution and the public policy of Tennessee.”). Since Riggs, Tennessee appellate courts have continued to affirm the existence of the public policy exception, but have refused to find it applicable. See Trustmark Bank v. Miller, 209 S.W.3d 54, 57–59 (Tenn. Ct. App. 2006) (holding that it did not violate Tennessee public policy to give priority to a security lien rendered by another state’s court on property located in Tennessee over a Tennessee court’s subsequently issued lien on the same property); Francis v. Francis, 945 S.W.2d 752, 753 (Tenn. Ct. App. 2006) (holding that it did not contravene Tennessee’s public policy to enforce a North Carolina judgment for alienation of affection, even though Tennessee had abolished the cause of action).

208 Wamsley v. Nodak Mut. Ins. Co., 178 P.3d 102, 116 (Mont. 2008) (holding that although there was no freestanding exception to full faith and credit based on Montana’s public policy, the court could decline to give effect to a judgment of another state when doing so would thwart the national unity interests behind the Clause).


210 Id. at 233–34.

211 Id. at 229–30; see N.Y.C.P.L.R. 1001(b).
the spouse was a necessary party, the Michigan court did not owe full faith and credit to the New York filiation order. The Michigan court’s conclusion deviates from those of other courts that have held that a court need not have had personal jurisdiction over a “necessary” but not “indispensable” party for their judgments to be entitled to full faith and credit. While the New York court considered the spouse “necessary,” the court’s allowing the action to proceed demonstrated that he was not “indispensable.” The Michigan court’s expansive reading of the personal jurisdiction exception seems to stem from its desire to prevent the party claiming to be the child’s father from circumventing the Michigan rule that a third-party does not have standing to seek a paternity decree unless “there first exists a judicial determination arising from a proceeding between [a] husband and [a] wife that declares that [a] child is not a product of the marriage.” To enforce this rule, rooted in Michigan’s interest in maintaining a presumption of legitimacy for children conceived and born in wedlock, the Michigan court had to conjure a way to avoid giving full faith and credit to the New York decree—the jurisdictional exception was the court’s recourse.

With the exception of the district court in Baker, federal courts are in general agreement that the Supreme Court has foreclosed any full faith and credit exception for judgments based on either federal or state policy interests. In a diversity case arising from the Eastern District of Virginia involving facts similar to those in Reading & Bates, the Fourth Circuit held that full faith and credit obligated it to enforce a Florida court’s refusal to domesticate a Canadian default judgment, even though the Florida court had acted pursuant to local policy considerations that a Virginia court would not have found persuasive. The court held that while policy reasons alone could justify a state court’s refusal to recognize a foreign judgment, Baker had squarely foreclosed policy-based refusals to recognize domestic judgments. Similarly, in an action brought by same-sex parents of adopted children seeking to enjoin enforcement of an Oklahoma statute that barred Oklahoma’s recognition of other states’ adoption decrees in favor of same-sex couples, the Tenth Circuit held that the statute required Oklahoma courts to violate the Clause and was therefore unconstitutional. The court reasoned that the Clause “applies unequivocally to the judgments of sister states” and therefore

212 805 N.W.2d at 233–34 (citing Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guaranty Ass’n, 455 U.S. 691, 705 (1982)).
213 See Lucas v. Estate of Stavos, 609 N.E.2d 1114, 1117–18 (Ind. Ct. App. 1993) (a Louisiana paternity order was entitled to full faith and credit, even though the Louisiana court did not have jurisdiction over a “necessary” but not “indispensable” party under Louisiana law).
214 Id. at 228.
216 Id. (“Thus, even if Florida public policy on this issue is contrary to Virginia public policy, this provides no basis for a state or federal court in Virginia to refuse to give a Florida judgment based on its public policy full faith and credit.”).
217 Finstuen v. Crutcher, 496 F.3d 1149, 1152–53 (10th Cir. 2007); see also Adar v. Smith, 597 F.3d 697, 707–09 (5th Cir. 2010), rev’d en banc on other grounds, 639 F.3d 146 (5th Cir. 2011).
Oklahoma could not constitutionally rest its statute on a public policy exception to the provision.\textsuperscript{218}

Until the Court again slams the door on any public policy exception for judgments, some states will continue to find and apply such an exception. Therefore, when diversity courts recognize judgments that their forum-state courts would deem contrary to state public policy, \textit{Erie} problems will result. On the one hand, these are the least troubling of the \textit{Erie} problems described, because a state court’s creating a phantom public policy exception rests on constitutionally shaky grounds at best. Therefore, perhaps one should not be bothered that the presence of diverse parties prevents a state court from unconstitutionally declining full faith and credit. But on the other hand, this \textit{Erie} problem creates outcomes that are just as unfair to litigants as the outcomes created by any other \textit{Erie} problem. When a party can get to federal court, he can enforce a judgment without regard to the forum state’s public policy; if he cannot get a federal forum, the enforceability of his judgment depends on a second state’s policy considerations. However advantageous access to the federal forum is for the diverse litigant, it is equally disadvantageous for the non-diverse litigant to see his judgment rendered moot because he and the defendant are of the same state. Either the Court must constrain the state courts from finding such public policy exceptions, or diversity courts must apply these exceptions as their forum-state courts would.\textsuperscript{219}

Moreover, this \textit{Erie} problem is particularly troubling from a federalism perspective. However uncertain the public policy exception is, it is not for diversity courts to correct state-court applications of the exception—the Framers left that role exclusively to the Court. By refusing to consider whether their forum-state courts would apply a public policy exception to another state’s judgments, diversity courts are applying their forum states’ laws in a way that possibly thwarts those states’ policy interests.\textsuperscript{220} Such an outcome is not merely an \textit{Erie} problem—it flies in the face of the national policy interests that undergird \textit{Erie}.\textsuperscript{221}

\textsuperscript{218} 496 F.3d at 1153. The court noted that adoptions were final judgments subject to the Clause’s scope. \textit{Id.}
\textsuperscript{219} Notably, in \textit{Baker}, the Court held that the lower federal court had erred in finding such an exception. \textit{See} 522 U.S. at 233. Although nothing in the Court’s analysis suggests that the Court’s ruling does not apply to state courts, the Court has conspicuously failed to correct a state court’s application of a freestanding public policy exception for judgments.
\textsuperscript{220} This inequitable outcome also incentivizes parties to engage in a form of forum shopping designed to thwart a state’s policy interests. Consider a litigant with a claim that he expects would result in a judgment that State A would consider adverse to its own policy interests. Accordingly, he expects that his claim would fail in a State A court. While he knows that a State B court would render a favorable judgment on his claim, to recover from the defendant, he must have a valid State A judgment. If he and the defendant are diverse, then he can bring the action in State B, recover a favorable judgment, and then enforce it in federal court in State A under diversity jurisdiction. However, if he and the defendant are non-diverse, then he will be left to enforce State B’s judgment in State A’s courts, where State A will decline full faith and credit pursuant to a public policy exception.
\textsuperscript{221} The federalism interests supporting \textit{Erie} are analyzed in Part Three, II., a., \textit{infra}.
II. Two More Sources of Full Faith and Credit Erie Problems

Even if the Court defined all of the exceptions, full faith and credit Erie problems will persist as long as diversity courts apply full faith and credit to non-forum-state judgments without regard to forum-state law. This is because of two related principles that govern extra-full faith and credit recognition of other states’ judgments. The first is the doctrine of interstate comity, whereby a second state court gives effect to another state-court judgment as a matter of discretion, even though the second court is not constitutionally required to do so. The second rests on less certain constitutional ground, but gives rise to Erie problems when not considered. This is the practice of a second state court giving greater preclusive effect to a first state court’s judgment than would the rendering court. Both doctrines result in a second state enforcing in other state’s judgments in ways that are not required by full faith and credit. Therefore, when diversity court applies section 1738 without considering whether its forum state’s courts would apply one of these related doctrines, Erie problems will result.

a. Interstate comity

In Hilton v. Guyot,222 the Court addressed what factors lower courts should consider when deciding whether to recognize the judgments of foreign states.223 The Court held that foreign judgments should be enforced pursuant to comity principle, which include, inter alia: whether enforcement would contravene a state’s public policy;224 whether the rendering foreign state would recognize an American judgment;225 whether the judgment at issue had been obtained by fraud;226 and whether recognizing the foreign judgment would “produce a friendly intercourse between the sovereignties . . . .”227 The Court emphasized that comity is a discretionary doctrine and does not give rise to an exacting full faith and credit obligation.228 Although Hilton arose in the context of the international judgment-recognition, courts have long considered it applicable to the context of interstate judgment-recognition when the Clause does not apply.229
There are a few types of judicial actions that state courts sometimes recognize out of comity. The first are anti-suit injunctions.\textsuperscript{230} In \textit{Baker}, the Court noted in dicta with approval the doctrine that states are not obligated to recognize “a state-court injunction barring a party from maintaining litigation in another State.”\textsuperscript{231} Nevertheless, state courts generally consider whether comity requires them to enforce another court’s anti-suit injunction and thus stay or dismiss proceedings covered by the injunction.\textsuperscript{232} For example, a Louisiana court held that it would recognize a Mississippi court’s anti-suit injunction regarding a claim that arose in Mississippi, since Mississippi had a greater interest in the dispute and Louisiana’s applicable law and procedure varied significantly from Mississippi’s.\textsuperscript{233} A Missouri court enforced a similar injunction issued by an Illinois court in a tort action when the plaintiff was a resident of Illinois, the claim arose in Illinois, and prosecution of the suit would require witnesses to travel from Illinois to Missouri to testify.\textsuperscript{234} However, an Indiana court held that comity principles did not require it to enforce a Tennessee court’s attempt to enjoin a husband from maintaining an Indiana divorce action when an Indiana court had obtained jurisdiction over the divorce proceeding before the Tennessee court and the record did not suggest forum shopping.\textsuperscript{235} Federal courts also consider whether comity principles dictate that they should recognize state anti-suit injunctions; however these courts generally balance federal interests against the interests of the issuing states, ignoring forum-state interests.\textsuperscript{236}

State courts also consider other state courts’ penal judgments pursuant to comity principles. In \textit{Oats v. Whittaker},\textsuperscript{237} a Massachusetts court concluded that a Texas court’s

\begin{itemize}
  \item An anti-suit injunction is an equitable decree rendered by a court barring a party from maintaining an action in another forum for the same claim or claims as are before the rendering court. \textit{See, e.g., Baker, 522 U.S. at 237 n.9.}
  \item \textit{See} 522 U.S. at 237 n.9 (citing Ruth B. Ginsburg, \textit{Judgments in Search of Full Faith and Credit: The Last in Time Rule for Conflicting Judgments}, 82 \textit{Harv. L. Rev.} 798, 823 n.99 (1969) (collecting cases)). The primary reason that anti-suit injunctions are exempt from full faith and credit is because “each state has a legitimate interest in determining for itself the fairness or unfairness of any resort to its courts.” \textit{See Abney v. Abney}, 374 N.E.2d 264, 267 (Ind. Ct. App. 1978) (collecting cases). However, state courts are not unanimous on this point. In \textit{Bard v. Charles R. Myers Ins. Agency, Inc.}, 839 S.W.2d 791 (Tex. 1992), the Supreme Court of Texas held that it owed full faith and credit to a Vermont court’s injunction prohibiting the prosecution of an action against a corporation in receivership in Vermont. \textit{Id.} at 794–95.
  \item \textit{See, e.g., Hare v. Starr Commonwealth Corp., --- N.W.2d ---, 2011 WL 17521 (Mich. Ct. App. 2011); Fuhrman v. Am. Ins., 269 N.W.2d 842, 847 (Minn. 1978); Abney, 374 N.E.2d at 267.}
  \item \textit{See Alford v. Wabash Ry. Co.}, 73 S.W.2d 277, 278 (Mo. Ct. App. 1934); \textit{see also Allen v. Chi. Great Western R. Co.}, 293 Ill. App. 38, 44 (1925).
  \item \textit{Abney}, 374 N.E.2d at 266–70.
  \item \textit{See, e.g. Blanchard v. Commonwealth Oil Co.}, 294 F.2d 834, 839 (11th Cir. 1961). In \textit{Blanchard}, the court held that the Texas district court hearing a shareholder-derivative suit under its diversity jurisdiction should give effect to a Florida court’s anti-suit injunction, when the Texas claims were based on Florida mineral rights. \textit{Id.} at 839. The court held that it would enforce the Florida action out of comity based on the national interest in federal-state relations. \textit{Id.} Ironically, the court cited \textit{Erie} in recognizing such a prevailing national policy. \textit{See id.}
\end{itemize}
default judgment awarding $10,000 in punitive damages for a violation of a Texas statute and $10,000 in exemplary damages for fraud was a penal judgment not entitled to full faith and credit. Nevertheless, the court enforced the judgment because doing so did not “contravene . . . any statute or policy of Massachusetts.” However, a California court declined to recognize a District of Columbia court’s reservation of a husband’s counterclaim for divorce when the husband subsequently filed for divorce in California. The California court concluded that the D.C. court had not ruled on the counterclaim as a means of punishing the husband for contempt—thus, the reservation was penal and did not preclude the California court from hearing the claim. Moreover, the comity principle of declining “to interfere with the D.C. court’s jurisdiction over the parties’ divorce” did not overcome California’s strong interest in resolving disputes pertaining to its citizens’ domestic relations.

Finally, various state courts have held that although tribal court judgments are not entitled to full faith and credit under section 1738, comity principles make such judgments generally enforceable. A New Mexico court so held after noting that “civil jurisdiction over non-Indians, engaged in pursuant to consensual commercial or contractual arrangements on reservation lands, presumptively lies in tribal courts . . . .” Therefore, recognition of the tribal court’s judgment was consistent with New Mexico public policy. An Oregon court enforced a tribal court judgment out of comity after concluding that the proceedings producing the judgment comported with due process. In an action involving a tribal court’s decree awarding custody to a deceased’s remains, a South Dakota court enforced the decree even though “tribal custom with respect to a dead body [was] different from South Dakota law on the subject.” In Wilson, the Ninth Circuit also applied comity principles to determine the effect of the tribal judgment at issue in the diversity case. However, it did so by

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238 Id. The court’s conclusion that such a judgment was penal was contrary to the prevailing view. See note 175, supra. The court may have been persuaded by the large punitive damage portion of the judgment and the judgment’s default nature.


241 Id.

242 Id.


244 Id.


247 127 F.3d at 809–15.
considering the *Hilton* factors in light of federal interests, without regard to any interest that Montana, the forum state, might have had in the judgment’s enforcement.\(^{248}\)

*Erie* problems result when a federal court and the courts of its forum state agree that full faith and credit is not owed to a judgment at issue, but a diversity court applies federal, instead of state comity principles. The tribal court cases offer clear examples of the varying outcomes likely to result from application of the differing laws. In the state cases described, the courts generally gave effect to the tribal judgments, without close examination of their merits. However, in *Wilson*, the Ninth Circuit very carefully analyzed the merits of the dispute and held that comity did not apply. A different outcome very easily could have resulted from a state court’s less exacting review.\(^{249}\)

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\(^{248}\) *Id.* The court independently determined whether the Montana court had subject-matter jurisdiction over the claim. *Id.* at 815. After concluding that the court did not have such jurisdiction, it declined to enforce the tribal court judgment. *Id.*

\(^{249}\) Coming from the context of the full faith and credit owed to statutes instead of judgments, the issue of interstate recognition of sovereign immunity presents a model of how diversity courts avoid comity-related *Erie* problems. In *Nevada v. Hall*, the Court held that the Clause did not require California to apply Nevada’s sovereign immunity law in a California resident’s California vehicular-injury based tort action against Nevada. 440 U.S. at 416. The Court held that “[the Constitution does] not imply that any one State’s immunity from suit is anything other than a matter of comity.” *Id.* at 425.

 Accordingly, in subsequent cases involving similar facts and parties, states have considered other states’ sovereign immunity laws pursuant to comity principles. See generally *Morrison*, 230 A.D.2d at 264–69. State courts have often applied other states’ sovereign immunity laws after finding that a defendant-state had a greater interest in the litigation than the forum state. See, e.g., *Ramsden v. Illinois*, 695 S.W.2d 457, 459 (Mo. 1985) (adopting Illinois sovereign immunity law in breach of contract action brought by Missouri resident against Illinois for alleged breach of contract to be performed in Illinois and governed under Illinois law); *Reed v. Univ. of N.D.*, 543 N.W.2d 106, 110 (Minn. Ct. App. 1996) (adopting North Dakota sovereign immunity law and dismissing the suit when the injury supporting the plaintiff-North Dakota resident’s claim occurred in North Dakota); *Jackett v. L.A. Dep’t of Water & Power*, 771 P.2d 1074, 1077 (Utah Ct. App. 1989) (adopting California sovereign immunity statute and dismissing a California resident’s suit against a California governmental entity based on injuries caused by helicopter crash that had fortuitously occurred in Utah). However, when a state court has found that its forum has a greater interest in the dispute than a defendant-state, the court has declined to dismiss the action pursuant to a defendant-state’s sovereign immunity law. See, e.g., *Hansford v. D.C.*, 617 A.2d 1057, 1068 (Md. 1993) (declining to adopt D.C.’s sovereign immunity statute to bar Maryland residents’ claim of negligent supervision when the claimed negligence resulted in a prison escapee’s murdering plaintiffs’ child in Maryland); *Faulkner v. Univ. of Tenn.*, 627 So.2d 362, 366 (Ala. 1992) (declining to adopt Tennessee’s sovereign immunity statute to bar Alabama resident’s claim against a state university after the university had threatened to revoke the plaintiff’s doctoral degree when the plaintiff had completed most of his coursework in Alabama). Unlike in the judgment context, diversity courts have generally considered whether their forum-state courts would recognize another state’s sovereign immunity—they have not conducted independent, federal interest-based comity analyses. See, e.g., *Lee v. Miller Cnty., Ark.*, 800 F.2d 1372, 1375–78 (5th Cir. 1986); *Hoffman v. Connecticut*, No. 09-CV-79-B-H, 2009 WL 3055137, at *20 (D. Me. Aug. 7, 2009); *Van Deelen v. City of Kan. City.*, Mo., No. Civ. A 05-2028, 2005 WL 3050151, at *12 (D. Kan. Nov. 14, 2005) (unpublished).

There is no clear explanation for this discrepancy. Perhaps it stems from the federal courts’ implicit recognition of their forum states’ important interests in maintaining relations with other states, and the federal courts’ reluctance to interfere in those relationships. Or perhaps the federal courts recognize that because diversity jurisdiction will almost always be available when a non-forum state’s sovereign immunity is at issue, forum shopping would always result if a federal court considered the issue differently than a forum-state court would. Nevertheless, these cases provide a model for how to avoid *Erie* problems in the context of full faith and credit or
b. Giving greater preclusive effect

Whether a court may give another court’s judgment greater effect than would the rendering court remains an open question and has been greatly debated by scholars. The issue arises when the rendering state’s courts would not consider a judgment to preclude a litigant’s contesting an issue in a subsequent suit (perhaps based on its requiring strict mutuality for collateral estoppel’s application); nonetheless, the second forum treats the previous judgment as preclusive, pursuant to its own preclusion law. On the one hand, the second forum has given the first forum’s judgment all of the effect it would have in the first forum, thus satisfying its full faith and credit obligation. Yet, most scholars argue that giving greater effect to the judgment is unconstitutional. Professor Atwood reasoned that such practice was impermissible under private international law, and the Clause should be construed to incorporate such a prohibition. Professors Casad and Clermont also concluded that the Clause prohibits this practice, reasoning that “[t]he boundaries are an intrinsic part of a judgment . . . . Consequently, the [Clause] must require giving the same effect to the judgment’s content and its boundaries as would the rendering state.” Similarly, Professor Degnan suggested that the “same effect” language in section 1738 stops a court from giving a judgment greater effect. One commentator added that denying a litigant’s right to relief by giving a judgment greater preclusive effect than it would have in the rendering court offends the Due Process Clause.

The Court has addressed this issue as to interstate res judicata, holding that a Virginia judgment that Virginia courts would not treat as preclusive evidence of a debt comity—a diversity court should give full faith and credit or comity recognition pursuant to the laws of its forum state.

The “mutuality doctrine” is “[t]he collateral-estoppel requirement that, to bar a party from relitigating an issue determined against that party in an earlier action, both parties must have been in privity with one another in the earlier proceeding.” BLACK’S LAW DICTIONARY, 4th ed., 1046. Most courts no longer require strict mutuality for a party to invoke collateral estoppel. See RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. d (1982). For a discussion of this evolving area of the law, see CASAD & CLERMONT, supra note 43, at 149–84.

Professors Casad and Clermont offered the following example:

Assume that the F-1 judgment is valid and final, that the F-1 res judicata rule in the situation under discussion would permit relitigation of the claim or issue, that the F-2 rule would not permit relitigation, and that the F-2 res judicata rule does not exceed due process or other such constitutional limitations when applied to F-2 judgments. If F-2 has a significant connection to the parties or to the events involved in the F-1 litigation, and if the relitigation is to take place in F-2’s court, F-2 is presumably free to conduct the litigation in accordance with its applicable substantive as well as procedural law.

CASAD & CLERMONT, supra note 43, at 214.


Atwood, supra note 13, at 69 n.54.


Degnan, supra note 13, at 750–55.

Currie, supra note 39, at 327.
could not be treated as such by New York or D.C. courts. The Court stated, “No greater effect can be given to any judgment of a court of one State in another State than is given to it in the State where rendered. Any other rule would contravene the policy of the provisions of the Constitution and laws of the United States . . . .” While the Court did not explicitly provide the basis or scope of its holding, many state courts have concluded that the Clause prevents them from enforcing another state court’s judgment the rendering state would not do so, or from giving greater preclusive effect to a judgment than a rendering state court would give to it.

However, some courts have held that the Clause permits a court to apply its own collateral estoppel rules to another state court’s judgment, particularly when doing so affords the judgment greater preclusive effect. In reaching this conclusion, the Supreme Court of Nevada reasoned that “the mandate of full faith and credit to judgments is limited to their effect as res judicata, and should not be extended to include questions of choice of law which may later arise.” A New York court adopted similar reasoning in Hart v. American Airlines, Inc. There, the plaintiffs, the estates of

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258 Id.
259 See, e.g., State v. Int’l Asset Recovery Corp., 866 N.Y.S.2d 823, 825–26 (N.Y. App. Div. 2008) (holding that the court could not enforce an Oregon judgment, even though the enforcement action was timely under New York’s statute of limitations, when a similar enforcement action would have been time-barred in Oregon); Rourk v. Amchem Products, Inc., 863 A.2d 926, 934–40 (Md. 2004) (holding that section 1738 prevented a Virginia class action judgment from being used for offensive, non-mutual collateral estoppel purposes when Virginia courts required strict mutuality for collateral estoppel); Gibson v. Gibson, 364 S.E.2d 518, 521 (Va. Ct. App. 1988) (holding that treating a Tennessee court’s divorce decree, when the decree was rendered based on in personam jurisdiction and the Tennessee court had held that it would exceed its jurisdiction if it considered support and property rights, as preclusive of a Virginia spousal support action would unconstitutionally give the Tennessee decree greater effect in Virginia than it would have in Tennessee); Goodson v. McDonough Power Equip., Inc., No. 80-CA-34, 1981 WL 2886, at *8 (Ohio Ct. App. Aug. 18, 1981) (unpublished) (“The constitutional concern for preservation of the integrity and finality of a sister state judgment, for preservation of judicially established rights and obligations necessitates at a minimum the importation of the F-1 law of res judicata and estoppel in so far as it is needed to protect that concern.”).
260 See, e.g., Finley v. Kesling, 433 N.E.2d 1112, 1117 (Ill. Ct. App. 1982) (“[T]hat a judgment has no constitutional claim to a greater effect in the second state than it had in the first . . . . does not mean that a state . . . cannot give greater effect to the adjudication of the issue therein than would the first state . . . . [T]he forum state may apply its own rules of collateral estoppel.”) (holding that an Indiana court’s determination of the plaintiff’s ownership of stock collaterally estopped the plaintiff from litigating the issue in a subsequent action against a different party, even though Indiana adhered to the mutuality requirement). Other states have applied their own rules of collateral estoppel to another state’s judgment, even when doing so causes them to give less preclusive effect than the rendering state would give the judgment. See, e.g., Ditto v. City of Clinton, 391 So.2d 627, 628 (Miss. 1980) (applying Mississippi rules of collateral estoppel to a Louisiana judgment and determining that because the question of fact essential to the judgment in the subsequent Mississippi case had not been “actually litigated and determined” by the Louisiana court, the plaintiff was not collaterally estopped by the Louisiana judgment).
261 Clark v. Clark, 389 P.2d 69, 71 (Nev. 1964). Therefore, the court held that in considering a Florida spousal maintenance decree’s preclusive effect, it “was not to be governed by the Florida law of res judicata or estoppel, or by the effect of those doctrines upon the husband’s ability to procure a divorce in that state, had he litigated his case there.” Id.
New York residents, brought a claim for wrongful death arising from a mid-air collision that killed most of the planes’ passengers.263 A federal court in Texas had rendered a judgment finding the defendant-airline liable for some passengers’ deaths.264 The New York plaintiffs argued that the defendant should be collaterally estopped by the Texas judgment from litigating the liability issues that were indistinguishable from those that had been before the Texas court.265 The New York court agreed, holding that it could apply New York collateral estoppel law, which permitted non-mutual, offensive use,266 instead of Texas law, which did not.267 The court held that the Clause was inapplicable because the case was not “a situation where the judgment . . . of the Texas court is sought to be enforced.”268 Instead, the court was bound by, “a policy determination by [New York] courts that [o]ne who has had his day in court should not be permitted to litigate the question anew.”269

Some federal courts have recognized a similar ability to apply federal rules of collateral estoppel to state judgments. In Williams v. Ocean Transport Lines, Inc.,270 the Third Circuit adopted, as a matter of federal common law, Pennsylvania’s collateral estoppel rules to govern the a New Jersey federal court’s judgment’s preclusive effect in a federal question case when the Pennsylvania rule permitted non-mutuality and the New Jersey rule did not.271 The court concluded that section 1738 did not prevent it from “affording to the first judgment greater precluding effect than would be afforded by the laws of the first forum.”272 The Fifth Circuit, in dicta, similarly recognized a federal court’s ability to apply its own rules of collateral estoppel to determine a state judgment’s preclusive effect.273

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263 Id. at 811.
264 Id.
265 Id. at 811–12.
266 Non-mutual, offensive collateral estoppel occurs when a plaintiff who was not a party to a former action seeks to invoke the judgment from that action to collaterally estop the defendant in the former action (also the defendant in the present action) from contesting issues decided in the former action. See CASAD & CLERMONT, supra note 43, at 175–77.
267 304 N.Y.S.2d at 811–12. The court assumed without analysis that the Texas district court would apply Texas law rather than federal common law. Id.
268 Id.
269 Id. The court considered applying Texas preclusion law, as a discretionary matter, but declined to do so because New York had a greater interest in the litigation than did Texas, the state in which the crash occurred. Id. The court considered the place of injury to have been “entirely fortuitous.” Id. (quotations omitted).
270 425 F.2d 1183 (3d Cir. 1970).
271 Id. at 1189–90.
272 Id. The case involved injuries sustained by a longshoreman in the collapse of a crane. Id. at 1185. The court reasoned that the accident had the potential to produce a multiplicity of federal admiralty suits, and that there was a significant federal interest in efficiently resolving such disputes. Id. at 1189–90. This significant interest supported adopting the non-mutuality rule. Id.
273 See Reimer v. Smith, 663 F.2d 1316, 1325–26 (5th Cir. 1981). In Reimer, the court found that there were no differences between the federal and rendering state collateral estoppel law; therefore, it did not need to accord greater effect to the judgment. Id.
There are two ways that uncertainty on this issue could produce an *Erie* problem. First, a diversity court might conclude, as the *Williams* court did, that section 1738 permits it to accord a non-forum-state judgment than would the rendering court, even though forum-state courts hold such practice unconstitutional. In that case, the federal court would treat the state judgment as preclusive and dismiss a diversity case when a forum-state court would not.

An *Erie* problem could also result if the diversity court does not look to forum-state law when giving greater effect, even if forum-state courts agree that giving greater effect is constitutional. Such a problem ensues if the federal court looks to federal, instead of forum-state, preclusion law for the judgment’s effect.

Consider a products liability action filed in the Northern District of Illinois under diversity jurisdiction. Different plaintiffs had previously brought an identical action against the same defendant in Virginia court. The Virginia court had rendered a final judgment on the merits in the plaintiffs’ favor. The plaintiff in the Illinois federal action relies on offensive, non-mutual collateral estoppel to argue that the Virginia court’s findings preclude the defendant from litigating liability issues. Allowing the plaintiff to do so would result in giving greater effect to the Virginia judgment than would a Virginia court, as Virginia courts require mutuality before applying collateral estoppel.274 While the Seventh Circuit has not considered the “greater effect” issue, assume that the Seventh Circuit holds the practice constitutional.275 Illinois state courts have reached this conclusion.276 Accordingly, the diversity court’s giving greater effect would not create an *Erie* problem in and of itself, as the federal court and a forum-state court would agree that doing so is permitted. However, an *Erie* problem would result if the federal court determined the Virginia judgment’s preclusive effect by looking to federal, instead of Illinois, preclusion law. Federal preclusion law permits offensive, non-mutual collateral estoppel.277 However, while Illinois does not adhere to the mutuality requirement for defensive collateral estoppel, the Supreme Court of Illinois has generally rejected offensive, non-mutual collateral estoppel anytime application of the doctrine would raise fairness concerns.278 Therefore, if the district court looks to federal preclusion law, it will hold that the Virginia judgment precludes the defendant from contesting liability, even though the plaintiff had not been a party to the Virginia suit. However, had the case been filed in an Illinois court, the state court would apply Illinois preclusion law and probably not permit the use of offensive, non-mutual

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275 This assumption is not unwarranted, as the court has applied federal preclusion law to determine a state-court judgment’s effect without regard to the rendering state’s preclusion law. *See Blankner v. City of Chi.*, 504 F.2d 1037, 1041–42 (7th Cir. 1974). Moreover, the court might be swayed by the Third Circuit’s analysis in *Williams*. *See* 425 F.2d 1189–90.
276 *Finley*, 433 N.E.2d at 1117.
278 *In re Owens*, 532 N.E.2d 248, 251–52 (Ill. 1988).
collateral estoppel, enabling the defendant to mount a defense. Thus, the outcome of the
dispute, arising under Illinois law, depends on its having been filed in federal court.

III. An Affront to Federalism

These differing outcomes between state and federal courts sitting in diversity not
only create *Erie* problems—they offend core notions of federalism by withdrawing from
state courts the power to adjudicate claims arising under their states’ laws. Anytime a
diversity court applies federal law, instead of state law, in a way that is dispositive of a
state-created claim, the forum state’s interests are offended somewhat. *Erie* and its
progeny sanction such offenses to a limited extent.279

However, the full faith and credit *Erie* problems offend states’ interests in a
unique and significant way. A diversity court’s barring a state-law claim based on the
preclusive effect of a non-forum-state judgment is itself entitled to full faith and
credit.280 Therefore, even if a plaintiff, after having his claim dismissed pursuant to a
diversity court’s construction of section 1738, could subsequently avoid federal
jurisdiction and file the same case in state court, the state court could not adjudicate the
merits of the claim. This is true even if the state court resoundingly disagrees with the
federal court’s full faith and credit analysis, because the state court could not deny full
faith and credit to the diversity court’s dismissal. Because the diversity judgment was
the “last in time,”281 it would preclude the state court’s consideration of the merits of the
case. Therefore, when a federal court finds the full faith and credit provisions applicable
when a forum-state court would not, it permanently prevents a state court from
enforcing, or declining to enforce the laws of its state.

This might not be unsettling if the federal court was applying settled
constitutional principles, and it was clear that the state court would not. However, this
is not necessarily the case. Full faith and credit raises intricate questions left open by the
Supreme Court. Often a state court’s answer to such a question has just as much
constitutional validity as that of a federal court. Therefore, it is possible that federal
courts are imposing unconstitutional constructions of full faith and credit to
permanently deprive state courts from properly applying the full faith and credit
provisions and then applying state law to resolve state claims. Such a result offends *Erie*
and the federalism principles upon which *Erie* rests.

PART THREE: TWO SOLUTIONS TO FULL FAITH AND CREDIT *ERIE* PROBLEMS

I. A Diversity Jurisdiction Exception to Section 1738

279 See Part Three, I., b., iii. *infra.*
281 See *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939). In *Treinies*, the Court held that the most recent
judgment rendered to decide an issue is the judgment to which a court owes full faith and credit. *Id.*
As described, in most cases it makes little difference whether a diversity court applies the full faith and credit provisions directly, or through *Erie* based on their application in state cases. Section 1738 mandates that federal courts accord the same full faith and credit to state decisions as the Clause and statute require states’ courts to give to decisions of other state courts.282 Therefore, an exception to section 1738 for diversity cases would leave diversity courts in routine cases applying full faith and credit without change.283 However, when a diversity court applies state substantive law, it must apply “not only state statutes, but also the unwritten law of a state as pronounced by its courts.”284 Therefore, application of section 1738 via state law should also require application of forum-state courts’ constructions of the federal provision.285 If a state court has decided that full faith and credit is or is not required in a particular context, the diversity court should be bound by that decision. On the one hand, this solution potentially withdraws from a federal court the power to apply a constitutional provision in the way that it considers correct. But on the other hand, it resolves the *Erie* problems described in Part Two. Before adopting this solution, one must be satisfied that this is a fair trade.

Three factors suggest that the trade is indeed fair. First, as previously stated, in the vast majority of cases, federal and state courts agree about the full faith and credit provisions’ scopes. Therefore, an exception to the statute mainly asks federal courts to apply state constructions with which the federal courts agree. The encroachment on federal judicial power is mostly one of form, not substance.

Second, it does not follow that a lower federal court will apply a constitutionally-unsound version of the full faith and credit provisions each time it applies a state court’s construction with which it disagrees. The Supreme Court has long recognized

282 See discussion in Part Two, I., supra.

283 Preclusion issues have long been considered substantive. E.g., *Richardson v. City of Boston*, 60 U.S. (19 How.) 264, 267 (1856); cf. *Klaxon*, 313 U.S. at 496. The full faith and credit provisions comprise parts of all states’ substantive preclusion law. See *Sun Oil*, 486 U.S. at 723 n.1 (noting that the Clause served its intended national unification purpose “not because the Clause itself radically changed the principles of conflicts of law but because it made conflicts principles enforceable as a matter of constitutional command”). Therefore, instead of applying section 1738 to preempt state substantive law, diversity courts would apply section 1738 because it comprises a portion of state substantive law. In the routine case where section 1738’s application is not in doubt, changing the analysis would not lead to a different result.

284 *King v. Order of United Commercial Travelers of Am.*, 333 U.S. 488, 491 (1948); see *Erie*, 304 U.S. 79–80. In applying state decisional law, diversity courts are required to apply the decisions of their forum states’ highest courts. *King*, 333 U.S. at 158. They are bound to apply decisions of their forum states’ intermediate appellate courts “unless there is persuasive evidence that the highest state court would rule otherwise.” *Id.; see, e.g, Six Cos. of Calif. v. Joint Highway Dist. No. 13 of Calif.*, 311 U.S. 180, 187 (1940); *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 188 n.7 (1941).

285 As discussed in note 395, infra, diversity courts generally consider themselves free to interpret and apply federal provisions without regard to forum-state constructions of those provisions. While the basis for this belief is unsound, as discussed, to the extent that this is a discretionary or prudential doctrine, these courts should decline to apply it when doing so would nullify a diversity jurisdiction exception to section 1738.
that state courts are obligated and competent to construe and apply federal constitutional and statutory provisions when appropriate. In most cases, lower federal courts have greater familiarity with federal provisions than do state courts; therefore their constructions of those provisions are perhaps more likely to be sound. However, section 1738 is a unique provision that provides a rule of decision in both state and federal cases. Issues of full faith and credit are as likely, if not more likely, to arise in state courts than in federal courts. Therefore, a federal court’s experience with the full faith and credit provisions makes it no more likely than a state court to soundly interpret those provisions.

Third, when the full faith and credit provisions’ applications are in doubt, a forum state’s interest in having its version of the provisions applied in a diversity case should prevail over other relevant interests. When a court grants full faith and credit to another court’s decision, it advances the interest that the rendering court has in its decision having extraterritorial effect. Accordingly, when a state court would hold the Clause inapplicable, the relevant interests to consider are those of the forum state (State 2) in having the diversity court reach the merits of claims brought under its law and those of the rendering state (State 1) in having its judgment given extraterritorial effect, thereby preempts such a merit-based adjudication. The areas where full faith and credit is unquestionably owed to a prior decision represent areas where Congress and the Court have concluded that State 1’s extraterritorial-effect interest overrides State 2’s

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286 See Martin v. Hunter’s Lessee, 14 U.S. 304, 341–42 (1816) (“It must therefore be conceded that the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals.”); see also Allen, 449 U.S. at 105 (noting the “constitutional obligation of the state courts to uphold federal law, and [the court’s] expression of confidence in their ability to do so.”); Robb v. Connolly, 111 U.S. 624, 637 (1884) (“Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, ‘anything in the constitution or laws of any state to the contrary notwithstanding.’”).

287 Cf. Stone v Powell, 428 U.S. 465, 494 n.35 (1976) (“Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems. In sum, there is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned in respect to the consideration of Fourth Amendment claims than his neighbor in the state courthouse.” (quotations and modifications omitted)).

288 See, e.g., Thomas, 448 U.S. at 272.

289 A third, federal interest in promoting national unity is also at play. See, e.g., L. M. Willis & Vincent M. Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum. L. Rev. 153, 161–62 (1949) (“Full faith and credit is a national policy, not a state policy. Its purpose is not merely to demand respect from one state for another, but rather to give use the benefits of a unified nation by altering the status of otherwise independent sovereign states.” (quotations omitted)). However, the Clause “implements this design by directing that a State . . . respect the legitimate interests of other States and avoid infringement upon their sovereignty.” Allstate Ins. Co. v. Hague, 449 U.S. 302, 322–23 (1981) (Stevens, J. concurring). Therefore, the federal interest manifests itself in the interest of the rendering state.
interest in applying its own law to a dispute. However, one can infer that State 1’s interests are significantly lower in areas where neither Congress nor the Court has made clear that the Clause applies. Of course it is axiomatic that the Court’s denial of certiorari to a particular case does not provide any indication of the Court’s opinion of the merits of the issue raised. Therefore, one cannot conclude that the Court’s failure to correct a state court’s specific full faith and credit analysis is an endorsement of the state court’s work. However, Court’s silence as to the Clause’s scope in a particular area, after more than two centuries of full faith and credit jurisprudence, surely has meaning.

By eliminating the Erie problems described while only slightly encroaching on federal judicial power, a diversity jurisdiction exception to section 1738 makes sound policy sense. However, the task remains of creating such an exception. For that, two avenues are available—one simple but unlikely, the other more complicated but far more likely.

a. Congress could amend section 1738 to make it inapplicable in diversity cases

As a creature of statute alone, federal courts’ full faith and credit obligation is subject to congressional modification. Although the Framers considered Congress’s full faith and credit power important, other than requiring lower federal courts to...

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290 For example, in a routine breach of contract action, State 1 has a greater interest in having its resolution of the dispute being given preclusive effect in State 2 than State 2 does in considering the merits of the claim. State 1’s interest comes from ensuring that a party cannot avoid an adverse judgment by bringing a new suit in a different jurisdiction. State 2’s interest in considering the merits of the claim is low when the parties first litigated the dispute in State 1.

291 The ambiguities considered in Part Two support this conclusion. For example, a state has a minimal interest in its compulsory counterclaim rules, which arise from judicial administration concerns, being given extraterritorial effect. See Van Pembrook, 380 N.W.2d at 67–68. The same is true of a state’s interest in having its statutes of limitations enforced beyond its borders. See Sun Oil, 486 at 725–26. Moreover, the Court has recognized that a second state’s strong interest in applying its own law and a rendering state’s low extraterritorial-effect interest supports the penal, title-transfer, and worker’s compensation exceptions. See Williams v. North Carolina., 317 U.S. 287, 310 (1942). Even in the context of the public policy exception this is true. A state’s strong public policy interests could support a denial of full faith and credit, even when the rendering state has an ordinary interest in its judgment or decision being given extraterritorial effect.

The same considerations are even stronger when a state would extend full faith and credit but a diversity court does not. In such cases, the forum state has already concluded that its interests in applying its own law to a dispute yield to the interests of the rendering state. A diversity court cannot have any greater interest in applying forum-state law than would a forum-state court.


293 See United States v. Thompson, 685 F.2d 993, 999 (6th Cir. 1982) (holding that the Court’s failure to grant certiorari on an issue in six cases from four different circuits was “certainly of more than passing interest.”); see also People v. Drielick, 255 N.W.2d 619, 623 (Mich. 1977); cf. Parker v. Ellis, 362 U.S. 574, 575–76 (1960).

294 See Sherrer, 334 U.S. at 352 n.18 (“We, of course, intimate no opinion as to the scope of Congressional power to legislative under Article IV, Section 1 of the Constitution.”).

295 During the Constitutional Convention’s consideration of what would become the Clause, Madison proposed that the provision include a sentence allowing the national legislature “to provide for the execution of judgments in other states under such regulations as might be expedient.” Costigan, supra note 5, at 472–74 n.3 (citing Doc. Hist. Of
extend full faith and credit to state judgments in the same way as state courts, Congress has largely ignored it. Nevertheless, Congress unquestionably could amend section 1738 to make clear that the statute shall not apply in cases where a federal court’s basis for jurisdiction comes from 28 U.S.C. § 1332, the general diversity jurisdiction statute, or 28 U.S.C. § 1441(b), the removal statute for diversity cases. While this would quickly resolve the issue, it is unlikely that Congress will be motivated to use a mostly-dormant power to resolve such a technical choice of law issue. Although the issue is important, it is unlikely to attract congressional attention.

b. The Court could recognize an implied exception to section 1738 for diversity cases

   i. The Court has the capacity to recognize an implied diversity jurisdiction exception to section 1738

In *San Remo Hotel, L.P. v. City and County of San Francisco*, the Court held that federal courts lack the power to “simply create exceptions to section 1738 wherever
courts deem them appropriate.” Instead, the implied repeal analysis set forth in Allen and Kremer is the exclusive means by which a court can recognize a non-explicit exception to section 1738. In Kremer, the Court held “that an exception to section 1738 [would] not be recognized unless a later statute contain[ed] an express or implied partial repeal.” A later statute contains an implied partial repeal of section 1738 when there is evidence of such “from the language or operation of [the] statute,” there is a “manifest incompatibility” between the statute and section 1738, or when legislative history suggests Congress’s intent to partially repeal section 1738. Since Kremer, the Court has repeatedly rejected invitations to find that a subsequently-enacted statute implicitly, partially repealed section 1738.

These cases would lead one to believe that Court is powerless to find an exception to section 1738 here. There is no subsequently enacted statute that could be said to impliedly repeal section 1738 in diversity cases. In San Remeo Hotel, the Court seemed to make clear that a federal interest alone does not support a section 1738 exception, even when the federal interest stems from a constitutional provision. It would seem, then, that the federalism interest underlying the Erie Doctrine would also be insufficient to support an exception.

Despite this, it is far from true that the Court is hamstrung from considering federalism notions when evaluating proposed section 1738 exceptions. In fact, just the opposite true—the Court’s implied repeal analysis always weighs federalism interests. However, the Court usually balances those federalism or state-court comity interests against whatever federal interests support the statute thought to create an implied exception. This is seen in the Court’s repeatedly emphasizing a proposed exception’s

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298 Id. at 344.
299 Id. at 345; see Allen, 456 U.S. at 468; Kremer, 449 U.S. at 99.
300 456 U.S. at 468.
301 Id. at 471–72. The Court then considered these factors and held that Title VII did not implicitly repeal section 1738. Id. at 471–79.
302 See San Remeo Hotel, 545 U.S. at 345; Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 380 (1996) (holding that Congress’s creation of exclusive federal jurisdiction for suits arising under the Exchange Act did not represent an implied partial repeal of section 1738 in such suits); Parsons Steel, 474 U.S. at 524 (holding that the Anti-Injunction Act (“AIA”) does not contain an implied partial repeal of section 1738 because the two provisions can be construed consistently with a narrowing application of the AIA’s relitigation exception); Migra, 465 U.S. at 82–83 (reaffirming that section 1983 did not imply repeal section 1738). See generally Epstein, 516 U.S. at 380 (“As an historical matter, we have seldom, if ever, held that a federal statute impliedly repealed section 1738.”); but see Comm’r v. Bosch’s Estate, 387 U.S. 456, 464 (1967) (holding that section 1738 did not require adoption of factual findings made by state trial court when those findings were relevant in subsequent federal tax cases, because Congress had intended the tax issues “to be strictly construed and applied” and had not explicitly stated that a federal court should adopt state court conclusions).
303 See 545 U.S. at 345.
304 The Court has admitted as much. In holding that the Eleventh Circuit had erred in finding an implied exception, the Court stated that the “Court of Appeals gave unwarrantedly short shrift to the important values of federalism and comity embodied in the Full Faith and Credit Act.” Parsons Steel, 474 U.S. at 523; see also Univ. of Tenn. v. Elliott, 470 U.S. 788, 798 (1986) (“Having federal courts give preclusive effect to the factfinding of state administrative
deleterious effect on states’ interests. For example, in Kremer, the Court noted that if section 1738 did not apply in Title VII actions “state court judgments [would be stripped] of finality” thus “lessening the incentive for full participation by the parties [in state administrative employment dispute resolution processes] and for searching review by state officials.” 305 In Allen, the Court noted that an implied exception for section 1983 actions could only be based upon “a general distrust of the capacity of the state courts to render correct decisions on constitutional issues.” 306 The Court then disclaimed any such distrust. 307 Thus, the Court’s reluctance to find implied exceptions to section 1738 does not stem from its reluctance to apply state decisional law in federal actions—it stems from its desire to apply state decisional law instead of federal law. Indeed, in federal courts, section 1738 is a vehicle for state interests.

Admittedly, the state interests behind the proposed exception are those of a forum state, whereas in the previously discussed cases, the Court considered only the interests of the state rendering a judgment. It did so because the interests of the forum state were either not relevant because the case arose under federal question jurisdiction, 308 or because the forum state and the rendering state were the same. 309 This is not to say that a forum state’s interests are not relevant. The Court has previously recognized that the constitutional requirement of full faith and credit can unnecessarily trample a state’s interest in applying its own law to govern a case in its own courts. 310 In considering whether a second state’s interests in enforcing its own laws gives rise to a full faith and credit exception, the Court has used a much less rigid analysis than the one set forth in Allen. In Milwaukee County, the Court held that exceptions to full faith and credit are “implied from the nature of our dual system of government, [and are

tribunals serves the value of federalism.”); Marrese, 470 U.S. at 1332 (“Section 1738 embodies concerns of comity and federalism that allow the States to determine, subject to the requirements of the Statute and the Due Process Clause, the preclusive effect of judgments in their own courts.”).

305 456 U.S. at 478. The Court concluded that such an effect “would reduce the incentive for States to work towards effective and meaningful antidiscrimination systems.” Id.

306 449 U.S. at 105.

307 Id.

308 See, e.g., Epstein, 516 U.S. at 369–70; Migra, 465 U.S. at 77; Kremer, 456 U.S. at 462–63; Allen, 449 U.S. at 91.

309 See, e.g., San Remo Hotel, 545 U.S. at 326; Parsons Steel, 474 U.S. at 519, 523–24.

310 See, e.g., Hague, 449 U.S. at 322–23 (“The Clause does not, however, rigidly require the forum State to apply foreign law whenever another State has a valid interest in the litigation.”); Magnolia, 320 U.S. at (“[W]e assume for present purposes that the command of the Constitution and the statute is not all-embracing, and that there may be exceptional cases in which the judgment of one state may not override the laws and policy of another . . . .”); Pink, 314 U.S. at 210 (“This Court has often recognized that, consistent with the appropriate application of the full faith and credit clause, there are limits to the extent to which the laws and policy of one state may be subordinated to those of another.”); Alaska Packers, 294 U.S. at 546 (“It has often been recognized that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce the judgment of another state, in contravention of its own statutes or policy.”).
based upon] the limits to which the policy of one state, in many respects sovereign, may
be subordinated to the policy of another.”

It is a familiar principle that a federal court sitting in diversity is “merely another
court of the state in which it sits.” Accordingly, in considering whether to recognize a
diversity jurisdiction exception to section 1738, the Court should not rely on the rigid
implied repeal framework that it uses when considering whether a subsequently
enacted federal statute trumps full faith and credit. Instead, it should apply the more
interest-balancing approach, “implied from the nature of our dual system of
government” that is applicable in deciding whether one state’s strong interest in
applying its own law to adjudicate the merits of a dispute trump another state’s
extraterritorial effect interest. As described, when application of the Clause is in doubt,
the balance of interests generally is in favor of the forum state, not the rendering state.
Accordingly, an implied exception is supported by Milwaukee County’s interest-
balancing approach. In addition, such an implied exception ensures that federally-
 imposed, substantive rules of decision do not preempt otherwise applicable state law in
federal cases. Therefore, the proposed exception has the same effect as the Court’s
refusal to find such exceptions in Allen and its progeny.

Such an exception is also in keeping with the Court’s holding in Semtek
International, Inc. v. Lockheed Martin Corp. There, the Court made clear that section
1738 does not require state courts to apply federal preclusion law when determining the
preclusive effect of a federal diversity judgment. Prior to Semtek, some states had held
that section 1738 includes an extra-textual requirement that state courts give to federal
judgments the same effect that federal judgments would receive in federal courts. The
Court rejected this notion, making clear that the text of the statute included no such
obligation. The Court held that while federal judgments’ effects in state courts are
governed by federal common law, the effect of a diversity court’s judgment should be
determined through reference to the law of the diversity court’s forum state. This is
because “state, rather than federal, substantive law is at issue [in such cases; suggesting

\[311\] 296 U.S. at 273.
\[312\] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 558 (1949) (Rutledge, J. dissenting); see Textile Workers
\[313\] 531 U.S. 497 (2001)
\[314\] Id. at 506–07.
1999) (“Federal . . . judgments are enforced in . . . states pursuant to . . . 28 U.S.C. § 1738.”); Lewin v. Four Seasons
Solar Products Corp., 694 N.Y.S.2d 749, 749 (N.Y. App. Div. 1 999) (citing section 1738 for the proposition that it
“must give full faith and credit to Federal judgments”); Matter of Humphreys, 880 S.W.2d 402, 405 (Tex. 1994)
(“Moreover, Article IV, § 1 and 28 U.S.C. § 1738 require Texas to extend ‘full faith and credit’ to the judgments of
federal trial courts in other states just as Texas must to the decisions of other state courts.”).
\[316\] 531 U.S. at 506–07 (“Neither the Full Faith and Credit Clause, nor the full faith and credit statute addresses the
question.” (citations omitted)).
\[317\] Id. at 508.
that] there is no need for a uniform federal rule.” While the Semtek Court made clear that a state court cannot apply its own preclusion law to determine a diversity judgment’s effect, it established the important principle that section 1738 does not require state courts to apply uniform federal rules of preclusion. A contrary holding “would produce the sort of forum-shopping . . . and . . . inequitable administration of the laws that Erie seeks to avoid.” Thus, the Court also made clear that applying different preclusion laws in federal diversity cases than in state cases has the potential to produce Erie problems, and courts should adopt preclusion rules that mitigate such problems. When a diversity court construes section 1738 differently than would a state court, the federal court imposes a federal preclusion rule to preempt state substantive law and creates Erie problems. Accordingly, it violates the crux of Semtek.

ii. The Court has previously held that strong state interests in adjudicating disputes can give rise to implied exceptions to a federal statute

If the Court recognized the proposed section 1738 exception, it would not be the first time that the Court had found that forum-state interests support exceptions to a federal statute. The Court has long held that states have such strong interests in and expertise with applying their own substantive law of domestic relations and probate that federal courts lack jurisdiction over cases in those areas, even when cases otherwise meet the requirements of the general diversity statute. Accordingly, the Court has recognized two implied exceptions to section 1332.

The Court has not stated the specific basis for either exception. It first recognized the domestic relations exception without citation and in dicta. Later, the Court

318 Id.
319 Id. at 507.
320 Id. at 508.
321 Id. at 508–09 (quotations omitted) (modifications in original).
323 See Ankenbrandt v. Richards, 504 U.S. 689, 693 (1992) (“[F]ederal courts have no jurisdiction over suits for divorce or the allowance of alimony.”); Markham v. Allen, 326 U.S. 490, 494 (1946) (“It is true that a federal court has no jurisdiction to probate a will or administer an estate . . . .”). Some courts have applied the exceptions in federal question cases. See e.g., Jones v. Brennan, 465 F.3d 304, 307 (7th Cir. 2006); Thomas v. N.Y.C., 814 F. Supp. 1139, 1146 (E.D.N.Y. 1993). However, most courts hold that the exceptions are applicable only in diversity cases. See, e.g., United States v. Mussari, 95 F.3d 787, 791 (9th Cir. 1996); Ingram v. Hayes, 866 F.2d 368, 370–71 (11th Cir. 1988); cf. Elk Grove Unified Schl. Dist. v. Newdow, 542 U.S. 1, 20–21 (2004) (Rehnquist, C.J. concurring) (“The domestic relations exception is not a prudential limitation on our federal jurisdiction. It is a limiting construction of the statute defining federal diversity jurisdiction . . . . This case does not involve diversity jurisdiction . . . . Therefore, the domestic relations exception to diversity jurisdiction forms no basis for denying standing to respondent.”).
324 See Barber v. Barber, 62 U.S. (21 How.) 582, 583 (1858); see also Ankenbrandt, 504 U.S. at 694 (“The statements [in Barber] disclaiming jurisdiction over divorce and alimony decree suits, though technically dicta, formed the basis for excluding ‘domestic relations’ cases from the jurisdiction over lower federal courts . . . . The Barber Court, however, cited no authority and did not discuss the foundation for its announcement.”).
suggested that the exception grew from English chancery courts’ jurisdictional limits; however, the Court then held that the exception’s continued vitality “was a matter of statutory construction.” Likewise, the Court has recognized a similar historical basis for the probate exception, but has also disclaimed any historical basis for its survival. In dicta the Court has suggested that the domestic relations exception lives because of the Court’s deference to the states’ strong interests in their citizens’ domestic affairs. Lower federal courts have followed suit, generally holding that states’ interests and expertise in these areas support the limitations on federal jurisdiction.

These exceptions support the broader principle that the states’ significant interests in ensuring that their laws are properly applied in cases involving diverse parties can lead to judicially-crafted exceptions to the diversity statute. In the cases

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325 Ankenbrandt, 504 U.S. at 698–00. In Ankenbrandt, the Court noted that the exception appeared to grow out of Congress’s having granted to lower federal courts jurisdiction over “all suits of a civil nature at common law or in equity . . .” when defining the original scope of diversity jurisdiction. Id. at 698; see Judiciary Act of 1789, § 11, 1 Stat. 73, 78. The Court noted that the dissenters in Barber had argued that the exception grew from the fact that Congress had intended to replicate the jurisdictional scope of the English courts of chancery in the Judiciary Act, and those courts did not have jurisdiction over divorce or alimony proceedings. Id. at 699; see Barber, 62 U.S. (21 How.) at 603 (Daniel, J. dissenting).

326 Ankenbrandt, 504 U.S. at 700.

327 See Markham, 326 U.S. at 494 (holding that the probate exception came into being because “the equity jurisdiction conferred by the Judiciary Act of 1789, which is that of the English Court of Chancery in 1789, did not extend to probate matters” (citations omitted)).

328 See Marshall v. Marshall, 547 U.S. 293, 308 (2006) (“As in Ankenbrandt, so in this case, [w]e have no occasion . . . to join the historical debate over the scope of English chancery jurisdiction in 1789 . . . .” (citations and quotations omitted) (first and second modifications in original)).

329 Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (“Insofar as marriage is within temporal control, the States lay on the guiding hand. The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. Federal courts repeatedly have declined to assert jurisdiction over divorces that presented no federal question.” (citations and quotations omitted)). The Court has also suggested that congressional acquiescence supports the exceptions’ continued recognition. See Marshall, 547 U.S. at 307–08; Ankenbrandt, 504 U.S. at 699.

330 In Vaughan v. Smithson, 883 F.2d 63 (10th Cir. 1989), the Tenth Circuit laid out the policy rationales for the domestic relations exception, holding, Courts have reasoned that: (1) the states have a strong interest in domestic relations matters and have developed an expertise in settling family disputes; (2) such disputes often require ongoing supervision, a task for which the federal courts are not suited; (3) federal adjudication of such disputes increases the chances of incompatible or duplicative federal and state court decrees; and (4) such cases serve no particular federal interest, while they crowd the federal court docket. Id. at 64; see also Golden ex rel. Golden v. Golden, 382 F.3d 348, 359 (3d Cir. 2004) (“The probate exception protects the state’s interest in managing all challenges addressing an estate res located in that state or which the state has some meaningful connection.” (emphasis removed)); Dunn v. Cometa, 238 F.3d 38, 41 (1st Cir. 2001) (“The aim of the [domestic relations] exception is to keep federal courts from meddling in a realm that is peculiarly delicate, that is governed by state law and institutions . . . , and in which inter-court conflicts in policy or decrees should be kept to an absolute minimum.”); Csibi v. Fastos, 670 F.2d 134, 136–37 (9th Cir. 1982) (“The domestic relations exception has persisted, however, because the courts have found it to be supported by sound policy. States have an interest in family relations superior to that of the federal government, and state courts have more expertise in the field of domestic relations.”); Wilkins v. Rogers, 581 F.2d 399, 403 (4th Cir. 1978) (“It has long been held that the whole subject of domestic relations belongs to the laws of the state and not to the laws of the United States.”).
where the roles of the full faith and credit provisions are in doubt, the states have strong
interests in applying their own versions of the Clause to avoid unnecessarily
supplanting their substantive laws. While these interests do not support a complete
exception to the diversity statute, they do support the less extreme remedy of
recognizing the proposed exception. Because the Court recognizes an exception to a
very general statute like section 1332 based upon strong state interests, so too should it
recognize an exception to a more specific statute like section 1738 based upon similar,
albeit narrower interests.\footnote{The Court’s practice of strictly construing the diversity and removal statutes so as not to upset the states’ more
general interest in adjudicating state-law cases in state courts further supports this argument. See *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107–08; see also *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 357 (1999) (Rehnquist, J. dissenting); *Gober v. Allstate Ins. Co.*, 855 F. Supp. 158, 159 (S.D. Miss. 1994) ("[The removal statute] must be construed narrowly in order to limit federal jurisdiction and avoid undue encroachment on a state’s right to adjudicate a case filed in one of its courts.” (emphasis in original)). For a

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\footnote{\textsuperscript{331}}

iii. The Court has previously construed federal statutes narrowly in diversity
cases to avoid displacing state substantive law

An implied exception to section 1738 for diversity cases would be consistent with
the Court’s practice of narrowly construing federal statutes in cases where broadly
reading a federal statute would displace a state’s substantive law and the state has a
prevailing interest in the diversity court’s applying its law. In *Hanna*, the Court
articulated the general rule that when federal and state provisions conflict in diversity
cases, a federal court should apply the federal provision so long as Congress had the
power to enact it.\footnote{380 U.S. at 471–72 ("We are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision or federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law."). Although in *Hanna*, the Court was asked to determine a Federal Rule of Civil Procedure’s application in a diversity matter, it has since made clear that the *Hanna* analysis applies to federal statutes as well. See, e.g., *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 26–27 (1988) ("If the district court determines that a federal statute covers the point in dispute, it proceeds to inquire whether the statute represents a valid exercise of Congress’ [sic] authority under the Constitution.").} The Court suggested that this rule only applied when there was a
"direct collision" between the two rules.\footnote{See 380 U.S. at 472.} However, it has since held that a federal statute displaces state law in a diversity case when “the federal statute [is] sufficiently broad to cover the point in dispute.”\footnote{Stewart, 487 U.S. at 27 n.4.} Nevertheless, in determining whether a federal statute or rule is so broad, the Court has occasionally given the federal provision an
exceedingly narrow construction in order to avoid displacing state law, apparently
because the forum-state interest in a dispute’s being decided by state law exceeded the
federal interest in applying the federal provision.
The leading case where the Court used this approach is *Bernhardt v. Polygraphic Co. of America, Inc.* There, the Court held that a diversity court should have applied a state law that made mandatory arbitration clauses revocable. To reach this conclusion, the Court first held that the conflicting provisions of the Federal Arbitration Act (“FAA”) did not govern the case. At issue was an employment contract between a Vermont resident and a New York corporation for services to be performed in Vermont. Section two of the FAA stated that arbitration clauses in contracts involving maritime transactions or in contracts “evidencing a transaction involving commerce” were “valid, irrevocable, and enforceable.” Section three required federal courts to stay actions brought on “any issue referable to arbitration under an agreement in writing for such arbitration.” The Second Circuit had concluded that the employment contract “involved commerce” and therefore had stayed the employee’s breach of contract suit pending FAA-mandated arbitration. The Court disagreed. It first held that there “was no showing that [the employee] while performing his duties under the employment contract was working ‘in’ commerce, was producing goods for commerce, or was engaging in activity that effected commerce.” Thus, section two did not apply. The Court then considered whether it should read section three independently of section two to provide a general basis for arbitration agreements’ enforcement. The Court concluded that it should not, holding that Congress had intended to limit the section three term “agreement” to those agreements made enforceable by section two. The Court suggested that to conclude otherwise could raise “a constitutional question” because “Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity . . . cases.”

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335 350 U.S. 198 (1956). Although *Bernhardt* pre-dates *Hanna, Hanna* did not overrule *Bernhardt*. In fact, the *Hanna* Court cited *Bernhardt* for the limitation of a diversity court’s power to apply rules of decision that lack constitutional foundation. See 380 U.S. at 471 n.15. Moreover, the Court has cited *Bernhardt* post-*Hanna* for the general requirement that federal courts apply state substantive law when federal law is not on point. See *Bosch’s Estate*, 387 U.S. at 465 (1967).
336 350 U.S. at 200, 202–03.
337 Id.
338 Id. at 199.
339 See id. at 200 n.1 (quotations omitted); see also 9 U.S.C. § 2 (1952).
340 350 U.S. at 200 n.2 (quotations omitted); see also 9 U.S.C. § 3 (1952).
341 See 218 F.2d 948 (2d Cir. 1955).
342 350 U.S. at 201–02.
343 Id. at 201.
344 Id.
345 Id.
346 Id. (“To be sure, section 3 does not repeat the words ‘maritime transaction,’ or ‘transaction involving commerce,’ used in sections 1 and 2. But sections 1 and 2 define the field in which Congress was legislating. Since section 3 is part of the regulatory scheme, we can only assume that the ‘agreement in writing’ for arbitration referred to in section 3 is the kind of agreement which sections 1 and 2 have brought under federal regulation.”).
347 Id. at 202.
These constitutional concerns caused Justice Frankfurter to articulate an even more restrictive view of the federal statute. He suggested that because the FAA might unconstitutionally preempt application of state substantive law, and because Congress had not made the statute specifically applicable in diversity cases, the Court should construe a diversity jurisdiction exception to it.

Eleven years later, the Court put to rest the constitutional concerns expressed in Bernhardt. Therefore, in Bernhardt, the Court narrowly construed two sections of a federal statute and pontificated about a constitutional question that it later held to be non-existent, all to avoid application of a seemingly applicable federal statute. The Court hinted at its reasons for going to such lengths to apply the state statute, noting that diversity courts enforce state-created rights and that “[t]he nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action.” The Court’s statements suggest that it was particularly concerned with the federalism implications of denying to a plaintiff bringing a state-law claim a day in court when the state creating the claim had specifically stated that he should not be so denied. The similarities between that concern and a diversity court’s full faith and credit-based dismissal, when that dismissal is directly contrary to forum-state law, are obvious and striking.

Similarly, the Court generally determines the scopes of federal procedural rules by looking to the broad scope of the Rules Enabling Act, under which they are promulgated. However, it has done differently in a few diversity cases to avoid displacing substantive state law with a federal procedural rule. First, in Ragan v. Merchants Transfer & Warehouse Co., the Court held that Rule 3 of the Federal Rules of Civil Procedure which states that “[a] civil action is commenced by filing a complaint .” did not cause the tolling of a statute of limitations when an applicable state provision stated that tolling did not occur until service. The Court reasoned that Erie precluded it from giving the state-law claim “longer life in the federal court than it

348 350 U.S. at 208 (Frankfurter, J. concurring) (“In view of [Erie], it would raise a serious question of constitutional law whether Congress could subject to arbitration litigation in the federal courts which is there solely because it is ‘between Citizens of different States’, in disregard of the law of the State in which a federal court is sitting.” (citations omitted)).
349 Id.
351 Id. at 202.
352 See, e.g., Shady Grove Orthopedic Asso’cs, P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (“Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters ‘rationally capable of classification’ as procedure.”); Semtek, 531 U.S. at 497; see also 28 U.S.C. § 2027(b) (providing that federal procedural rules “shall not abridge, enlarge, or modify any substantive right”).
353 337 U.S. at 533–34.
would have had in the state court . . . .” The Court reaffirmed Ragan in Walker v. Armco Steel Corp. There, the Court reiterated Rule 3’s narrow nature, noting that the federal rule did not, on its face, “affect state statutes of limitations,” whereas the state tolling rule at issue was “a statement of a substantive decision by” the state. As in Ragan, the Court feared allowing a state-law action to go forward in federal court when the state creating the claim would dismiss the action.

Admittedly, the Court has only employed this approach in a few instances. In other diversity cases, it has shown few qualms about applying Hanna to displace a state law with federal law. However, these cases do not suggest that the Court has abandoned the narrow construction approach of Bernhardt, Ragan, and Walker. In other cases, the Court might have declined to narrowly construe a provision because it deemed insignificant the state’s interest in the application of its own law instead of the

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354 Id. at 533. The Court also rejected the argument that the state rule was not “an integral part of the state statute of limitations . . . .” Id.
356 Id. The Court expounded on the substantive nature of statutes of limitations and accompanying tolling rules:

The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim. A requirement of actual service promotes both of those functions of the statute . . . Rule 3 does not displace such policy determinations found in state law.

Id. 357 See id.
358 For example, in Shady Grove Orthopedic Associates v. Allstate Insurance, the Court held that the class action requirements of Rule 23 of the Federal Rules of Civil Procedure conflicted with a New York statute that limited plaintiffs’ rights to bring a class action under a statute “creating or imposing a penalty.” See 130 S. Ct. at 1438–42; see also Fed. R. Civ. P. 23(a); N.Y. C.P.L.R. 901(b). Thus, the Court applied the federal rule, rejecting the defendant’s argument that a diversity court must first consider whether a state claim is subject to class treatment under state law before applying Rule 23. Id. at 1438. The Court disregarded state policies animating the state rule, holding that it was powerless to apply a state rule that clearly conflicted with an applicable federal procedural rule. Id. at 1440 (“The dissent’s concern for state prerogatives is frustrated rather than furthered by revising state laws when a potential conflict with a Federal Rule arises; the state-friendly approach would be to accept the law as written and test the validity of the Federal Rule.”); see also id. at 1442 n.8 (“But here . . . a collision is ‘unavoidable.’”).

Similarly, the Court has held that a Federal Rule of Appellate Procedure granting courts of appeals discretionary power to award a party “just damages” for an opposing party’s bringing a frivolous appeal preempted a state statute that imposed a mandatory appellate affirmance penalty. Burlington Northern R.R. Co. v. Woods, 480 U.S. 1, 5–7 (“Thus, the Rule’s discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama’s affirmance penalty statute. Moreover, the purposes underlying the Rule are sufficiently coextensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies the statute’s field of operation so as to preclude its application in federal diversity actions.”). In Stewart Organization, Inc. v. Ricoh Corp., the Court held that the federal statute governing venue transfer applied in a diversity action making a forum selection clause enforceable without regard to a state policy that looked “unfavorably” on such contractual provisions. See 487 U.S. at 28–31 (“[Application of the state policy] would impoverish the flexible and multifaceted analysis that Congress intended to govern motions to transfer within the federal system. The forum-selection clause, which represents the parties’ agreement as to the most proper forum, should receive neither dispositive consideration (as respondent might have it) nor no consideration (as Alabama law might have it), but rather the consideration for which Congress provided in [the transfer statute].”).

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federal law. In contrast, had the Court applied the federal provisions in Bernhardt, Ragan, or Walker, it would have displaced specifically-articulated state policies and allowed diversity cases to go forward or not go forward in direct contravention of the forum-states’ wishes.

An exception to section 1738 in diversity cases would be in keeping with the Bernhardt approach. Because diversity courts would still apply the full faith and credit provisions through Erie’s lens, the exception would only have an effect when a state’s interest in resolving a dispute exceeds the federal interests undergirding the Clause. Accordingly, the exception would be a narrow construction of section 1738 that avoids upsetting substantive state law that a state has a strong interest in applying. Of course, Bernhardt, Walker and, Ragan involved only narrow statutory constructions rather than implied exceptions. However, Justice Frankfurter’s concurrence in Bernhardt makes clear that the same analysis can support an implied statutory exception when the state interest in avoiding application of the federal statute will be the same in every diversity case. Alternatively, because section 1738 is not facially applicable to diversity cases, one could consider the proposed exception a mere narrow reading of the statute.

iv. An implied exception to section 1738 would be consistent with Gasperini’s accommodation principle

Narrowly construing federal statutes in diversity cases is not the only tool that the Court has used to preserve a state laws’ effects in diversity cases. In Gasperini v. Center for Humanities, Inc., the Court suggested that when a substantive state statute conflicts with a federal policy in a diversity case, the federal court should try to craft a rule that accommodates both state and federal interests. In Gasperini, the Court considered whether the Second Circuit had correctly applied a New York statute

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359 See Shady Grove, 487 U.S. at 1440 (declining to consider the state interests supporting the state provision when the clear text of the statute conflicted with the federal provision); Stewart, 487 U.S. at 30 n.9 (noting that the “putative” state policy appeared to exist “only to protect the jurisdiction of the state courts of Alabama.”); Woods, 480 U.S. at 4 (“The purpose of the [state provision is] to penalize frivolous appeals and appeals interposed for delay.”).

360 See Shady Grove, 130 S. Ct. at 1461 (Ginsburg, J. dissenting) (“In our prior decisions on point . . . we have avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest.”) (collecting cases); see generally Richard D. Freer, Erie’s Mid-Life Crisis, 63 Tul. L. Rev. 1087, 1120 (1998) (“Lurking in the background of every Hanna prong case is the knowledge that applying a federal statute displaces state law altogether in federal courts. Hanna is hard-hearted and heavy-handed . . . . its effect is so stark, and its possible intrusion into legitimate matters of state regulation [is] clear.”). Freer suggested that federal statutes that displace state law in diversity actions should be read pursuant to the cannon that “preemptive statutes should be read narrowly.” Id.

361 See 350 U.S. at 207–08 (Frankfurter, J. concurring) (“Since the United States Arbitration Act of 1925 does not obviously apply to diversity cases, in the light of its terms and the relevant interpretive materials, avoidance of the constitutional question is for me sufficiently compelling to lead to a construction of the Act as not applicable to diversity cases.”).

362 See id.

permitting appellate courts to overturn jury awards that “deviate[d] materially from what would be reasonable compensation.” The Court noted that prior to the enactment of the statute New York courts had followed the federal rule of not disturbing a jury award unless “the amount was so exorbitant that it ‘shocked the conscious of the court.’” The state standard clearly mandated “closer surveillance” of jury awards. Applying the Guaranty Trust framework, the Court held that application of the New York rule could be outcome determinative, and if the Second Circuit applied the federal “shocks the conscious” test in diversity cases instead of the state “materially deviates” standard, variant outcomes between state and federal courts would ensue. However, the Court also held that the state statute conflicted with an essential attribute of the federal system, stemming from the Seventh Amendment—the limited authority of an appellate court to set aside a trial court’s denial of a motion to vacate a jury award as excessive. The Court could have finished its work there and held that the federal constitutional interest displaced the state statute. However, it went on and held that the state’s “dominant interest [could] be respected, without disrupting the federal system . . .” by having federal trial judges apply the state standard when considering motions

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364 Id. at 418; see N.Y.C.P.L.R. 5501(c); see also 66 F.3d 427, 430 (2d Cir. 1995).
365 518 U.S. at 422.
366 Id. at 424.
367 Id. at 429–31. The Court made clear that “Erie precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.”
368 Id. at 434–36. The Court noted that the Seventh Amendment prohibited the reexamination of jury verdicts. Id. at 432; see U.S. Const. Amd. VII. While it was well-settled that trial courts could set aside jury verdicts for a variety of reasons, including excessive size, the power of appellate courts to do so was more uncertain. 518 U.S. at 433–34. Thus, the Seventh Amendment permitted appellate review of such verdicts, but only under an abuse of discretion standard. Id. at 435.
369 Id. at 437. In suggesting that the Court should craft a rule that accommodated the state and federal interests, the Court cited Byrd v. Blue Ridge Rural Electrical Co-Op., Inc., 356 U.S. 525 (1958). 518 U.S. at 431–33. In Byrd, the Court considered whether in a diversity action, a federal court should apply a state rule that required a court to determine whether a plaintiff bringing a negligence claim was a “statutory employee” and thus subjected to mandatory worker’s compensation. 356 U.S. at 533–34. The state rule conflicted with the Seventh Amendment-based practice of relying on juries to resolve contested factual issues. Id. The Court determined which rule to apply by weighing the relevant state and federal interests. Id. The Court held that the state interest in allowing the court to make threshold factual determinations “was merely a form and mode of enforcing the immunity.” Id. at 536. The rule was not an “integral part” of the state worker’s compensation scheme. Id. However, the distribution of functions between judge and jury is an “essential characteristic” of the federal system. Id. at 537. The Court concluded that although Guaranty Trust suggested that diversity courts should seek to produce analogous outcomes with state courts, they must not do so in such a manner that “disrupt[ed] or alter[ed] the essential character or function of a federal court.” Id. at 539. Thus, on remand, the district court was to submit the statutory employee issue to the jury, despite the conflicting state rule. Id. at 539–40.

Although Byrd resulted in the application of federal law at the expense of state law, the Gasperini Court relied on it for the proposition that such displacement should only occur after taking account of the relevant state and federal interests. 518 U.S. at 435–37. The Gasperini Court opined that if an accommodation avenue had been available, the Byrd Court would have taken it. Id. at 436 (“In Byrd, the Court faced a one-or-the-other choice: trial by judge as in state court, or trial by jury according to the federal practice.”).
to set aside jury verdicts.\footnote{Id. at 437–39.} This compromise gave effect to the New York interest while liberating the Second Circuit to apply the federal standard.

Commentators have noted that\textit{Gasperini} added an additional step to the \textit{Hanna} analysis—one that requires a diversity court to consider whether the state and federal interests underlying conflicting, equally applicable rules can both be given effect.\footnote{See, e.g., C. Douglas Floyd, \textit{Erie Awry: A Comment on Gasperini v. Center for Humanities, Inc.}, 1997 B.Y.U. L. REV. 267, 302–03 (1997) (arguing that the Court’s purported accommodation of New York’s interests could result in the erosion of the \textit{Byrd} doctrine, which required strict balancing); Richard D. Freer, \textit{Some Thoughts on the State of Erie After Gasperini}, 76 TEX. L. REV. 1637, 1643 (“But if the Court means what it says, it may have replaced the search for ‘plain meaning’ with a heightened sensitivity to potential impact on state policy.”); Armando Gustavo Hernandez, \textit{The Head-On Collision of Gasperini and the Derailment of Erie: Exposing the Futility of the Accommodation Doctrine}, 44 Creighton L. Rev. 191, 196 (2010) (arguing that “accommodation, post-\textit{Gasperini}, is now an integral factor to examine when determining which body of law applies in a diversity suit . . . .”); Thomas D. Rowe, Jr., \textit{Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in its Erie-Hanna Jurisprudence?}, 73 NOTRE DAME L. REV. 963, 1003–14 (1998).} Admittedly, relatively few cases lend themselves to this sort of accommodation.\footnote{See Hernandez, supra note 371, at 195–96.} One scholar suggested that\textit{Gasperini} is most likely to be applied in cases involving conflicts between state law and “judge-made federal procedural law.”\footnote{Rowe, supra note 371, at 992.} Nevertheless, lower courts have crafted\textit{Gasperini} accommodations in cases presenting facts different from\textit{Gasperini}’s.\footnote{See, e.g., \textit{Houben v. Telular Corp.}, 309 F.3d 1028, 1038 (7th Cir. 2002) (accommodating a state rule imposing a penalty for an employer’s failure to promptly pay a judgment in an employee wage case award and the federal practice of giving a federal judge discretion to render such penalties by applying the state rule only after the maximum period after which a federal judgment could become final and leaving it to the federal court’s discretion to make its judgment final earlier, thus triggering earlier application of the state penalty provision).}

The \textit{Erie}-full faith and credit issue is ripe for\textit{Gasperini} accommodation. First, the full faith and credit provisions do not establish what types of judgments are and are not entitled to full faith and credit. As discussed in detail infra, the Court has typically looked to the common law that pre-dated the Constitution to determine the provisions’ scopes. Therefore, a court’s conclusion that a specific judgment is or is not entitled to full faith and credit does not come directly from the provisions themselves, but instead from judge-made rules of decision that the full faith and credit provisions give rise to. The relationship between a court’s determination about the full faith and credit owed to a specific judgment and the full faith and credit provisions’ texts is akin to the relationship between the federal standard of review for excessive jury verdicts and the Seventh Amendment. In both instances, the federal rule is constitutionally-based, but judicially-crafted.

The proposed exception thus accommodates the federal interest behind the judge-made full faith and credit rules and the states’ interests in applying their own laws in areas where full faith and credit is not necessarily applicable. While this
accommodation would lead to exclusive application of state law in the areas where federal and state courts disagree, these areas are small and do not raise significant federal interests, as indicated by the Court’s ignoring the discrepancies. Where the federal interest is significant, application of full faith and credit through the lens of state law will be sufficient to give effect to the federal interest.

II. The Lingering Constitutional Solution

Although a diversity jurisdiction exception to section 1738 would resolve the full faith and credit Erie problems, a solution also lies in the Constitution. This is because when a diversity court ignores a state court’s construction of the Clause, it violates Erie and Erie’s constitutional basis in a certain and specific way.

a. Erie’s constitutional basis

In Erie, Justice Brandeis made clear that the Court’s analysis did not rest on the Rules of Decision Act alone. Instead, Swift’s unconstitutional nature compelled the

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375 See Houben, 309 F.3d 1038–39 (conceding that the court’s Gasperini-based accommodation was imperfect because it “depriv[ed] federal judges of discretion that ha[d] been conferred on them by valid federal rules.”).

376 This conclusion is true as it pertains to both federal and state judgments. An exception to section 1738 will only resolve the Erie problems if the Court recognizes an accompanying exception to a diversity court’s common law obligation to give effect to the judgments of other federal courts. However, state courts are also obligated to extend full faith and credit to federal judgments. Semtek, 531 U.S. at 506–07; Dupasseur, 88 U.S. at 135; see generally Stephen B. Burbank, Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach, 71 CORNELL L. REV. 733, 740–47 (1986) (noting the uncertainty regarding the source of a state court’s full faith and credit obligation). Thus, when applying its forum state’s full faith and credit law through Erie, a diversity court will still be required to extend full faith and credit to earlier federal judgments. Of course, such a practice could lead to a federal court being hamstrung and unable to extend full faith and credit to a previous federal judgment when it otherwise would do so, due to a state court’s narrow interpretation the full faith and credit it owes to such judgments. Such a result might seem too great an imposition on the independent power of the federal judiciary. However, it is important to note that a federal court would only be so limited when sitting in diversity. In such cases, the court “act[s] merely as another court of the State in which it sits.” See Lincoln Mills, 353 U.S. at 469 (Frankfurter, J. dissenting). Therefore, the extent to which such a result would burden federal power, despite initial appearances, would be no greater than the existing failure of a state court to extend full faith and credit to a federal judgment. In either case, any error is rectifiable by the Supreme Court on certiorari.

377 The following only considers the unconstitutionality of a diversity court’s failure to comply with state constructions of the constitutional provision. However, section 1738 imposes a second, coextensive requirement that state courts afford full faith and credit to other states’ judgments. See 28 U.S.C. § 1738. If a diversity court’s ignoring state constructions of the Clause is unconstitutional, then it necessarily follows that it is unconstitutional for a diversity court to ignore state constructions of the statute, as the two provisions are duplicative and the former, being a constitutional provision, entails greater federal interests.

378 304 U.S. at 77–78 (“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.”). In a seminal article, Judge Henry Friendly argued that a decision resting entirely on the Rules of Decision Act would have flagrantly ignored the principle of congressional acquiescence. Henry J. Friendly, In Praise of Erie—And of the New Federal Common Law, 39 N.Y.U. L. REV. 383, 390 (1964). Judge Friendly argued that, in light of Swift’s notoriety, “[f]or the Court to have abrogated a construction so long accepted by Congress, on the basis of an ‘archeological discovery’ . . . would have been a naked exercise of power.” Id. at 390–91.
Nevertheless, the Court’s opinion does not specify just how Swift violated the Constitution, nor what portion of the Constitution the Erie rule rests upon. Justice Brandeis only stated that “no clause in the Constitution purports to confer [common law-making] power on the federal courts” and that by applying such common law federal courts “invaded rights . . . reserved by the Constitution to the several states.” Scholars have long speculated as to his motives for intentionally relying on the Constitution when the case seemingly could have been resolved on statutory grounds. Justice Reed filed a concurring opinion in Erie to this effect, arguing that if Justice Brandeis meant to say “that the Congress is without power to declare what rules of substantive law shall govern the federal courts, that conclusion . . . seems questionable.” Despite the ambiguity and some commentators’ suggestions that the ambiguity arose from dicta, Erie implicated the Constitution—therefore, a court’s failure to apply state law “[e]xcept in matters governed by the Federal Constitution or by acts of Congress” is unconstitutional.

379 304 U.S. at 77–78.
380 See id. at 78–80; see also Wright, Miller, & Cooper, supra note 43, at § 4505, 51 (“Perhaps no aspect of the Erie decision has perplexed the commentators as much as [the constitutional basis].”)
381 Erie, 304 U.S. at 78, 80.
382 Professor Edward Purcell suggested that Justice Brandeis had a principled reason for offering a constitutional basis; Professor Purcell argued that Justice Brandeis believed that only a constitutional decision would put to rest the “fertile, amorphous, and dangerous assumption about the reach of federal judicial power” that Swift reflected. Edward A. Purcell, Jr., Justice Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth Century America 190 (2001). Wright, Miller, and Cooper agreed with this statement, writing that the justice’s reliance on the constitution “foreclose[ed] the risk of congressional reversal.” See Wright, Miller, & Cooper, supra note 43, at § 4505, 52.
383 See 304 U.S. at 91 (Reed, J. concurring in part). Justice Reed suggested that Article III and the Necessary and Proper Clause, Art. I, § 8, “may fully authorize legislation” declaring the substantive rules that a federal court should apply, even in a diversity case. Id. Although Justice Stone fully joined Justice Brandeis’s opinion, three years later, he referred to Erie’s constitutional references as “unfortunate dicta.” See Wright, Miller & Cooper, supra note 43, at § 4505, 52 & n.7.
385 See 304 U.S. at 78; see also Wright, Miller, & Cooper, supra note 43, at § 4504, 59 (“In the end, given the Supreme Court’s role as the final authority on constitutional matters, Erie must be accepted as a constitutional decision.”). In subsequent cases, the Court reiterated Erie’s constitutional basis. See Prima Paint, 388 U.S. at 404–05 (holding that application of the FAA in the diversity case comported with Erie and therefore did not violate the Constitution); Hanna, 380 U.S. at 471–72 (“We are reminded by the Erie opinion that neither Congress nor the federal courts can . . . fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.”); Bernhardt, 350 U.S. at 202 (noting that the FAA’s application in a diversity case might violate the Constitution). Despite these cases, Wright, Miller, and Cooper noted that it is puzzling that Justice Frankfurter ignored Erie’s constitutional basis in Guaranty Trust. See Wright, Miller & Cooper, supra note 43, at § 4505, 54–55. Professor Purcell argued that Justice Frankfurter, the author of the Guaranty Trust opinion, did not endorse Justice Brandeis’s view of Erie’s constitutional nature, because he did not believe in a substantive Tenth Amendment. Purcell, supra note 382, at 203.
Many scholars agree that *Erie’s* constitutional basis was structural, and that *Swift* was unconstitutional because it violated the federalism principles inherent in the United States’ system of dual sovereignties. Some have tied this structural principle to the Tenth Amendment and cited that provision as a possible basis for the decision. Judge Friendly characterized *Erie’s* constitutional basis as being “of stark simplicity” and argued that *Erie* merely stands for the proposition that federal courts may not decide cases based on rules that the federal government does not have the power to enact. In Judge Friendly’s view, *Swift* violated the Constitution because it caused the federal government to tread in areas reserved to the states. In a seminal work, Professor John Hart Ely suggested that *Erie* rested on different federalism principles; he wrote that

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386 E.g., Allen E. Smith, *Blue Ridge and Beyond: A Byrd’s Eye view of Federalism in Diversity Litigation*, 36 Tul. L. REV. 443, 466 (1962) (“Whatever else it may do, *Erie* at least teaches that in a constitutional federalism the federal judiciary must have respect for the policies of the states. Since the scheme of federalism is implicit in our constitutional framework, the *Erie* decision must have been constitutionally compelled at least to the extent that the policy of federalism demanded it.”); see also Friendly, *supra* note 378, at 396–98; Henry M. Hart, *The Relations Between State and Federal Law*, 54 Col. L. REV. 489, 509–10 (1954); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 239 n.121 (1948); Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1656–60 (2008). Professor Purcell cautioned that Brandeis was not deciding or implying anything in *Erie* concerning the ultimate scope of congressional power . . . . He was only affirming two points. One was that *Swift* permitted the federal courts to act beyond the constitutional reach of the federal judicial power because it allowed them to make rules presumptively beyond the scope of congressional authority. The other point was that the federal courts should not, without compelling reason, displace state rules with those of their own making because Congress had not passed legislation to cover the facts of *Erie*.

Purcell, *supra* note 382, at 177.

In *Erie*, Justice Brandeis wrote that the *Swift*-induced inequitable outcomes between state and diversity courts “rendered impossible equal protection of the law.” 304 U.S. at 74–75. However, scholars generally agree that this language does not suggest that *Erie* rested on the Equal Protection Clause, as that provision had not and has not been given a construction broad enough to support the weight of the *Erie* holding. See, e.g., Craig Green, *Repressing Erie’s Myth*, 96 CALIF. L. REV. 595, 603–04 (2008) (citing authorities).

387 E.g., Friendly, *supra* note 378, at 395 (“Yet it would be even more unreasonable to suppose that the federal courts have a law-making power which the federal legislature does not. Power to deal with the hypothesized subject and others like it is thus reserved by the Tenth Amendment ‘to the States respectively, or to the people.’”); see U.S. CONST. 10th Amd. Professor Purcell argued that while Justice Brandeis’s analysis found support in the Tenth Amendment, the justice intentionally eschewed strict reliance on the provision. See Purcell, *supra* note 382, at 178. According to Professor Purcell, Justice Brandeis was a strong proponent of Congress’s playing an expansive role in the 1930s societal changes, and he feared drafting an opinion that would cause courts to treat the Tenth Amendment as imposing “an independent limit on federal legislative power, precisely the type of constitutional constraint that opponents of the New Deal favored as a method of restricting Progressive legislation.” Id. Therefore, Justice Brandeis merely “hint[ed] at the Tenth Amendment” and “made the provision applicable only derivatively.” Id. at 180.

388 Friendly, *supra* note 378, at 394–95. Professor Green, critical of Judge Friendly’s view, argued that Congress’s prescribing rules of decision for cases that the Constitution specifically assigns to federal courts hardly seems to “violate some constitutional prerogative of the states[.]” Green, *supra* note 386, at 609. Professor Green wrote, “As a matter of constitutional structure and pre-*Erie* history, diversity cases are within the federal government's domain. And if Congress had explicitly enacted a *Swift*-based regime of federal general common law, states’ rights would not have constitutionally invalidated that system.” Id. at 610.

Swift was unconstitutional “because nothing in the Constitution provided the central government with a general lawmaking authority of the sort the Court had been exercising . . . .” Unlike Judge Friendly, Professor Ely did not consider Erie to have “fenced off” areas of local law in which Congress could not legislate; Erie merely reaffirmed that federal lawmaking, whether by Congress or the Court, had to be rooted in an enumerated power. Other scholars have taken a broader view, arguing that Erie rested on federalism and separation of powers principles—that even if Congress has the power to legislate in an area, it does not share that power with the judiciary.

b. Diversity courts’ full faith and credit common law

The exceptions to the Clause do not come from the face of the Clause itself—the full faith and credit provisions are silent as to their scopes. Nor do these exceptions come from some inference drawn from the provisions’ texts. When determining the provisions’ scopes, the Court looks to the common law that pre-dates the Constitution. Thus, the Courts’ recognition and refinement of the full faith and credit exceptions is not “governed by the Federal Constitution or by acts of Congress.” Instead, when the Court finds exceptions to the Clause, it engages in a process that is similar to the one that it uses to articulate Constitution-based common law rules.

391 Id. at 704. He argued that the Rules of Decision Act alone required federal courts to defer to state interests absent some congressional statement to the contrary, and thereby suggested that Congress was free to curtail that requirement so long as it had a constitutional basis for doing so. Id.
392 Professor Paul G. Mishkin suggested that Professor Ely appeared to reason that, absent the Rules of Decision Act, “the courts would have the same range of lawmaking power as Congress—that any time Congress could validly displace state law, the federal courts are also constitutionally equally empowered to do so.” Paul J. Mishkin, Some Further Last Words on Erie—The Thread, 87 Harv. L. Rev. 1682, 1683 (1974). Professor Mishkin suggested that even when Congress has the power to displace state law, federal courts do not share that power absent an explicit congressional statement to that effect. Id.; see also Young, supra note 386, at 1658 (“[E]ven where Congress could regulate legislatively, it may not simply empower the federal courts to make rules in common law fashion, outside the constraints of the Article 1, Section 7 lawmaking process.”). Professor Bradford R. Clark argued that Erie rested on “principles of judicial federalism,” which “posits that the federal courts unconstitutionally invade the autonomy and independence of the States whenever they unilaterally apply a rule of their own choosing in lieu of substantive state law.” Bradford A. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Penn. L. Rev. 1245, 1259 (1996) (quotations and citation omitted).
393 See note 397, infra.
394 380 U.S. at 78.
395 In a seminal article on the topic, Professor Henry P. Monaghan defined constitutional common law as “a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions . . . .” Henry P. Monaghan, Foreward: Constitutional Common Law, 89 Harv. L. Rev. 1, 2–3 (1975). The Fouth Amendment-based exclusionary rule, the dormant commerce clause, and the civil rights claim recognized in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), were examples of constitutional common law that Professor Monaghan identified. See id.

He suggested that such constitutional common law rules are subject to congressional overruling or modification. See id. at 4. Subsequently, the Court held that “Congress may not legislatively supersede our decisions interpreting and applying the Constitution.” Dickerson v. United States, 530 U.S. 428, 437 (2000) (disclaiming congressional power to abolish the Miranda v. Arizona’s requirements, which Professor Monaghan had cited as an
example of constitutional common law). One scholar suggested that the Court, in this statement, disclaimed constitutional common law’s existence, and espoused the view that all rules that are tangentially drawn from the Constitution derive from constitutional interpretation. Richard E. Welch, III, Mr. Sullivan’s Trunk: Constitutional Common Law and Federalism, 46 NEW ENGL. L. REV. 275, 299 (2012); but see Bush v. Vera, 517 U.S. 952, 1076–77 (1996) (Souter, J. dissenting) (noting that the Court determines “how far the Fourteenth and Fifteenth Amendments require [it] to devise constitutional common law to supplant the democratic process with litigation in federal courts”). Other scholars have disagreed with Professor Monaghan’s premise that an extra-textual rule derived from the Constitution is necessarily subject to congressional reversal or alteration. E.g., Mitchell Berman, Constitutional Decisional Rules, 90 VA. L. REV. 1, 101–05 (2004) (arguing that in crafting Constitution-based decisional rules, federal courts need “not defer to congressional interpretations of constitutional meaning”); cf. e.g. Brian K. Landsberg, Safeguarding Constitutional Rights: The Uses of and Limits of Prophylactic Rules, 66 TENN. L. REV. 925, 975–76 & n.340 (1999) (suggesting that Congress may only modify constitutional common law rules when it replaces the Court’s rule with one that equally safeguards the constitutional interest).

The Court’s recognizing full faith and credit exceptions is not exactly analogous to the Constitution-based rulemaking that gave rise to the Miranda warnings or the exclusionary rule. Full faith and credit exceptions are not necessarily prophylactic rules designed to further one of the Constitution’s normative principles, as those rules are. Instead, these exceptions recognize the implied limits that the Framers included in the Constitution’s text. Nevertheless, because the exceptions cannot be gleaned from resort to the text alone, and yet seek to animate the text’s meaning, their recognition is more like common law-making than constitutional interpretation.

However, even if one were to consider the exceptions the product of pure constitutional interpretation, it is not the case that a diversity court can consider the existing exceptions and recognize new exceptions without regard to forum-state law. Erie suggests that, in diversity cases in which the an issue involves but does not arise under the Constitution, a lower federal court should follow the constitutional interpretations of its forum state’s courts. Lower courts generally disagree with this statement. See Grantham v. Avondale Indus., Inc., 964 F.2d 471, 473 (5th Cir. 1992) (“It is beyond cavil that we are not bound by a state court’s interpretation of federal law regardless of whether our jurisdiction is based on diversity of citizenship or federal question.”) (declining to adopt a state court’s construction of the employer immunity provision in the federal Longshore and Harbor Worker’s Compensation Act, 33 U.S.C. § 901 et seq.; see also RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1275–76 & n.1 (7th Cir. 1997) (holding that a diversity court was not bound by forum-state precedent in determining whether it had personal jurisdiction over a defendant because “state precedent . . . was only persuasive authority on matters of federal law.”); Hertz v. Bethlehem Steel Corp., 50 F.3d 360, 363 (5th Cir. 1995) (“Despite the fact that the district court entertained this claim under its diversity jurisdiction, we apply federal law to determine questions of preemption.”); Admin. Cmte. of Wal-Mart Stores, Inc. Assocs. ’ Health & Welfare Fund v. Hummell, 245 F. Supp. 2d 908, 912 (N. D. Ill. 2003) (“The judges in this Court are being asked to decide the ambit of a federal statute, and I do not think that we can defer to a state court construction of a federal statute . . . .”); cf. In re Asbestos Litigation, 829 F.2d 1233, 1237–38 (3d Cir. 1987) (holding that in a diversity action, Erie did not require application of state decisions which the federal court determined were contrary to the United States Constitution); but see United States v. Fullard-Leo, 156 F.2d 756 (9th Cir. 1946) (en banc) (a federal court sitting in diversity was bound by a territorial court’s construction of the federal statute at issue). Moreover, Justice Brandeis’s statement that Erie did not apply in matters “governed by the Federal Constitution,” 380 U.S. at 70, appears to further foreclose this conclusion. However, it is not clear that Justice Brandeis believed that diversity cases brought under state law, which involved ancillary federal issues were “governed by the Federal Constitution or the Acts of Congress.” The Court suggested that such cases were not a few years after Erie, when it construed the scope of the Constitution’s Contracts Clause without reference to forum-state law, only after noting that it was “sitting in a non-diversity case.” D’Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447, 471 (1942).

The argument that Erie applies to require diversity courts to look to forum-state views of federal constitutional law is based on the nature of diversity jurisdiction. The Framers included this jurisdictional grant in order “to provide a forum for determination of controversies between citizens of different states which would be free from local prejudice or influence.” James William Moore & Donald T. Weckstein, Diversity Jurisdiction: Past, Present, and Future, 43 TEX. L. REV. 1, 14–15 (1964). Because the Framers also created federal question jurisdiction, one can assume that they expected that cases raising federal claims would be brought, without regard to
At the Constitutional Convention, the Framers were aware of the Clause’s ambiguous nature. Pennsylvania delegate James Wilson observed that the first sentence of the proposed provision “would amount to nothing more than what now takes place among all Independent Nations.” Just as Wilson expected, the Court very quickly looked to private international law to determine the Clause’s scope. Citing Wilson’s comment, Justice Scalia observed that the Court’s reliance on private international law “was practically inevitable, since there was no other developed body of conflicts law to which courts in our new Union could turn to guidance.” Justice Scalia went on to

whether the parties were diverse, in lower federal courts, assuming Congress created such courts. Thus, diversity jurisdiction ensured that out-of-state litigants would not be subjected to discriminatory applications of state law; it did not ensure that litigants that happened to be from another state could avail themselves of the benefit of federal applications of federal law, when those who were not from another state could not do so.

The Court’s limitations on federal question jurisdiction further suggest that lower federal courts sitting in diversity should adopt their forum-state courts’ federal constitutional constructions. In Louisville & Nashville Railroad Co. v. Motley, 211 U.S. 149 (1908), the Court held that the presence of a federal defense did not support federal question jurisdiction. Therefore, when one is sued by a citizen of his own state under a state-law claim, and raises a federal defense, he must litigate that defense in state court and is bound by the state court’s constructions of the Constitution (except to the extent that the Supreme Court reviews the state decision). There is no apparent reason to allow a party the benefit of a federal court’s independent construction of his federal defense based solely on his being from a different state than the plaintiff, when Motley would not otherwise so allow. The diversity court’s role is not to protect distinctly federal rights; it is to even-handedly apply settled state rights, even when those rights entail federal issues.

One might respond to this argument with a parade of horribles, arguing that federal courts should not be in the business of rendering unconstitutional decisions just because their forum-state courts would do so. But this statement ignores the fact that state-court decisions on matters of federal law are subject to Supreme Court review. Lower federal courts need not insert themselves into the delicate exchange that goes on between the Supreme Court and state courts, as they collaborate to determine how state law and the federal Constitution should co-exist.


The Court first did so in McElmoyle, as it was “settled that the statute of limitations may bar recoveries upon foreign judgments” and “the effect intended to be given under our Constitutions to judgments, is, that they are conclusive only as regards the merits; the common law principle then applies to suits upon them . . . .” 38 U.S. (13 Pet.) at 328. Decades later, the Court based its adoption of the penal exception on its conclusion that “[b]y the law of England and of the United States the penal laws of a country do not reach beyond its own territory . . . .” Pelican Insurance, 127 U.S. at 289–90; see also Huntington, 146 U.S. at 666 (“In order to determine [whether full faith and credit is owed here], it will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law . . . ‘The courts of no country execute the penal laws of another.’”) (quoting The Antelope, 23 U.S. (10 Wheat) 66, 123 (1825)). The Court also first based the jurisdictional competency exception on the “international law as it existed among the States in 1790, [which was] that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defence . . . .” D’Arcy v. Ketchum 52 U.S. (11 How.) 165, 176 (1850); see also Grover & Baker Sewing-Mach. Co. v. Radcliffe, 137 U.S. 287, 297 (1890); Pennoyer v. Neff, 95 U.S. (5 Otto) 714, 729 (1877); Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 464 (1873). The Court then cited private international law in extending the jurisdictional exception to the divorce decree context. See Haddock, 201 U.S. at 582 (the Court refused to adopt a rule allowing “a government, simply because one of the parties to a marriage was domiciled within its borders . . . to render a decree dissolving a marriage, which, on principles of international law, was entitled to obligatory extraterritorial effect . . . .”).

Sun Oil, 486 U.S. at 723
make clear that “[t]he conflicts law embodied in the . . . Clause allows room for common-law development, just as did the international conflicts law that it originally embodied.” 399 If the Clause’s scope is determined by common law-making, the question is—does diversity courts’ making of such common law comport with Erie?

After Erie, the Court recognized that federal courts could create federal common law rules400 in two limited instances—in cases arising under a federal statute containing a gap, where it appears that Congress intended courts to fill that gap,401 and in cases raising prevailing and uniquely federal policy interests.402 The Court has since developed a set of requirements for a court’s valid exercise of its common law-making power. When the Supreme Court determines what types of judgments are covered by the Clause, it satisfies these requirements.403 As a threshold matter, final resolution of the Clause’s scope raises a uniquely federal concern. Moreover, the Court’s decisions in this area fall within an area of national competence;404 are supported by an implied

399 Id. at 723 n.1.; see id. at 724 (“[Early judges’] implicit understanding that the . . . Clause did not preclude reliance on . . . international law . . . carries great weight.”). In Sun Oil, Justice Brennan cited the Court’s statement in M.E. White that the Clause’s purpose had been “to alter the status of the several states as independent sovereignties, each free to ignore obligations created . . . by the judicial proceedings of the others . . . ,” 296 U.S. at 276–77, in arguing that the Court should not rely on private international law principles in upholding McElmoyle. 486 U.S. at 740–41 & n.3 (Brennan, J. concurring). Justice Scalia responded that Justice Brennan had misconstrued the Milwaukee County Court’s point, which was not that “the Clause itself radically changed the principles of conflicts law[,]” but rather that it had made those preexisting principles “enforceable as a matter of constitutional command rather than leaving enforcement to the vagaries of the forum’s view of comity.” Sun Oil, 486 U.S. at 723 n.1.

400 See generally Friendly, supra note 378; Wright, Miller, & Cooper, supra note 43, at § 4514.

401 Texas Indus., Inc. v. Radcliffe Materials, Inc., 451 U.S. 630, 640 (1981); see also Illinois v. City of Milwaukee, Wisc., 406 U.S. 91, 103 (1972); BellSouth Telecomm., Inc. v. MCI Metro Access Transmission Serv’s, Inc., 317 F.3d 1270, 1291 (11th Cir. 2003) (en banc) (declining to create federal common law to govern contracts that were the subjects of federal statutory regulation because the case arose under state law); Morris v. City of Hobart, 39 F.3d 1105, 1112 (10th Cir. 1994) (holding that the court did not have jurisdiction over the plaintiff’s breach of settlement resolving a previous Title VII action because federal common law did not govern agreements settling Title VII suits); Kennedy v. Washington, 986 F.2d 1129, 1134 (7th Cir. 1993); Smith v. Grimm, 534 F.2d 1346, 1351 (9th Cir. 1976); but see Perfect Fit Industries, Inc. v. Acme Quilting Co., Inc., 646 F.2d 800, 806 (2d Cir. 1981) (“State law does not bar the scope of the equity powers of the federal court; and this is so even when state law supplies the rule of decision.”).

402 See Boyle v. United Techs. Corp., 487 U.S. 500, 507–08 (1988) (recognizing the existence of a federal common law defense in diversity action involving a government contractor); see also City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 313 (1981) (limiting a federal court’s power to develop federal common law to instances “when there exists a significant conflict between a federal policy or interest and the use of state law[]” (quotations omitted)); Miree v. DeKalb Cnty, Ga., 433 U.S. 25, 28–29 (1977) (holding that federal common law “may govern even in diversity cases where a uniform national rule is necessary to further the interests of the Federal Government” (citations omitted)).

403 See D’Oench, 315 U.S. at 469–70 (Jackson, J. concurring) (“I do not understand [Erie] to deny that the common law may in proper cases be an aid to or the basis of decision of federal questions.”) (holding that the Court was not bound by a state’s view as to what constitutes a contract for purposes of determining the scope of the Contracts Clause, despite the constitutional provision not specifying its scope).

404 See Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370–71 (1977) (holding that federal common law was not applicable in a case when the only federal interest in the property dispute was the
grant of power to the Court to determine the Clause’s scope (although this implied grant comes from the Framers rather than Congress); and are binding on state courts pursuant to the Supremacy Clause—once the Court speaks, lower federal courts and state courts come into harmony on the Clause’s effect in a particular area.

However, when a lower diversity court applies its own interpretation of the Clause’s scope at the expense of the differing view of its forum state’s courts it is not creating permissible federal common law. The diversity cases described in Part Two do not implicate the threshold requirements for a federal court’s common law-making. Cases in which the Clause or section 1738 are at issue do not “arise under” federal law. Although such cases involve a constitutional (and statutory) gap, that gap, as explained infra, is not one which Congress has the power to fill, a prerequisite for a court’s exercise of its gap-filling function. While courts may develop common law, even in diversity cases in which federal law is not otherwise applicable, they may only do so when “a uniform national rule is necessary to further the interests of the Federal Government . . . .” Even if the Clause’s scope necessitated a uniform national rule,

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405 See D’Oench, 315 U.S. at 469. If the Court did not have the power to determine the Clause’s scope, then states could effectively render the Clause meaningless by announcing exceedingly narrow opinions as to the types of judgments entitled to full faith and credit. See U.S. Const. Art. VI, § 2; see also Free v. Bland, 369 U.S. 663, 670 (1962); Clearfield Trust Co. v. United States, 318 U.S. 363, 366–67 (1943).

406 While a lower federal court shares the Court’s power to render decisions on the Clause’s scope, and thus recognize new exceptions, the following makes clear that this power is made dormant by Erie’s overriding constitutional principles when a federal court sits in diversity jurisdiction. Minnesota v. Northern Secs. Co., 194 U.S. 48, 72 (1904); see also Anglo-Am. Provision Co. v. Davis Provision Co., 191 U.S. 373, 374 (1904) (holding that the Clause “establishes a rule of evidence rather than of jurisdiction”); Adar, 639 F.3d 146, 153 (5th Cir. 2011) (en banc) (holding that a state court’s denial of full faith and credit does not violate a litigant’s constitutional rights, and therefore cannot be vindicated by the litigant through a section 1983 action because the Clause imposes only a “constitutional rule of decision on State courts.” (quotations omitted)); Rosin v. Monken, 599 F.3d 574, 576 (7th Cir. 2010).

407 See City of Milwaukee, 451 U.S. at 313–14 (1981) (“We have always recognized that federal common law is subject to the paramount authority of Congress.” (quotation omitted)).

408 See Miree, 433 U.S. at 29.

409 This is not necessarily a strong assumption. In Texas Industries, the Court held that its federal interest-based common law crafting power was constrained to three areas—“[matters] concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases,” 451 U.S. at 641 (footnotes and citations omitted). The second possible basis is the only one that might justify allowing a federal court to adopt a rule governing the Clause’s scope without rooting such a rule in a textual gap. However, full faith and credit issues do not necessarily implicate “conflicting rights of states.” In noting the existence of this area of federal common law, the Court stated that most cases in the area “arise from interstate water disputes,” and therefore “involve especial federal concerns to which federal common law applies.” Texas Indus., 451 U.S. at 641 n.13; see City of Milwaukee, 406 U.S. 91; Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). These cases suggest that competing state interests must be directly involved to necessitate resort to federal common law. Although state interests are obviously at play whenever a court determines whether to extend full faith and credit to another court’s judgment or decision, these
the Court could impose such uniformity by reviewing state decisions construing the Clause—the Court’s having not done so in a particular area suggests that such uniformity is not needed.\textsuperscript{412} Moreover, before a federal court adopts a federal common law rule, it must engage a “presumption that state law should be incorporated into federal common law.”\textsuperscript{413} In the diversity cases described in Part Two, the courts uniformly failed to consider whether “some significant conflict between some federal policy or interest and the use of state law” existed.\textsuperscript{414} While most courts failed to even acknowledge the existence of a body of state full faith and credit law, the few that did brazenly dismissed its relevance.\textsuperscript{415}

interests exist a case’s the background. The competing interests directly at play are those of the individual parties. It is doubtful that background state interests are strong enough to clear the high hurdle that the Court has set for federal interest-based invocation of its common law-making power.

\textsuperscript{412} See Part Three, I. supra.

\textsuperscript{413} Kamen v. Kemper Fin. Ser’vs, 500 U.S. 90, 98 (1991) (collecting cases); see also Texas Indus., 451 U.S. at 640–42; United States v. Kimball Foods, 440 U.S. 715, 728 (1979); De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) (“The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law.”). This presumption is based on the notion that “[e]ven when there is related federal legislation in an area,” Congress acts against the backdrop of state law, and is aware of such state law when it leaves gaps in federal provisions. See Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966).

\textsuperscript{414} See id.; see lower federal court diversity cases cited in Part Two, supra.

\textsuperscript{415} See, e.g., Sizemore, 200 F.3d at 378 (“Because full faith and credit questions are matters of federal constitutional and statutory law . . . the district court need not apply the law of the forum state.”); United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 255 (9th Cir. 1992) (Reinhardt, J. concurring in part, dissenting in part).

The argument that diversity courts craft unconstitutional general common law when they ignore their forum states’ courts views of the Clause’s scope is a strong one. Nevertheless, the Court could avoid the constitutional issue and still resolve the \textit{Erie} problems by applying the presumption in favor of adopting state law and holding that, as a matter of federal common law, a federal court sitting in diversity should adopt the law of its forum state to determine the Clause’s scope. See O’Melveny & Myers v. F.D.I.C., 512 U.S. 79, 85 (1994) (noting that it was “only of theoretical interest” whether the state rule was applied based upon the state’s “own sovereign power or federal adoption of [the state’s] disposition”); Boyle, 487 U.S. at 507 n.3.

As to the first possible basis for federal common law, textual gap-filling, in \textit{Kemper}, the Court held that a federal court “should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards, or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand.” 500 U.S. at 98 (citations omitted). As to federal interest-based federal common law, the displacement of state law under this basis is appropriate only when there is a “significant conflict between some federal policy . . . and the use of state law.” Wallis, 384 U.S. at 68; see Atherton v. F.D.I.C., 519 U.S. 213, 218 (1997); O’Melveny & Myers, 512 U.S. at 87. In all other matters, a court must adopt forum-state law as its rule of decision. See Atherton, 519 U.S. at 218; O’Melveny & Myers, 512 U.S. at 87–88; Kamen, 500 U.S. at 98; Kimball Foods, 440 U.S. at 727–28 (“Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules.”).

First, the Clause’s scope does not require uniform national rules. The Court’s having not endeavored to create such uniformity is a testament to this. In \textit{Semtek}, the Court held that the preclusive effect of a diversity court’s decision did not need to be based on a uniform federal rule because “state, rather than federal, substantive law is at issue . . . .” 531 U.S. at 508 (“This is, it seems, a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by the state courts in the State in which the federal diversity court sits.”). Similarly, in the cases described in Part Two, other than the Clause’s scope, the substantive issues were matters of
i. Determining the Clause’s scope is beyond federal competency

Instead of crafting permissible federal common law rules, diversity courts’ own, independently developed views of the Clause’s scope are most similar to Swift-era common law. Professor Ely noted that Swift’s constitutional shortcoming was that it allowed federal courts to make rules that were beyond federal competency.\(^416\) In Erie’s wake, the Court has made clear that for a federal common law rule to be valid, the rule must be one that Congress could constitutionally enact.\(^417\) The question is, then, could Congress enact a statute declaring what types of judgments and judicial decisions are entitled to full faith and credit, and what types are not? One might be quick to answer that Congress could, and cite the Clause’s enabling sentence, which allows Congress to

state law. From Semiek, it follows that when there is no need for judgments and opinions unquestionably covered by a full faith and credit mandate to have their preclusive effects determined pursuant to uniform national rules, there is similarly no need for uniform national rules to determine when the full faith and credit mandate applies at all. A uniform rule regarding the Clause’s scope would be an antecedent to applying a uniform rule to determine a judgment’s effect. If the latter is not necessary, then there is no reason to treat the former differently.

Moreover, even if there is need for uniformity, it is vertical, not horizontal uniformity that would be most valuable in this context. Usually, a litigant can easily predict before an action’s commencement where she will be involved in a second suit raising the same or similar claims. The litigant might anticipate that she will need to bring an enforcement action in the defendant’s state of residence; or perhaps she anticipates the defendant countersuing in the state where the claims arose. What is more difficult to predict, however, is whether that subsequent litigation will occur in state or federal court. The litigant may be uncertain as to her opposing party’s state of domicile, and therefore unable to ascertain whether a federal forum will be available for the subsequent action. Even if the litigant is certain as to the opposing party’s state of domicile, she may be unable to anticipate the party’s litigation strategy and therefore unsure whether her opponent will remove the case to federal court. Therefore, if allowing litigants, before commencing an action in one forum, the ability to predict how a second forum will treat the first forum’s judgment is a sufficient interest to require uniform rules regarding the Clause’s scope, the uniformity that is important is the vertical uniformity between state and federal courts in a single state, not horizontal uniformity between lower federal courts across districts and circuits. A federal view of the Clause’s scope articulated by lower federal courts, in an effort to attain national uniformity, would be ineffective in attaining the vertical uniformity that is actually needed, as state courts are not bound by federal constructions of the Clause. See Ely, supra note 390, at 714 n.125 (“Thus, once again, the problem reduces itself to a choice of uniformities, specifically a choice between horizontal uniformity among all federal courts and vertical uniformity between federal and state courts of a given state. But that choice was at the heart of the disagreement between Swift and Erie, and Erie signaled a recognition that although the promotion of one kind of uniformity inevitably sacrifices the other . . . [Congress] had chosen vertical uniformity.”); Ernest A. Young, Sorting out the Debate over Customary International Law, 42 Va. J. Int’l L. 365, 434 n.353 (2002) (“Erie did not merely prefer ‘vertical’ uniformity within a state to ‘horizontal’ uniformity among states; rather its constitutional holding stands for the inability of any uniformity concerns to trump . . . basic postulate[s] of federalism . . . .”); see also Donald L. Doernberg, The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest A More Straightforward Form of Erie Analysis, 109 W. Va. L. Rev. 611, 663 (2007) (recognizing that the federal common law post-Erie would produce vertical and horizontal uniformity because courts only adopted federal common law rules when the Supremacy Clause would bind states to the national rules); Monaghan, supra note 395, at 39–40 (suggesting that it was not the case that “constitutional common law must invariably extend to state as well as to federal officials”). Accordingly, the need for vertical uniformity is best served by adopting a federal common law rule that resolves the Erie problems described in Part Two, and the uncertainty that they cause. That common law rule is one that adopts the rules regarding the Clause’s scope articulated by a federal court’s forum-state courts.

\(^416\) Ely, supra note 390, at 703–04.

\(^417\) See, e.g., Atherton, 519 U.S. at 218–19; City of Milwaukee, 451 U.S. at 313–14; Clearfield, 318 U.S. at 367.
enact “general laws prescribing the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.” However, a close reading of the provision undermines this answer. In arguing against DOMA’s constitutionality, leading constitutional scholar Laurence Tribe wrote that the enabling sentence “includes no congressional power to prescribe that some acts, records and proceedings that would otherwise be entitled to full faith and credit under the . . . Clause as judicially interpreted shall instead be entitled to no faith or credit at all[.]” Professor Tribe went on to argue that the enabling sentence’s grant of congressional power to decree the manner of proving and effects of other states’ judgments did not include a power to nullify the executing sentence’s affirmative requirement. He concluded that the DOMA’s exempting from full faith and credit a state’s same-sex marriage decrees exceeded congressional authority under the Clause because,

The Full Faith and Credit Clause authorizes Congress to enforce the clause's self-executing requirements insofar as judicial enforcement alone, as overseen by the Supreme Court, might reasonably be deemed insufficient. But the Full Faith and Credit Clause confers upon Congress no power to gut its self-executing requirements, either piecemeal or all at once.

Unsurprisingly, the scholarly community did not unanimously agree with Professor Tribe. The Court has not yet determined whether the Clause grants Congress the power to enact provisions like DOMA that withdraw full faith and credit.

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418 U.S. Const. Art. IV, § 1.
420 Tribe Letter, supra note 419. Professor Tribe’s argument rested on the conclusion that the executing sentence is indeed self-executing. However, this is the view of most scholars and comports with the history of the provision. See note 295 supra.
421 Tribe Letter, supra note 419.
422 Then-Professor Michael McConnell argued that the enabling sentence granted Congress plenary power to legislate in matters involving full faith and credit. The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary, 104th Cong. 58 (1996) (letter from Michael W. McConnell, Professor, University of Chicago Law School, to Sen. Orrin G. Hatch, Chairman, Comm. on the Judiciary (July 10, 1996)). Professor Mark D. Rosen made a similar argument, suggesting that the enabling sentence should be read to grant the political branches “the power to decide that a particular class of acts, judgments, or judicial proceedings need not be given effect,” and suggested that the Court’s full faith and credit role was to review congressional action taken pursuant to the enabling sentence. Mark D. Rosen, Why the Defense of Marriage Act is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires, 90 MINN. L. REV. 915, 960 (2006). One commentator characterized Professor Tribe as “playing with words” and argued that DOMA did not “transgress the plain meaning of” the Clause because “to say that something shall have no effect is . . . to say what effect the thing shall have.” See Daniel A. Crane, The Original Understanding of the “Effects Clause” of Article IV, Section 1 and Implications for the Defense of Marriage Act, 6 GEO. MASON L. REV. 307, 313 (1998).
from particular types of judicial actions. However, the Tribe argument is persuasive in this context. The enabling sentence’s language does not include a plenary grant of legislative power. Rather, it allows Congress to perform two tasks—determine the manner that a state’s “acts, records, and proceedings” shall be proved in another state’s courts, and determine the effect that those “acts, records, and proceedings” shall have in that state court, once proved. Conspicuously lacking is a grant of congressional power to define the words “acts, records, and proceedings.” If the Framers had intended to give Congress such power, they could have done so, either by including language to that effect, or by crafting a more general enabling sentence that could fairly be read as extending to Congress plenary full faith and credit power. They did not do so.

If the enabling sentence does not give Congress the power to determine the Clause’s scope, the question remains whether some other constitutional provision or set of provisions does. In Erie, Justice Reed suggested that the Necessary and Proper Clause, in conjunction with Article III, allowed Congress to enact substantive rules of decision to be followed by the federal judiciary. However, the Court has since made clear that these provisions “empower[] Congress to establish a system of federal . . . courts and, impliedly, to establish procedural [r]ules governing litigation in these courts.” Moreover, Justice Brandeis’s opinion in Erie forecloses the notion that they give Congress the power to enact substantive law that lacks some other constitutional basis. As noted, the effect of an earlier judgment is a substantive issue with the potential to determine a case’s outcome. A statute declaring an earlier judgment’s effect is hardly a “judicial housekeeping rule.” Therefore, the notion that Congress could enact a statute declaring the Clause’s scope finds no comfort in these provisions. There are no other enumerated powers in Article I that seem to grant Congress such power. Therefore, the Clause’s scope is left to be determined like all other ambiguous or

424 See Erie, 304 U.S. at 91 (Reed, J. concurring).
425 See Woods, 480 U.S. at 5 n.3; see also Stewart Org., 487 U.S. at 31 (holding that section 1404(a) fell “comfortably within Congress’ powers under Article III as augmented by the Necessary and Proper Clause.”).
428 Moreover, even if there is some provision, perhaps the Commerce Clause, that could be read expansively to impliedly grant Congress this power, such a reading would conflict with the explicit failure of the Clause to do so. Accordingly, the Court would be obligated to apply the more specific constitutional provision when it conflicted with the less specific provision. See, e.g., Smith v. Robinson, 468 U.S. 992, 1024 (1984) (Brennan, J. dissenting); Basic v. United States, 446 U.S. 398, 408–09 (1980) (recognizing the cannon of construction “a more specific [provision] will be given precedence over a more general one”).
 unspecified provisions of the Constitution—by the Court.429 If Congress may not withdraw full faith and credit from judgments that are otherwise entitled to it, as determined by the Court, then it necessarily follows that Congress may not require states to extend full faith and credit to judgments that the Court has not determined are covered by the Clause.430 The limits of federal common law similarly restrict lower federal courts.431 Moreover, it is even more certain that Congress may not articulate the ways in which state courts should consider out-of-state judgments that are subject to comity-based consideration—matters of comity are left to the states and are not subject to federal interference. No constitutional provision suggests otherwise.432

   ii. Diversity courts’ independent consideration of the Clause’s scope unnecessarily invades provinces left to the states

   Also, like Swift’s progeny, diversity courts invade provinces traditionally left to the states when they apply their own versions of the Clause’s scope.433 In doing so, they ignore Judge Friendly’s federalism-based view of Erie, as supported by the Tenth

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429 See D’Oench, 315 U.S. at 470; cf. Baker v. Carr, 369 U.S. 186, 232–44 (Douglas, J. concurring) (noting that “[s]o far as voting rights are concerned, there are large gaps in the Constitution” but that the Court could fill in some of these gaps through by considering other constitutional provisions).

430 Professor Emily J. Sack made this argument very poignantly. See Emily J. Sack, Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders, 98 NW. U. L. REV. 827, 895–96 (2004). Professor Sack argued that “the Effects Clause was not intended to permit Congress to either expand or dilute full faith and credit beyond what the Constitution required.” Id. She reasoned that “[e]xpanding or diluting, action in direct contradiction to the Constitution would violate the intent of the Framers. Id. They placed the power to require full faith and credit in the first sentence as a mandate of the Constitution to be defined by the Court.” Id. Professor Sack rejected the argument made by some that the first sentence of the Clause created a “floor” for full faith and credit matters that Congress is free to legislate beyond. Id. at 904. However, Professor Sack went on to suggest that where the Court had not yet spoken as to the full faith and credit owed to particular types of acts or judgments, Congress is free to legislate. Id. at 896.

   This latter argument seems to plainly contradict Professor Sack’s earlier assertion. If the Court is the ultimate arbiter of the Clause’s scope, then any congressional enactment clarifying the matter in areas where the Court has not yet spoken would necessarily be subject to judicial reversal. Therefore, such a statute would be like any other congressional action that lacks a constitutional basis.

431 See 380 U.S. at 78; see also Ely, supra note 390, at 73. It is not contradictory to suggest that the exceptions to the Clause are based on unchangeable principles not subject to federal modification, and yet argue that these exceptions are extra-textual rules developed by the Court. The argument is not that the Clause has no scope absent the one that the Court gives to it—if that were the case, then perhaps Congress would have a claim to joining in the process of defining the scope. The point is instead that the Framers implicitly incorporated a settled body of law into the Clause. Congress has no stake in divining what that body is and applying it to novel issues—that role is left to the judiciary. Of course, lower federal courts may engage in this process when their doing so does not result in the creation of Swift-like common law rules, as it does when they sit in diversity jurisdiction.

432 Further, as noted, it is not clear whether Congress has the power to stop a state court from giving a judgment greater preclusive effect than it would have in a rendering state court. Although Congress may set a floor for a preclusive effect, it is not clear that it may also set a ceiling.

433 See Boyle, 487 U.S. 500, 517, n.2; BellSouth, 317 F.3d at 1291; Bynum v. FMC Corp., 770 F.2d 556, 568 (5th Cir. 1985).
According to Judge Friendly, post-<i>Erie</i> federal common law dodged Tenth Amendment concerns because, [w]e are dealing here with a restricted area—not with the whole range of private law. Because of the presence of a federal question most of the litigation is likely to be in federal courts, which thus have an opportunity to develop a set of rules as to what issues shall be left to state law, and also a body of federal law on those issues where national uniformity is demanded. Finally, since the subject matter is of federal concern, state courts will be more willing to heed decisions of the inferior federal tribunals—a willingness reinforced by the consideration that in the last analysis the Supreme Court can require adherence to the federal view. Diversity courts’ constructions of the Clause’s scope have none of these ameliorative characteristics. The cases subject to the Clause’s various gaps are not confined to isolated areas; rather, they arise in “the whole range of private law.” A federal court’s ignoring state full faith and credit law has the potential to preempt the application of the entire realm of state law—a state’s interest in avoiding such an outcome is tremendous. On the other hand, other than the possible application of the Clause, such diversity cases are unlikely to involve federal questions or significant federal interests, and indeed questions regarding the interstate recognition of judgments are much more likely to be litigated at the state, rather than the federal level. Finally, the cases described in Part Two make clear that state courts have not

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434 Friendly, supra note 378, 395. In a noted work, Professor George D. Brown elaborated on Judge Friendly’s conclusion that <i>Erie</i> rested, at least in part, on the Tenth Amendment. Professor Brown wrote that Justice Brandeis based his Tenth Amendment analysis “on the notion of an ‘invasion’ of powers reserved to the states, and treat[ed] Congress and the courts as equally culpable if they commit such an act.” George D. Brown, <i>Of Activism and Erie—The Implication Doctrine’s Implications for the Nature and Role of the Federal Courts</i>, 69 IOWA L. REV. 617, 621 (1984).

Outside of the federal common law context, the Court has held that a Tenth Amendment violation occurs when a federal action “invades the province of state sovereignty reserved by the . . . Amendment.” <i>New York v. United States</i>, 505 U.S. 144, 155 (1992); see <i>Garcia v. San Antonio Metro. Transit Auth.</i>, 469 U.S. 528, 550–52 (1985) (“In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority.”).

435 Friendly, supra note 378, at 411. More recently, Professor Clark suggested that when a court applies a federal common law rule to decide a matter that the Constitution leaves to the “legislative competence of the states” it “threaten[s] legitimate state authority no less than the application of ‘general common law’ under <i>Swift</i>.” Clark, supra note 392, at 1266–67. Professor Clark made this statement in response to Professor Martha A. Field’s argument that a federal common law rule is valid without regard to state interests so long as there is some basis for federal action. See Martha A. Field, <i>Sources of Law: The Scope of Federal Common Law</i>, 99 HARV. L. REV. 881, 927–28 (1986).

436 The diversity cases in which the Court has permitted the application of a federal common law rule have generally been those in which the rule adopted would subsequently be applied primarily in federal question cases. See <i>Boyle</i>, 487 U.S. at 506–07 (the rule defining the liability of governmental contractors would directly affect terms of government contracts, usually litigated in federal court); <i>Wallis</i>, 384 U.S. at 1303–06 (adopting a state rule as federal common law in a breach of contract diversity action to govern the rights of parties to an oil and gas lease
found persuasive the full faith and credit conclusions of lower federal courts—instead, state courts have persisted in conflicting constructions of the Clause, thus creating the *Erie* problems described.

Supplanting otherwise-applicable state law with novel interpretations of the Clause’s scope necessarily invades the province of state sovereignty. By its existence, the Clause establishes that the interstate recognition of most judgments is a matter of federal concern. However, the effect of a first state’s judgment in an action brought in and arising under the laws of a second state, when the first state’s judgment is not clearly covered by the Clause, has long been left to the second state’s courts to determine. Professor Stanley E. Cox argued that by withdrawing full faith and credit from judgments previously entitled to such effect, DOMA unconstitutionally tramples on the sovereign interests of a rendering state.437 This is because DOMA withdraws from a rendering state the power, conferred by the Clause itself, to determine the interstate effect of its judgments.438 Professor Cox’s argument lends itself to a strong converse argument—that the federal government invades state interests when it withdraws from a second state the power to determine the effect of a first state’s judgment, when the Clause’s limitations have otherwise left that power to the second state. In both instances, the federal government invades the sovereign interests implicated by preclusion matters.

Professor Tribe argued that allowing Congress to withdraw judgments from the Clause’s protection “would do violence . . . to the spirit of the . . . Clause,” which he characterized as the Constitution’s “most vital unifying provision.”439 However, permitting diversity courts to expand the Clause and preempt otherwise applicable forum-state law would do violence to the limits that the Framers intentionally placed on the provision. The Framers could have crafted a provision that departed from the

issued pursuant to the federal Mineral Leasing Act of 1920, when the statute did not specify the parties’ rights); *Sola Electric Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 177 (1942) (adopting federal rule of estoppel in breach of contract action that also gave rise to a violation of the Sherman Act). In *Clearfield*, the leading case in this area, the Court held that *Erie* did not require resort to state law, because “[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law.” 318 U.S. at 366. Although the case arose under diversity jurisdiction, the federal issue made it ripe for federal question jurisdiction. Subsequently, the federal cases where a court applied the common law rule adopted in *Clearfield* were generally federal question cases. See, e.g. *United States v. First Nat’l Bank of Atlanta, Ga.*, 441 F.2d 906 (5th Cir. 1971); *United States v. Continental-Am. Bank & Trust Co.*, 175 F.2d 271 (5th Cir. 1949); *United States v. Jones*, 176 F.2d 278 (9th Cir. 1949). In contrast, full faith and credit issues are more likely to come up in state than federal court, suggesting that the Clause’s scope is not one that necessarily needs federal clarification.

437 Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063, 1079 (1999) (“Thus, the Full Faith and Credit Clause power advocated for Congress under DOMA assumes that the state with the pre- eminent jurisdictional right to declare the appropriate state common-law rule can be deprived of that authority whenever a shifting federal majority disagrees with the particular state policy balance that has been drawn.”).

438 Id.

common law and explicitly required states to enforce all judgments, without regard to a judgment’s character. They did not do so, and instead made the Clause’s scope co-extensive with that of the existing common law. The Clause’s departure from the common law, and thus its national unifying force, was not in its scope, but rather in the effect that it required states to give to the judgments that it covered. By only requiring that states apply the “same effect” standard to judgments that had previously been subject to the common law “prima facie evidence” standard, the Framers struck a balance between unifying disparate judicial systems and allowing those judicial systems to retain essential sovereign attributes. Thus, the Clause was a “unifying provision,” as Professor Tribe suggested, in areas where the Framers and the wisdom of the common law indicated a need for unity; in areas that the common law did not reach, the Clause’s silence was a reaffirmation of state sovereignty. By giving voice to that silence, diversity courts diminish the states’ sovereignty.

Finally, diversity courts’ motives for applying their own views of the Clause’s scope seem to be strikingly similar to those of late nineteenth and early twentieth century federal courts applying Swift common law. Professor Purcell described the Court of this era as embracing federal common law because it allowed the justices to “protect[] corporate enterprise and the national market” from the vagaries of local regulation. Diversity courts apply full faith and credit with the same suspicion of local law. These courts appear to consider their own views necessary to give effect to the federal scheme of full faith and credit—that if the Clause is left in the hands of the states, the country might return to the chaotic era that preceded the Clause, when debtors could run from state court to state court to avoid a judgment. Such fears are hardly warranted. It is true that the cases described in Part Two demonstrate that state courts are somewhat more willing than federal courts to adopt a wide view of the Clause’s exceptions. However, the effect of their doing so has not been economic or

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440 Doing so would have made real the fears of Virginia delegate Edmund Randolph, who argued that the proposed provision was “so loose as to give [the national government] opportunities of usurping all state powers.” See Costigan, supra note 5, at 473 n.3 (quotations omitted) (quoting 5 Elliott’s Debates (2nd Ed.) p. 504).
441 See Sun Oil, 486 U.S. at 723–24 & n.1.
442 See id.
443 Purcell, supra note 382, at 56; see generally id. at 51–63. Professor Purcell depicted Justice Brewer as the primary abuser of Swift. Professor Purcell described Justice Brewer as “equat[ing] God’s justice with the law, the law with the courts, and the federal courts with the salvation of the nation.” Id. at 63. Justice Brewer thus used federal common law to displace state law when doing so was necessary to achieve this salvific result. See id. Professor Daniel R. Ernst added that Justice Brewer’s “expansion of the Swift doctrine was one phase of a general and dramatic growth of the power and prestige of the federal judiciary after the Civil War.” Daniel R. Ernst, Thinking Like a Historian: Erie in the Dimension of Time, 26 Law & Soc. Inquiry 719, 724 (2001). Professor Ernst noted that this expansion resulted from the rise of interstate transportation, particularly the railroads. Id. at 726. Because railroad companies were generally able to remove actions to federal court under a court’s diversity jurisdiction, they were able to enjoy the benefit of the pro-corporate federal common law that the courts had developed. Id. Professor Ernst quoted one North Carolina lawyer who described a railroad company as “a giant octopus which kept federal judges at its bidding to protect its bold resistance to the law.” Id. (quotation omitted).
judicial chaos—rather it has been giving life to important state interests manifested in
the adjudication of state law claims. Hospitable federal courts were not necessary for
the growth of the modern economy—the industrial development that continued after
_Erie_ proved that. Similarly, the displacement of state law in diversity actions with
federal standards of full faith and credit is not necessary to protect the now well-
established national unity from attack by renegade state courts.

**CONCLUSION**

At its surface, this article’s topic is narrow. It is not mere happenstance that many
of the hypothesized _Erie_ problems have not yet come to pass (at least they have not yet
been noted in a written opinion), despite being latent since the day that the Court
rendered its _Erie_ decision. However, beneath the article’s surface lies a deeper
problem—the willingness of federal courts to cast aside applicable state law whenever
they can credibly claim to be doing so pursuant to a valid federal decree. Perhaps
diversity courts should always abide by their forum-state courts’ constructions and
interpretations of federal provisions. Whether or not this broader statement is true, in
the full faith and credit context—where the federal provision is so vague, the federal
interest is so low, and the state interest in having its own law applied is so great—there
is no defensible reason for a diversity court’s ignoring forum-state law. In a federal
system that delicately balances the sovereign interests of the states against the
important and increasing needs for national unity, there is little room for such federal
judicial overreaching. In such a remote and undefined corner of the law, federal power
should yield to the states. _Erie_ and its constitutional basis, as well as the Full Faith and
Credit Clause and its uncertain scope command nothing less.