SUPREME COURT REVIEW OF MISCONSTRUCTIONS OF SISTER STATE LAW

William B. Sohn[*]

INTRODUCTION

WHEN the Constitution requires a state court to apply sister state law to a case before it, how faithfully must the state court interpret that law? Although one might expect that the state court is obligated to construe the sister state's law as a court in the sister state likely would, that is not so. The Supreme Court in *Sun Oil Co. v. Wortman* declined to review a state supreme court's highly questionable interpretations of three other states' laws, even though the Constitution required the application of those laws.[1] The questionable interpretations involved a determination that each sister state would adopt novel legal theories they had never before considered. Without conclusive evidence that courts in the sister states would *not* reach such unexpected holdings, the Supreme Court held that review was unavailable.[2] As a consequence of *Wortman*, state courts constitutionally compelled to apply a sister state's law have nearly unlimited freedom to construe that law however they wish. But should they?

Until recently, this question received almost no attention from commentators.[3] Although the holding in *Wortman* has been criti-

[*] J.D. 2012, University of Virginia School of Law. I am grateful to Professor Michael G. Collins for his invaluable guidance on this Note, and for his superb instruction during my time in law school. I would also like to thank the editors of the Virginia Law Review, especially Jack A. Herman and Lance Y. Murashige, for their helpful suggestions. All errors are my own.

[1] 486 U.S. 717, 731–34 (1988).

[2] See infra notes 38–47 and accompanying text.

[3] Professor Michael Green published an article on this issue last May. Michael Steven Green, Horizontal *Erie* and the Presumption of Forum Law, 109 Mich. L. Rev. 1237 (2011). Relying primarily on the logic of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), Professor Green argues that state courts should be required to faithfully interpret sister state law in all circumstances, not just in cases where application of sister state law is required by the Constitution. Green, supra, at 1239 & n.10, 1240. This Note, by contrast, addresses the obligation of state courts to faithfully interpret sister state law only when its application is constitutionally required. Prior to Professor Green's article, this issue was last addressed more than fifty years ago. Note, Misconstruction of Sister State Law in Conflict of Laws, 12 Stan. L. Rev. 653 (1960) [hereinafter Stanford Note].

cized,[4] there has been little examination into whether *Wortman* was a proper application of Supreme Court precedent, and if not, how the Supreme Court ought to review state court misconstructions of sister state law whose application is required by the Constitution. That is what this Note seeks to do.

Part I of this Note begins by examining the constitutional limitations on state choice of law. Although the constitutional limitations are minimal, they still play a role, most notably in multistate class action lawsuits. Nevertheless, these limitations can be easily evaded as a result of the freedom *Wortman* gives to state courts to construe sister state law in unpredictable ways, which Part I also explains. The constitutional guarantee that a particular state's law will apply means little if a sister state court applying that law can construe it to reach an outcome contrary to what one would expect under that law. But that is the practical effect of *Wortman*.

Part II examines *Wortman*'s precedential foundation. Although the *Wortman* Court grounded its holding in precedent from the late nineteenth and early twentieth centuries, the validity of those cases in light of subsequent legal developments is highly questionable. First, when those cases were decided, Supreme Court review of alleged denials of federal rights by state high courts was mandatory under the writ of error, so the Court was justifiably concerned about the effect of permitting review on its caseload. Today, however, such review is discretionary under the writ of certiorari, so this can no longer be a significant concern. Second, issues of sister state law used to be treated as issues of fact and reviewed as such, but today they are treated as issues of law and are reviewable no differently than issues of domestic law. And third, when the earlier cases were decided, there were no clear constitutional limitations on choice of law. Those limitations arose only after the cases relied on by *Wortman* were decided, but well before *Wortman* itself. The existence of a constitutional right fundamentally alters how the issue should be perceived. These three changes ought to have led the *Wortman* Court to freshly examine the doctrine.

[4] See, e.g., Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 Colum. L. Rev. 249, 258–59 (1992); Heather Scribner, Protecting Federalism Interests After the Class Action Fairness Act of 2005: A Response to Professor Vairo, 51 Wayne L. Rev. 1417, 1429 (2005).

Part III does precisely that. Surveying instances where the Supreme Court reviews state court constructions of state law when other constitutional guarantees are at stake, such as the Full Faith and Credit Clause's right to the enforcement of sister state judgments and the Contract Clause's protection from the retroactive statutory impairment of contracts, Part III concludes that the constitutional right to have certain state law applied is anomalous because it does not receive similar protection from unsupported state court constructions of state law. In order to maintain consistency with other constitutional rights, the Supreme Court should be more willing to review unsupported state court constructions of sister state law when the Constitution requires that law to be applied.

I. CHOICE OF LAW AND THE CONSTITUTION

When a case involves parties or events from two or more states, the court that hears the case must first decide a question of prime importance: which state's law should apply to the case? Resolution of this question often determines the outcome of the case. For instance, State *A* may enforce a contractual provision that is unenforceable in State *B*,[5] or State *A* may recognize a tort defense that is unavailable in State *B*.[6] "Choice of law"[7]—the legal principles that address which state's law should apply—has been an evolving field since the nation's Founding. Today these principles, generally a matter of state common law, are much less rigid than they were in the past. Consequently, a court may have significant freedom to select from several available states' laws.[8] In this flexible regime, a court presented with conflicting state laws may

[5] See, e.g., N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357, 376–77 (1918) (holding that a Missouri court must apply New York law and enforce a contract made in New York even though the contract would be unenforceable under Missouri law).

[6] See, e.g., Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932) (holding that Vermont workmen's compensation statute is a defense against wrongful death action in New Hampshire, even though that defense is unavailable under New Hampshire law).

[7] "Choice of law" is also known as "conflict of laws."

[8] Traditional choice of law principles often mandated application of a particular state's law. For instance, in contract disputes, courts were required to apply the law of the state where the contract was formed, and in tort suits, courts were required to apply the law of the state where the injury giving rise to the claim occurred. Modern principles, by contrast, generally involve weighing the interests of the states having a connection to the dispute, which gives courts considerable discretion. As of 2009, forty-two of fifty-two jurisdictions (including Puerto Rico and Washington, D.C.) have abandoned the traditional principles. See Symeon C. Symeonides, Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should, 61 Hastings L.J. 337, 346 (2009).

prefer application of its own state's law for reasons of convenience, familiarity, or favorability to a particular outcome.

Two clauses of the Constitution, however, constrain this choice: the Due Process Clause[9] and the Full Faith and Credit Clause.[10] Application of the law of a state with little connection to a case can be unfair to a party who could not have anticipated that law would apply, or it can infringe upon the interests of a sister state with a stronger connection to the case. This Part examines what the constitutional limitations on choice of law are, and then explains how state courts are able to avoid those constraints through unsupported interpretations of sister state law.

A. The Modern Constitutional Limitations on Choice of Law

Although the Constitution has applied in some form to choice of law decisions since the early twentieth century,[11] the modern limitations were not established until 1981, in a dispute over whether Minnesota law could apply to an insurance contract made in Wisconsin between an insurance company and a Wisconsin resident who was killed in an automobile accident in Wisconsin. In *Allstate Insurance Co. v. Hague*, the Supreme Court held that the application of Minnesota's law was constitutional, and established the present standard for satisfying both the Due Process and Full Faith and Credit Clauses: the state whose law is applied "must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[12] This standard is a low hurdle, as its application

[9] U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

[10] Id. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

[11] See infra Section II.C.

[12] 449 U.S. 302, 312–13 (1981). Although only a plurality of the Court created this standard in 1981, it was not contested by the dissent, id. at 332 (Powell, J., dissenting), and it has subsequently been applied by a majority of the Court, see Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 821–22 (1985). *Allstate* was a significant development in this field for two reasons. First, it confirmed that the inquiries under the Due Process and Full Faith and Credit Clauses are the same. Previously, the Full Faith and Credit Clause "required a more exacting standard." *Allstate*, 449 U.S. at 308 n.10. Second, it represented an abandonment of the Court's previous approach of weighing competing state interests. See, e.g., Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 550 (1935). Now, "to justify application of forum law the Supreme Court only requires contacts with the forum state sufficient to create a state interest, even if another state has a materially greater interest. The Court will not

in *Allstate* reveals. Three Minnesota contacts, each arguably tenuous, were relied on by the Court. First, because Hague worked in Minnesota (even though he was not killed while commuting to or from work), Minnesota had an interest in protecting him.[13] Second, Allstate did business in Minnesota, and Minnesota had an interest in regulating insurers' obligations to members of its workforce.[14] Third, because Hague's widow (who represented Hague's estate) was now a Minnesota resident, Minnesota had an interest in keeping its residents "off welfare rolls" and enabling them "to meet financial obligations."[15] This "significant aggregation of contacts" permitted Minnesota to apply its own law.[16] The Court did not say whether all three of these contacts were necessary to satisfy the Constitution[17]—perhaps just two of the three would suffice—but regardless, the Constitution's limitations cannot be said to be substantial.

Nevertheless, limitations exist. Although *Allstate* has been criticized as the "apparent end of all meaningful limits,"[18] appellate courts continue to hold some selections of law unconstitutional,[19] and a desire to avoid testing the constitutional limits can also play an important role in the selection of which law to apply.[20] One important limitation is that a plaintiff's residence in the forum state, by itself, is not sufficient to satisfy the Constitution.[21] The limits are most likely to be an issue in multi-

weigh interests, it will just find them." Edith Friedler, Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem, 37 U. Kan. L. Rev. 471, 500 (1989).

[13] *Allstate*, 449 U.S. at 314–15.

[14] Id. at 317–18.

[15] Id. at 319 (internal quotation marks omitted) (quoting the Minnesota Supreme Court's opinion in *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1978)).

[16] Id. at 320.

[17] Id. at 320 n.29.

[18] Laycock, supra note 4, at 257.

[19] See, e.g., Gerling Global Reinsurance Corp. of Am. v. Gallagher, 267 F.3d 1228, 1236–40 (11th Cir. 2001); Soo Line R.R. Co. v. Overton, 992 F.2d 640, 647 (7th Cir. 1993); McCluney v. Jos. Schlitz Brewing Co., 649 F.2d 578, 583–84 (8th Cir. 1981). Note that in diversity actions, a federal court must use the choice of law principles of the state in which it sits. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496–97 (1941).

[20] See, e.g., New England Leather Co. v. Feuer Leather Corp., 942 F.2d 253, 257 (4th Cir. 1991); Campbell v. Arco Marine, 50 Cal. Rptr. 2d 626, 631–32 (Cal. Ct. App. 1996); Reed v. Univ. of N.D., 543 N.W.2d 106, 108 (Minn. Ct. App. 1996).

[21] See John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 179, 182 (1936) (holding that the Full Faith and Credit Clause forbade application of Georgia law to a life insurance contract made in New York, when Georgia's only contact was that the insured's widow subsequently moved to Georgia); Home Ins. Co. v. Dick, 281 U.S. 397, 407–08 (1930) (holding that the Due Process Clause forbade application of Texas law to an insurance contract made in Mexico between two Mexican residents, when Texas's only contact was that the insured

state class action suits where a court may be presented with hundreds or even thousands of claims, only a few of which have a connection to the forum. Indeed, that was the situation in *Phillips Petroleum Co. v. Shutts*,[22] the Supreme Court's only case subsequent to *Allstate* holding a court's selection of law to be unconstitutional. That case, and the subsequent litigation that gave rise to the *Wortman* rule, are the subject of the next Section.

B. Evading the Limitations: The Wortman *Decision*

The scope of the holding in *Wortman* cannot be understood properly without reference to the complicated background of the case. The events giving rise to the dispute began in the 1970s, more than ten years before *Wortman* was decided. During that time, two Delaware corporations, Phillips Petroleum Company and Sun Oil Company, extracted and sold gas from land across the United States leased from tens of thousands of private owners. The owners received royalties from the sales of gas,[23] which was sold at prices approved by the Federal Power Commission ("FPC").[24] When the corporations sought FPC approval of higher prices, they were permitted to charge the higher prices to their customers before the prices were approved. But, if the prices were rejected, the FPC required the corporations to refund to the customers "the difference between the approved price and the higher price charged, plus interest" at a specified rate.[25]

When the corporations sold gas at prices that were pending approval, the royalties initially paid to the landowners were based only on the approved prices. This made sense for the corporations: if they paid royalties based on prices that were subsequently rejected by the FPC, they would be forced to recoup money from the owners.[26] The unpaid royalties on the portion of the sale prices that were pending approval were re-

had subsequently become a Texas resident). The *Allstate* Court acknowledged that these decisions are still good law. 449 U.S. at 309–11.

[22] 472 U.S. 797, 801 (1985).

[23] See *Wortman*, 486 U.S. at 719 (stating that the royalties from Sun Oil were "usually one-eighth of the proceeds").

[24] The FPC's powers have since been assumed by the Federal Energy Regulatory Commission. See 42 U.S.C. §§ 7171(a), 7172(a) (2010).

[25] *Shutts*, 472 U.S. at 800.

[26] See id.

ferred to as "suspended royalties."[27] When the higher prices were eventually approved, the corporations then paid the suspended royalties to the owners, but without interest. Because the suspended royalties were worth millions of dollars, the exclusion of interest was quite significant. The owners filed two class action suits—one against Phillips Petroleum, the other against Sun Oil—seeking interest on the suspended royalties.

The suits were both filed in Kansas state court, even though only a small fraction of the plaintiffs and the leased properties were located in Kansas. The vast majority were in Texas, Oklahoma, and Louisiana. The trial court held that under Kansas law, the corporations owed interest to all of the plaintiffs equal to the rates they were obligated to pay with respect to customer refunds[28] (the "FPC interest rates"), and in 1984, the Kansas Supreme Court affirmed.[29] The corporations then separately appealed to the United States Supreme Court on the grounds that Kansas law could not constitutionally apply to the claims involving plaintiffs and royalty arrangements that had no connection to Kansas, and the Court agreed to hear Phillips Petroleum's case.

In 1985 the Court agreed with Phillips Petroleum, and held that under *Allstate*, the Constitution forbade application of Kansas law because Kansas lacked a "significant aggregation of contacts" to the plaintiffs and royalty arrangements outside of Kansas.[30] In so doing, the Court recognized that Texas, Oklahoma, and Louisiana law conflicted with the Kansas court's decision, and that application of those laws would likely result in a lower rate of interest.[31] The Court remanded both Phillips Petroleum's and Sun Oil's cases back to Kansas for reconsideration.

Reconsideration of the cases, however, produced the exact same result. Applying Texas, Oklahoma, and Louisiana law, the Kansas trial

[27] Id.

[28] See *Wortman*, 486 U.S. at 720. "These rates were 7% per annum prior to October 10, 1974; 9% from then until September 30, 1979; and thereafter the average prime rate compounded quarterly." Id. The prime rate reached a record high of 21.5% per annum in December 1980 and never dipped below 10% until 1985, so application of the FPC interest rates magnified the corporations' liability. See Prime Rate Interest History, FedPrimeRate.com, http://www.fedprimerate.com/wall_street_journal_prime_rate_history.htm (last visited October 31, 2012).

[29] Shutts v. Phillips Petrol. Co., 679 P.2d 1159 (Kan. 1984); Wortman v. Sun Oil Co., 690 P.2d 385 (Kan. 1984).

[30] *Shutts*, 472 U.S. at 821–22 (quoting *Allstate*, 449 U.S. at 312–13). The Court held that a state court's mere jurisdiction over a case cannot be considered a contact for purposes of satisfying *Allstate*. Id. at 821.

[31] Id. at 816, 817 & n.7, 818.

court held that each of those states, just like Kansas, would require interest equal to the higher FPC interest rates, and the Kansas Supreme Court affirmed.[32] But the court's interpretation of each state's laws was "barely plausible."[33] Texas provided a statutory prejudgment interest rate of six percent unless a "specified rate of interest [was] agreed upon by the parties."[34] Oklahoma had a similar law,[35] and also a law that provided that "[a]ccepting payment of the whole principal, as such, waives all claim to interest."[36] And a Louisiana statute provided a prejudgment interest rate of seven percent "unless otherwise stipulated."[37] The court dodged these statutory commands by concluding, without precedential support, that "equitable principles" would lead each state to imply an agreement between the parties to use the FPC interest rates. These implied agreements prevailed over the statutory interest rates because each statute contained an exception for agreements to use a different rate (for example, "unless otherwise stipulated" in Louisiana's statute). The implied agreement in Oklahoma also superseded Oklahoma's statute that provided that an acceptance of the principal waived all claim to interest. The corporations lost because they were unable to produce decisions showing that Texas, Oklahoma, or Louisiana would *not* imply an agreement in those circumstances. But because the issue had never been considered in those states, the corporations could not possibly have succeeded. Both corporations appealed to the United States Supreme Court once again, still alleging that the Kansas Supreme Court had violated the Constitution, and Sun Oil's case was heard.

This time, however, the corporations were not successful. The Court in *Sun Oil Co. v. Wortman* held that the Kansas court's interpretation of Texas, Oklahoma, and Louisiana law did not rise to the level of a constitutional violation and thus affirmed the Kansas Supreme Court's decision. The Court articulated its rule:

---

[32] Shutts v. Phillips Petrol. Co., 732 P.2d 1286, 1313–14 (Kan. 1987); Wortman v. Sun Oil Co., 755 P.2d 488, 490–91 (Kan. 1987).

[33] 16B Charles Alan Wright et al., Federal Practice and Procedure: Jurisdiction and Related Matters § 4030 (2d ed. 1996).

[34] *Wortman*, 486 U.S. at 731 (citing Tex. Rev. Civ. Stat. Ann. art. 5069-1.03 (Vernon 1987)).

[35] Id. at 733 (citing Okla. Stat. tit. 15, § 266 (1981) (providing for six-percent interest "in the absence of any contract as to the rate of interest, and by contract the parties may agree to any rate as may be authorized by law")).

[36] Id. (citing Okla. Stat. tit. 23, § 8 (1981)).

[37] Id. at 734 (citing La. Civ. Code Ann. art. 1938 (1977)).

> To constitute a violation of the Full Faith and Credit Clause or the Due Process Clause, it is not enough that a state court misconstrue the law of another State. Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court's attention.[38]

The Court relied exclusively on its cases from the early twentieth century for support.[39] Applying this rule, the Court held that because Sun Oil presented "no [decisions] clearly indicating that an agreement to pay interest at a specified rate would *not* be implied in these circumstances," the Kansas court could imply such an agreement under each state's law.[40] "[P]lacing the initial burden on respondents to support the Kansas court's interpretations is flatly inconsistent with the precedent of this Court," the Court reasoned.[41] Thus, the constitutional protection from the application of Kansas law to every claim, granted just three years prior by *Shutts*, was essentially taken away by *Wortman*.

Justice O'Connor, joined only by Chief Justice Rehnquist, passionately dissented from this part of the Court's holding.[42] Without actually questioning the Court's articulated rule,[43] the dissent recognized that the Court's application of its rule enabled the Kansas court to shirk its constitutional duty:

> Faced with the constitutional obligation to apply the substantive law of another State, a court that does not like that law apparently need take only two steps in order to avoid applying it. First, invent a legal theory so novel or strange that the other State has never had an opportunity to reject it; then, on the basis of nothing but unsupported specu-

[38] Id. at 730–31.

[39] Id. at 731 (citing Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96 (1917); W. Life Indem. Co. v. Rupp, 235 U.S. 261, 275 (1914); Louisville & Nashville R.R. Co. v. Melton, 218 U.S. 36, 51–52 (1910); Banholzer v. N.Y. Life Ins. Co., 178 U.S. 402, 408 (1900)).

[40] Id. (emphasis added); see also id. at 733–34.

[41] Id. at 732 n.4 (citing *Rupp*, 235 U.S. at 275; Tex. & New Orleans R.R. Co. v. Miller, 221 U.S. 408, 416 (1911); *Melton*, 218 U.S. at 52).

[42] The Court also held that the Kansas court could constitutionally apply its own statute of limitations to all of the claims before it, id. at 722, which Justice O'Connor did not dispute.

[43] Id. at 744 (O'Connor, J., concurring in part and dissenting in part) ("The Court correctly states that misconstruing those States' laws would not by itself have violated the Constitution, for the Full Faith and Credit Clause only required the Kansas court to adhere to law that was clearly established in those States and that had been brought to the Kansas court's attention.").

> lation, "predict" that the other State would adopt that theory if it had the chance.[44]

That, the dissent argued, was precisely what the Kansas court did. It held that each sister state would imply an agreement between the parties to use the FPC interest rates, despite producing "no case from *any* jurisdiction adopting [this] theory,"[45] thereby enabling its conclusion that each sister state "would decline to apply its own statute."[46] To the dissent, in the absence of authority suggesting that the statutory interest rates would not apply, it was clearly established that those rates *would* apply, and therefore the Kansas court's refusal to apply those rates was unconstitutional. Ultimately, the dissent reasoned that upholding the decision of the Kansas Supreme Court "ignores the language of the Constitution and leaves it without the capacity to fulfill its purpose."[47]

As bold as the dissent's contention may seem, it is a fair characterization. Commentators have written that this *is* the practical effect of *Wortman*[48] (although not all necessarily see this as problematic[49]). Their conclusion seems unavoidable: just three years before *Wortman*, the Supreme Court itself, in determining that Kansas law could not constitutionally apply, was convinced that the application of sister state law would likely lead to a different outcome.[50] The Kansas holding that fol-

---

[44] Id. at 749. For a disagreement with Justice O'Connor's criticism of the Kansas Supreme Court, see Russell J. Weintraub, Commentary on the Conflict of Laws 640 (5th ed. 2006) (stating that Justice O'Connor's criticism is unfair "[i]n the light of the lack of close precedents in Texas or Oklahoma"). But a lack of close precedents on the question of whether a state would apply its own statute in a case where the statute is textually applicable, as was the case in *Wortman*, is arguably quite different from a situation where a state lacks precedent on which of two equally plausible legal outcomes it would choose.

[45] *Wortman*, 486 U.S. at 746.

[46] Id. at 748.

[47] Id. at 749.

[48] See, e.g., Laycock, supra note 4, at 258 ("As matters stand, the Full Faith and Credit Clause means almost nothing, and state courts can often evade the little that it does mean."); Scribner, supra note 4 ("The dissent correctly noted that *Wortman* left the Full Faith and Credit Clause essentially meaningless . . . ."); see also Stephen B. Burbank, The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View, 156 U. Pa. L. Rev. 1439, 1507 (2008); Earl M. Maltz, Visions of Fairness—The Relationship Between Jurisdiction and Choice-of-Law, 30 Ariz. L. Rev. 751, 759 (1988).

[49] See, e.g., Burbank, supra note 48 (acknowledging, but not criticizing, *Wortman*'s refusal to review the misconstructions); Maltz, supra note 48 (same).

[50] *Shutts*, 472 U.S. at 822 (referring to Kansas law's "substantive conflict with jurisdictions such as Texas"). This determination was made despite detailed arguments by Justice Stevens in dissent, the Kansas Supreme Court, and the plaintiffs that the laws did not neces-

lowed was certainly unexpected, so the Court's refusal to review it despite the Constitution's protection of "the expectation of the parties"[51] suggests this protection is superficial. As the *Wortman* dissent accurately noted, this problem stems not from the standard *articulated* by the *Wortman* majority, but from the majority's *application* of that standard in holding that the Kansas court's refusal to apply textually applicable statutes did not contradict "clearly established" law.[52] If a textually applicable statute in a particular case is not itself "clearly established" law solely because no court in the enacting jurisdiction has yet to apply it to an identical set of facts, *Wortman*'s standard is nearly insurmountable.

After *Wortman*, it is hard to imagine a scenario where the Supreme Court would overturn a state supreme court's misconstruction of a sister state's law. Unless presented with a sister state case applying contrary law to an identical set of facts, a state court could find endless ways to construe sister state law to match its own state's law. For example, instead of using equitable principles to imply an agreement that superseded the sister states' prejudgment interest statutes, the Kansas court in *Wortman* could have held that courts in each sister state, upon being presented with identical facts, would engage in imaginative reconstruction and conclude that the legislatures never intended the prejudgment interest statutes to apply in such circumstances.[53] As farfetched as such a conclusion may seem, unless Sun Oil could prove that imaginative reconstruction would *not* be used, Sun Oil would presumably lose.

For the Supreme Court to review a misconstruction, perhaps the state supreme court must "effectively raise[] its middle finger to a coequal sovereign's law that has been thrust before [its] eyes."[54] Professor Michael Green equates the standard of review in *Wortman* with the plain

sarily conflict. Id. at 834–36 (Stevens, J., concurring in part and dissenting in part); Shutts v. Phillips Petrol. Co., 567 P.2d 1292, 1317–21 (Kan. 1977); Brief for Respondents at 28–31, *Shutts*, 472 U.S. 797 (No. 84-233).

[51] *Shutts*, 472 U.S. at 822.

[52] *Wortman*, 486 U.S. at 744.

[53] For an example of imaginative reconstruction, see *Riggs v. Palmer*, 22 N.E. 188, 189 (N.Y. 1889) (holding that New York's statute of wills did not apply when the beneficiary murdered the testator because, "[i]f such a case had been present to [the legislators'] minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it").

[54] Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 167 n.267 (2009), *cited in* Green, supra note 3, at 1263 n.118.

error standard,[55] which, in criminal cases, permits appellate courts "to recognize a plain error that affects substantial rights, even if the claim of error was not brought to the district court's attention."[56] The standard of review in *Wortman* can also be compared to the standard with which federal courts in habeas proceedings review claims brought by prisoners that were previously adjudicated in state court, pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").[57] AEDPA permits review when the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved unreasonable application of, clearly established federal law."[58] Whatever the precise limits of the Supreme Court's review are, the vast freedom *Wortman* gives state courts to construe sister state law however they wish is clear.

The practical effects of this vast freedom are quite significant. In addition to upsetting the expectation of parties that a particular state's law—*as that state is likely to construe it*—will apply to a transaction, *Wortman* greatly eases the multistate class action plaintiff's burden in achieving class certification. As Professor Green explains, state courts often presume that unsettled sister state law is similar to forum law.[59] When class certification is sought, although the plaintiffs must show that there are questions of law common to the class (a potentially difficult problem if multiple states' laws are at issue) this burden is substantially lessened when forum courts can freely interpret sister state laws to match forum law.[60] Restricting the availability of Supreme Court review

[55] Green, supra note 3, at 1265–66.

[56] United States v. Marcus, 130 S. Ct. 2159, 2164 (2010) (internal quotation marks omitted). Plain error review is authorized by Fed. R. Crim. P. 52(a). The four requirements for plain error review are:

> (1) there is an "error"; (2) the error is "clear or obvious, rather than subject to reasonable dispute"; (3) the error "affected the appellant's substantial rights, which in the ordinary case means" it "affected the outcome of the district court proceedings"; and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Marcus, 130 S. Ct. at 2164 (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)). For an overview of plain error review, see 3B Charles Alan Wright et al., Federal Practice and Procedure: Federal Rules of Criminal Procedure § 856 (3d ed. 2004).

[57] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[58] 28 U.S.C. § 2254(d)(1) (2006). This is not as high a bar as plain error review. See Williams v. Taylor, 529 U.S. 362, 412–13 (2000).

[59] Green, supra note 3, at 1269–70.

[60] Id. at 1272–73.

thus not only can affect the outcome of cases, but can affect whether a case should be heard at all.

II. *WORTMAN*'S WEAK FOUNDATION

As problematic as the outcome in *Wortman* may seem, it was not at odds with the Supreme Court's precedent for reviewing state court misconstructions of sister state law. Cases from the late nineteenth and early twentieth centuries indicated at best that Supreme Court review was available only in exceptional circumstances,[61] and at worst, that no review was available.[62] Whatever the standard was, review was never exercised on any occasion. So despite "the sheer dishonesty of the Kansas holding,"[63] Supreme Court review would have been a departure from precedent.[64] This Part asks, should the *Wortman* Court have been faithful to precedent?

[61] See, e.g., Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96 (1917) ("[S]omething more than an error of construction is necessary in order to entitle a party to [review]."); Louisville & Nashville R.R. Co. v. Melton, 218 U.S. 36, 51–52 (1910); Finney v. Guy, 189 U.S. 335, 340 (1903).

[62] See, e.g., W. Life Indem. Co. v. Rupp, 235 U.S. 261, 275 (1914) ("[W]here, in a state court . . . the controversy turns merely upon [the statute's] interpretation or construction, no question arises under the 'full faith and credit' clause of the Federal Constitution."); Smithsonian Inst. v. St. John, 214 U.S. 19, 29 (1909); Lloyd v. Matthews, 155 U.S. 222, 227 (1894); Glenn v. Garth, 147 U.S. 360, 368–69 (1893).

[63] Laycock, supra note 4, at 258 n.60.

[64] One Supreme Court case from 1936, involving a situation where the Constitution compelled Georgia to apply New York law to a life insurance contract, arguably marked a departure from the Court's precedent on review of misconstructions. There, the Court held that the Georgia Supreme Court misapplied a New York statute that, as construed by New York's high court, required that the contract be voided if the policy applicant made a material misrepresentation in the application. John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 182–83 (1936). This determination was made in spite of the respondent's argument that, according to precedent, "whether the courts of Georgia were correct or not, in their 'conclusions' and 'independent construction of the New York statute' is 'immaterial.'" Brief for Respondent at 12, *Yates*, 299 U.S. 178 (No. 146) (quoting Johnson v. N.Y. Life Ins. Co., 187 U.S. 491, 496 (1903); Banholzer v. N.Y. Life Ins. Co., 178 U.S. 402, 408 (1900)). After *Yates*, one commentator remarked that "[t]he earlier doctrine that a mistaken interpretation of a statute of a sister state does not raise a question under the full faith and credit clause . . . seems to have gone by the boards, though apparently never expressly overruled." Edmund M. Morgan, Choice of Law Governing Proof, 58 Harv. L. Rev. 153, 168 n.31 (1944) (citation omitted). But *Yates* was never again cited for the proposition that the Court's earlier precedent had been overruled, and subsequent commentators and the *Wortman* Court treated the earlier precedent as still applicable. Even Professor Green, who argues that states have a constitutional obligation to interpret sister state law faithfully in all circumstances, not just in

When the Court first held that it had no power to review state supreme court misconstructions of sister state law in 1893, in *Glenn v. Garth*,[65] the legal landscape was significantly different from what it was in 1988, when *Wortman* was decided. Indeed, three key aspects of the law in the late nineteenth century, any one of which would have compelled the conclusion that Supreme Court review was unavailable, have been vastly altered since then. This Part examines those three changes in the law and concludes that the *Wortman* rule is not justified if its sole support is in century-old precedent.[66]

A. The End of Mandatory Supreme Court Review

The first important legal development was the change in the Supreme Court's appellate jurisdiction over state court judgments. From the Constitution's ratification until 1916, a party who alleged denial of a federal right by a state's highest court was entitled to mandatory review by the Supreme Court via a writ of error.[67] This was to guard against "disobedience of national authority by state judiciaries," a concern which was not "ill-founded."[68] Although initially small in number, the cases coming to the Court in this manner significantly increased after the passage of

cases where the Constitution compels application of sister state law, acknowledges that "the Supreme Court had no power of review" in *Wortman*. Green, supra note 3, at 1266 n.130.

[65] 147 U.S. 360, 368–69 (1893). *Garth* partially relied on *Grand Gulf Railroad & Banking Co. v. Marshall*, 53 U.S. 165, 167–68 (1851), but that case did not involve an alleged constitutional violation. Ten years prior to *Garth* the Court first discussed the issue of whether a misconstruction of sister state law violated the Constitution in *Chicago & Afton Railroad Co. v. Wiggins Ferry Co.*, 108 U.S. 18, 22 (1883). That case, however, involved a removal from a state court to a lower federal court, not an appeal directly to the United States Supreme Court. Id. at 19. The lower federal court's decision in *Wiggins* is the earliest case from any court I can find discussing this issue. Wiggins' Ferry Co. v. Chi. & A.R. Co., 11 F. 381, 383–84 (C.C.D. Mo. 1882); see P.H.V., Annotation, Federal Constitution and Conflict of Laws as to Rights Not Based on Judgments, 74 A.L.R. 710 (1931).

[66] Unfortunately, the petitioner in *Wortman* did not question the validity of *Pennsylvania Fire*, 243 U.S. at 96, so the Court was never asked to reconsider its rule. See Brief for the Petitioner at 39, *Wortman*, 486 U.S. 717 (No. 87-352).

[67] See Judiciary Act of 1789, 1 Stat. 73, 85–86 (1789). The original Judiciary Act was substantially amended in 1867, but the writ of error remained. See Act of February 5, 1867, 14 Stat. 385, 386–87 (1867). "A writ of error was limited to matters in the record and, unlike a modern appeal, permitted review only of legal issues." Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 431 (6th ed. 2009) [hereinafter Hart & Wechsler]; see id. at 431–34 for an overview of the shift from mandatory to discretionary jurisdiction.

[68] Felix Frankfurter & James M. Landis, The Business of the Supreme Court 190–91 (1928).

the Fourteenth Amendment (specifically, the Due Process Clause) in 1868, which "put claims of federal right within easy reach of astute counsel in the state courts."[69] *Garth* was decided during this era.

Had the *Garth* Court instead held that a misconstruction of sister state law violated the Constitution, its caseload would have vastly increased. Any party plausibly alleging that a state's highest court misconstrued a sister state law would be entitled to mandatory Supreme Court review. The *Garth* Court suggested that this was one of the justifications for its holding,[70] and at least one subsequent decision reaffirmed this.[71] The Court understandably did not want to be swamped with claimed errors as to questions of state law.

In 1916, however, Congress eliminated this concern by ending the practice of mandatory Supreme Court review for alleged denials of a federal right by a state supreme court.[72] The Judiciary Act of 1916, which was partially enacted in response to the rising number of appeals that the Supreme Court was forced to hear,[73] replaced the writ of error with the writ of certiorari as the means for appealing state court judgments allegedly denying a federal right. Unlike the writ of error, the writ of certiorari offered only discretionary review, giving the Supreme Court control over its docket. The shift was successful. Five years after the Act's passage, the number of cases coming to the Supreme Court from

[69] Id. at 191. The Federal Employer's Liability Act, 45 U.S.C. §§ 51–60 (1908) ("FELA"), exacerbated this problem even further because it forced the Supreme Court frequently to determine "whether a particular employee at a particular moment was acting in his interstate or intrastate capacity." Id. at 206. Such a determination was necessary because the Commerce Clause of the Constitution necessitated that FELA's application "be limited to injuries suffered at the time of employment *in interstate commerce*." Id. (emphasis added).

[70] *Garth*, 147 U.S. at 368–69 ("If every time the courts of a state put a construction upon the statutes of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated.").

[71] See Johnson v. N.Y. Life Ins. Co., 187 U.S. 491, 496 (1903) ("To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another state had been construed to his detriment."); see also Elliott E. Cheatham, Federal Control of Conflict of Laws, 6 Vand. L. Rev. 581, 605–06 (1952) ("The Supreme Court is aware of this threatened burden . . . .").

[72] Act of September 6, 1916, ch. 448, 39 Stat. 726.

[73] Frankfurter & Landis, supra note 68, at 210. Chief Justice Taft explained that "Congress found that counsel were often astute in framing pleadings in state courts to create an unsubstantial issue of Federal constitutional law and so obtain an unwarranted writ of error to the supreme court." Id. at 212 n.115 (quoting 47 A.B.A. Rep. 250–56 (1922)).

state supreme courts via a writ of error (which was still available in other instances) was only approximately forty percent of what it was in 1916.[74] Since 1916, the Supreme Court has generally chosen to review state cases involving denials of a federal right based on whether "the public interest appeared to demand it."[75] As a consequence of the shift from mandatory to discretionary Supreme Court review, the creation of new federal rights, whether by Congress or the Supreme Court, will not inevitably result in an enlargement of the Supreme Court's caseload.

Were the Supreme Court, post-1916, to hold that a misconstruction of sister state law violates the Constitution it would decide which misconstructions to review on a case-by-case basis rather than having to limit the number of cases through *Wortman*'s nearly insurmountable bar. Today, the Court generally reviews only state supreme court decisions that conflict with other state supreme courts or federal circuit courts, those that present "an important federal question" that ought to be resolved by the Court or those that conflict with the Court's decisions.[76] Thus, while a misconstruction arising in an ordinary worker's compensation or life insurance dispute, for example, would probably not merit Supreme Court review, a misconstruction in a multistate class action concerning thousands of parties and millions of dollars, as in *Shutts* and *Wortman*, might be sufficiently important. Rather than being flooded with mandatory appeals, as the Court would have been had *Garth* been decided the other way, today the Court would merely face more petitions for certiorari, from which it could pick and choose cases to review.

Even in the certiorari era, some have continued to justify the Court's refusal to review misconstructions on the same grounds as the Court did in *Garth*.[77] But this justification is no longer tenable. The burden from

[74] Id. at 214 n.121.

[75] Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 294 (1921) (Brandeis, J., dissenting), *quoted in* Frankfurter & Landis, supra note 68, at 212 n.115. Congress in 1925 further constrained mandatory Supreme Court review to cover only "state judgments invalidating a treaty or Act of Congress or upholding a state statute attacked on federal grounds," and in 1988, it eliminated mandatory review entirely for state court judgments. Hart & Wechsler, supra note 67, at 433.

[76] Sup. Ct. R. 10. "The issues must be unsettled and important, a conflict of decisions must exist, or the law on the matter must be such that it warrants further consideration." Eugene Gressman et al., Supreme Court Practice 265 (9th ed. 2007).

[77] James D. Sumner, Jr., The Status of Public Acts in Sister States, 3 UCLA L. Rev. 1, 6–7 (1955) ("Were it made a federal question the Supreme Court would be loaded down with reviews involving the issue.").

an increase in petitions for certiorari is slight compared to the burden from an increased caseload: most petitions never even receive consideration in the conference of Justices.[78] For a petition to be discussed at all, it must be placed on a "special list."[79] And since there are relatively few cases where the Constitution compels the application of sister state law, limiting the availability of review to those cases will be unlikely to impose a substantial burden on the Court.[80]

The elimination of the writ of error has thus removed an important justification that supported the precedent on which *Wortman* relied. When determining whether a misconstruction of sister state law violates the Constitution, one need no longer be as concerned about the impact on the Court's caseload.

B. The Rejection of Treating Foreign Law as an Issue of Fact

The second important legal development is the shift in how issues of foreign law were treated by courts. As noted by Professor Green, until the mid-twentieth century questions of foreign law (including sister state law) were treated as questions of fact, not as questions of law.[81] The party invoking foreign law had to plead its content (not merely that it applied),[82] and bore the burden of producing supporting evidence. For statutes, this consisted of "authenticated copies" of the written laws; for common law, testimony made under oath by knowledgeable witnesses was generally required.[83] This was necessary then, as foreign law materials were often inaccessible to courts; even as late as the 1960s, "extensive foreign-law libraries exist[ed] only in the important commercial and

[78] Hart & Wechsler, supra note 67, at 1463 (describing how the Justices' law clerks screen out petitions that do not merit consideration).

[79] John Paul Stevens, The Life Span of a Judge-Made Rule, 58 N.Y.U. L. Rev. 1, 13 (1983).

[80] See Stanford Note, supra note 3, at 659–60 ("However, this objection is unconvincing when considered in the context of diminishing constitutional restrictions on choice of law. So long as re-examination is confined to those few cases where a forum is required to apply sister state law the possibilities of a surge in case load are limited.").

[81] Green, supra note 3, at 1267; see also id. at 1263 n.116 (recognizing that the precedents on which *Wortman* relied are of "doubtful" validity given this legal development).

[82] Id. at 1267.

[83] Joseph Story, Commentaries on the Conflict of Laws §§ 640–41 (Boston, Hilliard, Gray & Co. 1834). For more on the procedures for proving the content of foreign statutory and common law, see William B. Stern, Foreign Law in the Courts: Judicial Notice and Proof, 45 Calif. L. Rev. 23, 31–39 (1957).

legal centers, so that foreign legal materials [were] not readily available in substantial areas of the nation."[84] Much like factual issues, courts lacked the ability to independently determine the content of foreign law.[85]

This approach to proof of foreign law (including sister state law) had important consequences. First, when foreign law was not sufficiently pleaded and proved, rather than simply dismissing the case, courts would generally presume foreign law to be the same as the forum's law.[86] This was arguably a better solution than dismissal, for it enabled the adjudication of claims that the plaintiff might otherwise be unable to bring.[87] Second, appellate review of questions of foreign law was substantially restricted, much like appellate review of questions of fact.[88] Although some appellate courts exercised plenary review over trial court interpretations of foreign statutes and judicial decisions that were proved at trial, other appellate courts refused to exercise such review.[89] The writ of error used by the Supreme Court "permitted review only of legal issues,"[90] which did not encompass questions of the interpretation of sister state law in appeals under the Full Faith and Credit Clause.[91] Thus, state courts had significant freedom to construe ambiguous sister state law however they wished, and those determinations were often unreviewable.

Although some state courts abandoned the traditional practice early on,[92] the most dramatic shift occurred in 1936, when the Uniform Judicial Notice of Foreign Law Act was adopted by the National Conference

[84] Arthur R. Miller, Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine, 65 Mich. L. Rev. 613, 619 (1967).

[85] Green, supra note 3, at 1267.

[86] See Stern, supra note 83, at 29–31.

[87] Arthur Nussbaum, The Problem of Proving Foreign Law, 50 Yale L.J. 1018, 1039 (1941), *cited in* Stern, supra note 83, at 31.

[88] Stern, supra note 83, at 27–28 (review limited to situations "when the trial court has not made findings on foreign law," when "relevant evidence was prejudicially excluded," when "the evidence on foreign law is not as a matter of law sufficient to support the findings," or when "the finding of the trial court is not supported by substantial evidence").

[89] See Miller, supra note 84, at 623, 624 & n.35.

[90] Hart & Wechsler, supra note 67 (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 409–10 (1821); Wiscart v. D'Auchy, 3. U.S. (3 Dall.) 321, 327–29 (1796) (Elsworth, C.J.)).

[91] Hanley v. Donoghue, 116 U.S. 1, 6 (1885) ("[T]he laws of another state are but facts, requiring to be proved in order to be considered . . . .").

[92] Miller, supra note 84, at 624–25.

of Commissioners on Uniform State Laws.[93] This Act, which was subsequently adopted by most states, provided that courts should take judicial notice of the statutes and common law of all states.[94] This enabled courts to independently examine the content of other states' laws regardless of whether that law was sufficiently pleaded and proved. Around this time, the Supreme Court asserted its ability to independently examine a state high court's interpretation of sister state law, but in the context of enforcing a sister state judgment, not a sister state cause of action.[95] Issues of foreign law could no longer be said to be akin to issues of fact.

When issues of foreign law were treated like issues of fact, *Garth* was a logical consequence: the Supreme Court was no more likely to review a state high court's interpretation of a sister state law any more carefully than it was likely to review an issue of fact. *Garth* and the cases that followed it were brought to the Supreme Court via the writ of error, which "permitted review only of legal issues."[96] Acknowledging that the construction of sister state law was a "matter of fact," the Court necessarily declared this to be "outside of the limits of [its] jurisdiction."[97] But with the shift from the writ of error to the writ of certiorari as the means to review such questions,[98] treating these questions as factual issues no longer precludes Supreme Court review. Furthermore, since courts today are required to take judicial notice of foreign law, issues of foreign law are as reviewable by appellate courts as issues of domestic law, and the Supreme Court itself has exercised review of state court determinations of sister state law in several cases involving a state court's obligation to enforce a sister state judgment under the Full Faith and Credit Clause.[99] With *Garth* no longer logically compelled by the current law, the validity of *Garth* and its progeny should have, at the very least, been reexamined in *Wortman*.

---

[93] 23 A.L.R.2d 1437, 1438 (1952), *cited in* Miller, supra note 84, at 625 n.42.

[94] Id. at 1441.

[95] See infra notes 133–36 and accompanying text.

[96] Hart & Wechsler, supra note 67 (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 409–10 (1821); Wiscart v. D'Auchy, 3. U.S. (3 Dall.) 321, 327–29 (1796) (Elsworth, C.J.)).

[97] W. Life Indem. Co. v. Rupp, 235 U.S. 261, 275 (1914), *cited in* Green, supra note 3, at 1263 n.116; see also Chi. Life Ins. Co. v. Cherry, 244 U.S. 25, 30 (1917) ("[The sister state court] may be mistaken upon what to it is matter of fact, the law of the other State. But a mere mistake of that kind is not a denial of due process of law.").

[98] See supra Section II.A.

[99] See Stanford Note, supra note 3, at 653 & n.1 (citing Johnson v. Muelberger, 340 U.S. 581 (1951); Barber v. Barber, 323 U.S. 77 (1944); Adam v. Saenger, 303 U.S. 59 (1938)).

C. The Emergence of the Constitutional Right to the Application of Sister State Law

The third, and perhaps most important, legal development is the Supreme Court's creation of the constitutional limitations on choice of law. These constraints did not emerge until the twentieth century's second decade, well after *Garth* was decided.[100] Prior to this, choice of law principles were solely a matter of "comity":[101] the Constitution had nothing to say on the subject.

When the Supreme Court began reviewing the constitutionality of choice of law by state courts in the early twentieth century, commentators struggled to make sense of the Court's decisions.[102] By 1925, the Court had invalidated state court choices of law on several occasions, but had yet to articulate precisely what the Constitution requires, or even how the different provisions of the Constitution apply.[103] In several cases arising from the corporation-shareholder and insurer-insured relationships, where the parties were all from the same state, the Court held that the Full Faith and Credit Clause required application of that state's law to the dispute.[104] Around the same time, the Court held in two cases that Missouri's application of its own nonforfeiture statute to insurance contracts made in New York violated the insurer's "liberty of contract," then guaranteed by the Due Process Clause.[105] The Court also held that a state statute that imposed liability for failure to deliver a telegram could not be applied when the place of delivery was Washington, D.C., a "ter-

[100] Notably, the Supreme Court first suggested that the Full Faith and Credit Clause constrained choice of law in 1887 in *Chicago & Alton Railroad Co. v. Wiggins Ferry Co.*, 119 U.S. 615, 622 (1887). This statement was made in dicta, however.

[101] Story, supra note 83, § 38.

[102] See, e.g., E. Merrick Dodd, Jr., The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws, 39 Harv. L. Rev. 533, 556 (1926) ("Looking at the cases as a whole, it certainly cannot be said there are as yet any settled and sharply defined doctrines as to the relation between constitutional law and conflicts.").

[103] See id. at 556–57 ("[T]he precise bearing of each of the possibly applicable constitutional clauses on the problem [is a question] to which the Court has as yet given no very intelligible answer.").

[104] See Robert H. Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 13–14 (1945) (citing Modern Woodmen of Am. v. Mixer, 267 U.S. 544 (1924); Royal Arcanum v. Green, 237 U.S. 531 (1915); Converse v. Hamilton, 224 U.S. 243 (1912)).

[105] N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357, 377 (1918); N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914).

ritory where the United States has exclusive control."[106] One commentator in 1916 noted that the Court "opens the way for a possible further broadening of the scope of the 'full faith and credit' clause to apply to all statutes."[107] But much uncertainty remained.

This uncertainty was exacerbated in 1916 by *Kryger v. Wilson*,[108] where the Court declined to review a North Dakota court's allegedly erroneous decision to apply North Dakota law to a contract made in Minnesota for the purchase of land in North Dakota.[109] Rejecting the plaintiff's argument that the North Dakota decision violated the Due Process Clause, the Court stated:

> The most that the plaintiff in error can say is that the state court made a mistaken application of doctrines of the conflict of laws in deciding that the cancellation of a land contract is governed by the law of the *situs* instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned.[110]

In attempting to explain the decision, some commentators suggested that if the plaintiff had argued under the Full Faith and Credit Clause instead of the Due Process Clause, a federal question would have been presented.[111] Others later suggested that if a forum's law has some "connection with the operative facts" of the case, as it did in *Kryger*, the forum may be free to "disregard all foreign law and apply its own."[112]

---

[106] W. Union Tel. Co. v. Brown, 234 U.S. 542, 547 (1914). Professor Merrick Dodd interpreted this decision as holding that "the failure to apply [the law of the District of Columbia] violated the constitutional provision giving the Federal Government exclusive control of the District of Columbia." Dodd, supra note 102, at 555. But Justice Jackson wrote that the case did not make clear whether it was based on "an erroneous conflict of laws decision or on conflict with the federal commerce power." Jackson, supra note 104, at 14.

[107] Comment, Conflict of Laws and Full Faith and Credit, 25 Yale L.J. 324, 328 (1916). Twelve years later, however, another commentator cautioned that "it would at the present time be unsafe and unsound to generalize the dicta in these decisions into a theory of unlimited federal competence in the field of the conflict of laws." Hessel E. Yntema, The Hornbook Method and the Conflict of Laws, 37 Yale L.J. 468, 482 (1928).

[108] 242 U.S. 171 (1916).

[109] Id. at 176.

[110] Id.

[111] See Comment, Comment on Recent Cases, 13 Ill. L. Rev. 43, 54 (1918); Comment, The Due Process and Full Faith and Credit Clauses as Applied to the Conflict of Laws, 26 Yale L.J. 405, 410–11 (1917).

[112] G. W. C. Ross, Has the Conflict of Laws Become a Branch of Constitutional Law?, 15 Minn. L. Rev. 161, 180 (1931); see also Russell J. Weintraub, Due Process and Full Faith

Nevertheless, *Kryger* clearly went against the Court's "trend . . . of making use of constitutional limitations" in the choice of law realm.[113] A clearer picture of the relationship between the Constitution and choice of law would not emerge until many years later.

It was not until the 1930s that the Due Process and Full Faith and Credit Clauses of the Constitution were both understood as constraining state choice of law. Unlike the modern doctrine, however, the two Clauses' constraints were separate and distinct. The Due Process Clause protected parties from impairment of their rights by the laws of jurisdictions they had no connection with,[114] and the Full Faith and Credit Clause prevented states from impairing the effectiveness of the laws of sister states by declining to apply them.[115] *Bradford Electric Co. v. Clapper* was viewed as a significant development for two reasons: first, it extended the Full Faith and Credit Clause to cover relationships beyond those of the corporate-shareholder and insurer-insured, and second, it required application of one state's law even though two states arguably had "substantial interests" in being able to apply their own law.[116] But subsequent cases gave states greater freedom to apply their own worker's compensation laws when they had an interest in the case.[117]

and Credit Limitations on a State's Choice of Law, 44 Iowa L. Rev. 449, 457 (1959) ("North Carolina as situs had a sufficient contact with the facts to keep its use of North Carolina law within the bounds of reason.").

[113] Dodd, supra note 102.

[114] See Home Ins. Co. v. Dick, 281 U.S. 397, 407–08 (1930) (holding that Texas's application of its own law to an insurance contract made in Mexico between a Mexican insurance company and the plaintiff, then a Mexican resident (who had subsequently moved to Texas), violated the Due Process Clause). Use of the Due Process Clause was necessary, since the Full Faith and Credit Clause does not apply to the laws of other nations. Indeed, the plaintiff unsuccessfully argued that because the Full Faith and Credit Clause did not apply, the Texas court's choice of law was constitutionally permissible. Id. at 410–11. This case erased any uncertainty stemming from *Kryger*; a state's choice of law could indeed present a federal question even when the Full Faith and Credit Clause was not invoked. See Ross, supra note 112, at 178; see also Comment, Constitutional Restraints on State Freedom of Action in Conflict of Laws Cases, 40 Yale L.J. 291, 291 (1930).

[115] Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 159–62 (1932). Notably, Justice Brandeis, who wrote in *Kryger* that a state court's erroneous choice of law was a "matter with which this court is not concerned," supra note 110 and accompanying text, authored the Court's opinion in *Clapper*.

[116] Note, *Bradford Electric Light Co. v. Clapper*: Full Faith and Credit and the Workmen's Compensation Statutes, 46 Harv. L. Rev. 291, 295 & n.20, 296 (1932).

[117] See Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n of Cal., 306 U.S. 493, 504 (1939); Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal., 294 U.S. 532, 550 (1935).

Although the method for weighing state interests was still unclear,[118] the Constitution at this point clearly could require application of sister state law in a variety of circumstances, and the interests of both the forum and the sister state were relevant considerations. The constitutional limitations continued to evolve, most notably in *Allstate* when the Court declared that the inquiries under the Due Process and Full Faith and Credit Clauses are the same. *Wortman* was decided in this regime.

Unlike *Garth* and the other cases on which *Wortman* relied, *Wortman* involved a situation where the party alleging a misconstruction of sister state law had a constitutional right to the application of that law. The Constitution, not merely "comity," compelled Kansas to apply Texas, Oklahoma, and Louisiana law. A misconstruction of those sister states' laws would undermine a constitutional right, a concern not present when *Garth* was decided. With *Garth* stripped of its justifications by subsequent legal developments, especially the emergence of constitutional limitations on choice of law, the *Wortman* Court should not have so readily relied on century-old precedent. Instead, it should have freshly determined what standard of review would be necessary to protect the constitutional rights of litigants. That is what the next Part seeks to do.

III. THE PROPER STANDARD OF REVIEW

State high court interpretations of state law are not immune from reexamination by the United States Supreme Court. Whether the state high court interprets its own state's law or the law of a sister state, the Court has made clear that interpretations that infringe upon constitutional rights can be reviewed. For example, in a recent case, the Supreme Court suggested that if a state high court reaches a new interpretation of state property law that "eliminates an 'established property right,'"[119] this can implicate the Fifth Amendment's Takings Clause[120] or the Fourteenth Amendment's Due Process Clause, and the Court can review the state high court's interpretation of its own state's property law.[121] Re-

[118] See Jackson, supra note 104, at 16 ("Nowhere has the Court attempted . . . to define standards by which 'superior state interests' in the subject matter of conflicting statutes are to be weighed.").

[119] Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2613 (2010) (Kennedy, J., concurring in part and concurring in judgment).

[120] U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[121] See infra notes 157–63 and accompanying text.

view of state court interpretations of state law is generally deferential: according to the Court, the state court decision only requires "fair support."[122] But *Wortman* makes misconstructions of sister state law that effectively impair a party's constitutional right to application of that sister state law much more difficult to review.[123] The constitutional right to the application of sister state law stands out as an anomaly: state high courts are free to misconstrue sister state laws in ways that violate this right, unlike other rights guaranteed by the Constitution.

This Part provides an overview of the Court's standards for reviewing state high court misconstructions of state law, and of the various constitutional rights that are protected from misconstructions. It then concludes that, consistent with the cases outlining these standards, misconstructions of sister state law that violate a party's constitutional right to the application of sister state law should also be reviewable in a similar manner.

A. Supreme Court Review of State Court Determinations of State Law in Other Contexts

The Supreme Court's power to review the accuracy of state high court determinations of state law has been established for almost as long as the Constitution itself. The early case of *Fairfax's Devisee v. Hunter's Lessee*[124] concerned the Treaty of Paris of 1783, which ended the Revolutionary War and, among other things, barred "future confiscations" of Loyalists' property by the United States.[125] Two years prior to the Treaty, Lord Fairfax died, and title to his Virginia estate passed to his nephew Martin. Hunter, however, claimed title to the estate by virtue of a grant from the Commonwealth of Virginia, which he alleged had confiscated the estate before the Treaty. The outcome thus depended not only on the Treaty, but also on the question of when Virginia had confiscated the estate—a question of state law. The Virginia Court of Appeals held

[122] See, e.g., Broad River Power Co. v. South Carolina ex rel. Daniel, 281 U.S. 537, 540 (1930). The precise contours of this standard are unclear, as this Part will demonstrate.

[123] See supra notes 48–58 and accompanying text.

[124] 11 U.S. (7 Cranch) 603 (1812). The litigation in this case led to the famous decision in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), where the Supreme Court affirmed its power to review state court determinations of *federal* issues, see id. at 351 ("[T]he appellate power of the United States does extend to cases pending in the state courts . . . .).

[125] Herbert Wechsler, The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review, 34 Wash. & Lee L. Rev. 1043, 1051 (1977).

that Virginia had acquired the land prior to the Treaty, and consequently ruled in favor of Hunter.[126] The United States Supreme Court reversed, implicitly holding that it could independently review the Virginia court's determination of title.[127] Such review is necessary "if the federal right is to be protected against evasion and discrimination."[128]

Even though the Supreme Court *can* review state court determinations of state law, the situations in which it will do so are limited. *Murdock v. City of Memphis*[129] marked the beginning of the Court's path to its present doctrine that it "will not review judgments of state courts that rest on adequate and independent state grounds."[130] That is, if an issue of state law that is separate from any federal questions determines the state court's judgment regardless of how the federal questions are resolved, the state court judgment will not be disturbed as long as the state grounds are "adequate." This is where Supreme Court review of state court determinations of state law enters into play: determining whether or not a state ground is "adequate" requires the Court "to engage in some review of the correctness of the state court's decision of state law issues . . . to ensure that federal rights are not undercut by serious misapplications of state law."[131] This is what the Court did in *Fairfax's Devisee*, and has done in a variety of contexts since then.

1. The Full Faith and Credit Clause

Although state courts can circumvent the Full Faith and Credit Clause's obligation to apply sister state law by misconstruing that law, they cannot so easily circumvent the Clause's obligation to enforce sister state judgments. On several occasions, the Supreme Court has reviewed

[126] Hunter v. Fairfax's Devisee, 15 Va. (1 Munf.) 218, 231–32 (1809).

[127] *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 632 (Johnson, J., concurring in part, dissenting in part and dissenting in the judgment) ("[S]uch an enquiry must, in the nature of things, precede the consideration how far the law, treaty, and soforth [sic], is applicable to it."). Interestingly, the majority opinions in both this case and in *Martin v. Hunter's Lessee* were authored by Justice Story, not Chief Justice Marshall, who typically authored the Court's opinions, because Marshall and his brother were part of a syndicate that had been assigned Martin's property interest. Wechsler, supra note 125.

[128] Hart & Wechsler, supra note 67, at 458.

[129] 87 U.S. (20 Wall.) 590 (1875).

[130] Michigan v. Long, 463 U.S. 1032, 1041–42 (1983). This operates as a limitation on the Court's appellate jurisdiction, id. (citing Herb v. Pitcairn, 324 U.S. 117, 125 (1945)), and is done out of "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions," id. at 1040.

[131] Hart & Wechsler, supra note 67, at 463.

state court misconstructions of sister state judgments, on the grounds that a misconstruction of this sort violates a party's right to have full faith and credit given to a sister state proceeding.[132] *Adam v. Saenger*[133] is particularly instructive. There, the Court reversed a Texas court's erroneous determination that a California court's judgment, as a matter of California law, was invalid due to improper service of process.[134] Although the Court stated it would give "deference" to the Texas court's interpretation of California law, it would not, "if the laws and Constitution of the United States are to be observed, accept as final the decision of the state tribunal as to matters alleged to give rise to the asserted federal right."[135] The Court recognized that since the constitutional right to have full faith and credit given to a sister state judgment turned on the interpretation of the sister state's law, it must have the power to review interpretations of that law.[136]

2. The Due Process Clause

The Fourteenth Amendment's Due Process Clause can forbid state courts to "dramatically and unpredictably" alter state law in a manner that burdens constitutional rights.[137] One prominent example is in *NAACP v. Alabama ex rel. Patterson*.[138] In that case, after the NAACP was held in contempt of court for refusing an order by the State of Alabama to produce the names and addresses of all its members, the Alabama Supreme Court refused to review the contempt judgment on procedural grounds—specifically, by holding that only mandamus review, not certiorari review, was available.[139] Alabama's argument that the Alabama Supreme Court's denial of review was an independent state ground precluding review by the United States Supreme Court was rejected; the Court held that review was not precluded "because petitioner

[132] See Stanford Note, supra note 3, at 653 & n.1 (citing Johnson v. Muelberger, 340 U.S. 581 (1951); Barber v. Barber, 323 U.S. 77 (1944); Adam v. Saenger, 303 U.S. 59 (1938)).

[133] 303 U.S. 59 (1938).

[134] Id. at 67.

[135] Id. at 64.

[136] Id.

[137] E. Brantley Webb, Note, How to Review State Court Determinations of State Law Antecedent to Federal Rights, 120 Yale L.J. 1192, 1244 (2011); see also Henry P. Monaghan, Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases, 103 Colum. L. Rev. 1919, 1984–85 (2003).

[138] 357 U.S. 449 (1958).

[139] Id. at 451–54.

could not fairly be deemed to have been apprised of [the procedural rule's] existence."[140] Were Alabama courts permitted to invent new procedural rules to bar the NAACP's appeal, the NAACP would have a much tougher time bringing its constitutional claims to the Supreme Court.

Six years after *Patterson*, the Court held in *Bouie v. City of Columbia* that South Carolina could not convict participants in a "sit-in" through an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language."[141] There, the South Carolina Supreme Court had adopted an unsupported construction of its state's trespass statute,[142] giving the sit-in participants "no warning whatever" that their conduct was criminal at the time they committed it.[143] Reaching this conclusion required the Court to examine carefully whether the South Carolina Supreme Court's decision was justified in light of South Carolina law.[144]

Chief Justice Rehnquist suggested that *Patterson* and *Bouie* can be read for the general proposition that when a state court "impermissibly broaden[s] the scope of [a] statute beyond what a fair reading provided," due process is violated.[145] But others have urged that those cases, as well as *Fairfax's Devisee*, can be distinguished based on special "historical contexts."[146] Whatever their reach, the cases illustrate the Court's willingness to exercise "independent judgment" over state court determinations of state law in some circumstances.[147]

3. The Contract Clause

The Contract Clause, which prohibits states from passing laws that "impair[] the Obligation of Contracts,"[148] has also been the basis for Su-

[140] Id. at 457. "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." Id. at 457–58.

[141] 378 U.S. 347, 352 (1964).

[142] Id. at 350 (explaining that the South Carolina Supreme Court "construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave"). This construction "ha[d] not the slightest support in prior South Carolina decisions." Id. at 356.

[143] Id. at 355.

[144] Id. at 356–57.

[145] Bush v. Gore, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring).

[146] Id. at 139–40 (Ginsburg, J., dissenting).

[147] Monaghan, supra note 137, at 1984–86.

[148] U.S. Const. art. I, § 10, cl. 1.

preme Court review of state court determinations of state law. If a state statute is challenged as unconstitutionally impairing a contract, and a state high court on review determines, contrary to the state's established contract law, that no contract existed (and thus, that there was no contract to impair), review can be sought in the Supreme Court. *Indiana ex rel. Anderson v. Brand*[149] is a textbook example.[150] There, the Court held that the Indiana Supreme Court's determination that a teacher lacked an employment contract, which defeated the teacher's claim that an Indiana statute unconstitutionally impaired her contract, was an erroneous interpretation of state contract law.[151] The Court stated that, although it would give "respectful consideration and great weight to the views" of the Indiana Supreme Court, it was "bound to decide for [itself] whether a contract was made" through "an appraisal of the statutes of [Indiana] and the decisions of its courts" to ensure that the Contract Clause "may not become a dead letter."[152] This is the same concern that motivated the Court in the Full Faith and Credit and Due Process Clause cases discussed above: an independent examination of state law is necessary to vindicate the constitutional right.

The Court's standard for reviewing state court determinations of state law in the Contract Clause context is unclear.[153] Just one year before *Brand*, for instance, the Court declared that "it would accept the state court's judgment as to 'the effect and meaning of the contract as well as its existence . . . . unless manifestly wrong.'"[154] *Brand*, however, "undertook a very extensive analysis of the Indiana statutes and case law, precisely the kind of analysis that one would expect to find, not in the Court's reports, but in the Indiana law reports."[155] The Court's latest statement on this issue does not resolve this uncertainty.[156] But one thing

[149] 303 U.S. 95 (1938).

[150] See, e.g., Hart & Wechsler, supra note 67, at 480 (reprinting *Brand*, 303 U.S. 95).

[151] *Brand*, 303 U.S. at 105.

[152] Id. at 100.

[153] See Webb, supra note 137, at 1217–19.

[154] Hart & Wechsler, supra note 67, at 486 (quoting Hale v. Iowa State Bd., 302 U.S. 95, 101 (1937)).

[155] Monaghan, supra note 137, at 1979.

[156] See Gen. Motors Corp. v. Romein, 503 U.S. 181, 187 (1992) (repeating that the Court would "'accord respectful consideration and great weight'" to the state court, but that it ultimately had a "'duty to exercise [its] own judgment'" (quoting *Brand*, 303 U.S. at 100; Appleby v. City of N.Y., 271 U.S. 364, 380 (1926))); Hart & Wechsler, supra note 67, at 486.

is certain: some review of state court determinations of state law is available in this area.

4. The Takings Clause

The same cannot be said in the context of the Takings Clause: whether the Takings Clause prohibits state courts from reinterpreting state property law in such a way as to amount to a "taking" has not been definitively resolved. The Supreme Court's first suggestion of this came in 1967, when Justice Stewart, in concurrence, argued that if a state court reinterprets state law to transform private property into public property, in a manner that the state government could not do without providing just compensation, this too was a taking.[157] Since then, there has been considerable academic discussion of "judicial takings."[158]

This issue was recently brought into the spotlight in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*,[159] when a plurality of four Justices of the Court accepted the idea of judicial takings.[160] Two other Justices, concurring in the judgment, argued that such protection from judicial takings ought to be found in the Due Process Clause, not in the Takings Clause.[161] But these two Justices, along with the remaining three, declined to take a definitive position, as it was unnecessary to the resolution of the case since the Justices were in agreement that no taking occurred.[162] *Stop the Beach* has been criticized for rejecting the "fair support" rule used for reviewing state court determinations of state law, and instead engaging in too close of an examination of state law.[163] Since six Justices endorsed the idea that judicial decisions that eliminate property rights *can* raise constitutional problems, it

[157] Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring); see Webb, supra note 137, at 1226 & n.153.

[158] The first comprehensive treatment of this topic was in 1990. Barton H. Thompson, Jr., Judicial Takings, 76 Va. L. Rev. 1449 (1990); see Webb, supra note 137, at 1195 n.10 (collecting articles).

[159] 130 S. Ct. 2592 (2010).

[160] See id. at 2601–02 (plurality opinion) (stating that if "a court declares that what was once an established right of private property no longer exists, it has taken that property" (emphasis omitted)).

[161] Id. at 2614 (Kennedy and Sotomayor, JJ., concurring in part) ("If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law.").

[162] Id. at 2617–18; id. at 2618–19 (Breyer, J., concurring in part).

[163] See Webb, supra note 137, at 1197.

can be assumed that Supreme Court review of state court decisions on state property law is permissible in some circumstances. But whether this will occur under the Takings Clause or the Due Process Clause, and what standard of review the Court will employ, remains to be seen.

5. Article II

The famous and controversial case of *Bush v. Gore*,[164] which ended Florida's court-ordered vote recounts and effectively resulted in George W. Bush being declared the winner of the 2000 presidential election, included a noteworthy discussion of the standard for reviewing state court determinations of state law. In a concurring opinion, Chief Justice Rehnquist (joined by Justices Scalia and Thomas) argued that the Florida Supreme Court's interpretation of Florida election law "significantly departed from [Florida's] statutory framework," thereby violating Article II of the Constitution.[165] "[T]he Constitution require[d] [the] Court to undertake an independent, if still deferential, analysis of state law," the concurrence stated.[166] The dissenting Justices vigorously contested this argument.[167] In particular, Justice Ginsburg argued that because the Florida Supreme Court's interpretation was "reasoned," it was entitled to deference.[168] The issue was not dispositive (neither side had a majority of votes), but it received significant attention from commentators.[169]

[164] 531 U.S. 98 (2000) (per curiam).

[165] Id. at 122 (Rehnquist, C.J., concurring). Specifically, the concurrence alleged Clause 2 of Section 1 of Article II was violated, which provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." U.S. Const. art. I, § 1, cl. 2. Notably, Justice Scalia, who joined this concurrence and who authored the plurality opinion in *Stop the Beach*, also authored the Court's opinion in *Wortman*.

[166] *Gore*, 531 U.S. at 114 (Rehnquist, C.J., concurring).

[167] Id. at 131–33 (Souter, J., dissenting); id. at 136–41 (Ginsburg, J., dissenting).

[168] Id. at 136 (Ginsburg, J., dissenting); see id. at 139–40 (distinguishing *Fairfax's Devisee*, *Patterson*, and *Bouie* based on the "embedded . . . historical contexts hardly comparable to the situation here").

[169] See, e.g., Laura S. Fitzgerald, Suspecting the States: Supreme Court Review of State-Court State-Law Judgments, 101 Mich. L. Rev. 80, 146–51 (2002); John Harrison, Federal Appellate Jurisdiction Over Questions of State Law in State Courts, 7 Green Bag 2d 353 (2004); Harold J. Krent, Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in *Bush v. Gore*, 29 Fla. St. U. L. Rev. 493 (2001); Monaghan, supra note 137; Ronald D. Rotunda, Yet Another Article on *Bush v. Gore*, 64 Ohio St. L.J. 283, 307–14 (2003); Michael E. Solimine, Supreme Court Monitoring of State Courts in the Twenty-First Century, 35 Ind. L. Rev. 335, 336 (2002); Laurens Walker, The Stay Seen Around the World: The Order that Stopped the Vote Recounting in *Bush v. Gore*, 18 J.L. &

Unsurprisingly, there is little agreement on what the Court's standard of review in these types of cases is, or on what it ought to be. Professor Henry Monaghan has argued that the Court ought to exercise "independent judgment" when reviewing state court determinations of state law that involve constitutional rights, and explains that this is in fact the standard often employed by the Court.[170] But the Court's standard of review has been characterized more narrowly: the Court will perhaps exercise review "[o]nly where it suspects state courts of evading federal law or deliberately impeding federal claims."[171] Professor Laura Fitzgerald has advocated for a "proven mistrust" rule: the Court should exercise review "only where it can identify and substantiate some concrete indication that the state court has deliberately manipulated state law to thwart federal law and then evade Supreme Court review."[172] Rather than enter this extensive debate, this Note will simply apply what can be inferred from the above decisions to the subject of misconstructions of sister state law when the Constitution compels that law's application.

B. The Review Necessary to Effectuate the Constitution's Limitations on Choice of Law

Unlike the constitutional rights examined in the previous Section, the right to the application of a particular state's law, guaranteed by the Due Process and Full Faith and Credit Clauses, does not receive similar protection from misconstructions by state courts. *Wortman*'s rule that misconstructions will not be reviewed unless they are contrary to sister state law "that is clearly established and that has been brought to the court's attention,"[173] as it was applied to the facts of the case to bar review of novel interpretations of sister state law that were without precedential support, distinguishes this constitutional right from the others. Comparing this right with the other constitutional rights that receive greater protection suggests no reason for such a distinction.

The Court's cases on the review of misconstructions of sister state law in the context of giving full faith and credit to sister state judgments

Pol. 823 (2002); Michael Wells, Were There Adequate State Grounds in *Bush v. Gore*?, 18 Const. Comment. 403, 405 (2001); Webb, supra note 137, at 1202 n.35.

[170] Monaghan, supra note 137, at 1927.

[171] Webb, supra note 137, at 1208.

[172] Fitzgerald, supra note 169, at 89.

[173] *Wortman*, 486 U.S. at 730–31.

are most instructive.[174] Little can distinguish the constitutional obligation to enforce sister state judgments from the constitutional obligation to apply sister state law. The former has been much longer established in the Constitution,[175] but this should not affect the protection it receives via Supreme Court review. The refusal to review misconstruction in causes of action (when the Constitution compels application of sister state law), but not in the enforcement of judgments, has been justified out of concern for the Court's caseload,[176] but in addition to this concern being unwarranted,[177] it does not seem compelling enough to permit misconstructions of sister state law that effectively deny the constitutional right to application of that law, as in *Wortman*. The Full Faith and Credit Clause treats laws and judgments as "grammatical equivalents," suggesting that the constitutional rights to the application of sister state law and the enforcement of sister state judgments should not receive such drastically different treatment.[178] There was some indication that the Court accepted this rationale, as evidenced by *McKenzie v. Irving Trust Co.*,[179] where, in dicta, the Court declared that if a state court was required by federal choice of law rules to apply sister state law, the Supreme Court "would be under the duty of making an independent investigation of the [sister state] law."[180] In reaching this conclusion, the Court relied in part on *Adam v. Saenger*.[181] But when the time came to directly confront this issue, in *Wortman*, the Court relied on the century-old precedent refusing to review misconstructions of sister state law, and

[174] See Johnson v. Muelberger, 340 U.S. 581 (1951); Barber v. Barber, 323 U.S. 77 (1944); Adam v. Saenger, 303 U.S. 59 (1938).

[175] See Mills v. Duryee, 11 U.S. (7 Cranch) 481, 484 (1813) (holding that the Full Faith and Credit Clause requires state courts to give sister state judgments the same effect as the judgment-rendering state would give); see also Jackson, supra note 104, at 7 (noting that Francis Scott Key, "in his almost forgotten role of advocate," unsuccessfully argued in *Duryee* that the Full Faith and Credit Clause only requires sister state judgments to be admitted as evidence"). The constitutional obligation to apply sister state law, by contrast, has existed for only about one hundred years. See supra Section II.C.

[176] See Cheatham, supra note 71, at 604–06.

[177] See supra notes 77–80 and accompanying text; see also Stanford Note, supra note 3, at 659–60.

[178] Stanford Note, supra note 3, at 658.

[179] 323 U.S. 365 (1945).

[180] Id. at 371 n.2, *cited in* Stanford Note, supra note 3, at 662.

[181] Id. (citing Barber v. Barber, 323 U.S. 77, 81 (1944); Adam v. Saenger, 303 U.S. 59, 64 (1938)).

not on the more recent cases that permitted review in the context of judgment enforcement.[182]

In addition to the judgment enforcement cases, the Due Process Clause, Contract Clause, and Takings Clause cases lend considerable support to the argument that the *Wortman* Court was too deferential.[183] The rights at issue in these cases were threatened by unforeseen judicial interpretations of state law.[184] That is precisely the manner in which misconstructions threaten the right to the application of sister state law, guaranteed by the Due Process and Full Faith and Credit Clauses.

The Due Process Clause protects parties from being subject to law that they "could not reasonably have anticipated" would apply to them.[185] But a misconstruction of sister state law has the same effect as an unanticipated application of forum law: it "frustrates the justifiable expectations of the parties."[186] Thus, when a state court that is constitutionally required to apply sister state law misconstrues that law to match its own law, it evades the Constitution's protections.

Perhaps the argument can be made that since a construction that does not contradict "clearly established" law would be permissible by a court in the sister state whose law is being applied, courts outside that state ought to be able to reach a similar determination. For example, since a Texas state court *could* have permissibly construed Texas law to provide the higher FPC interest rates in the *Wortman* litigation, the Kansas court was justified in reaching the same construction of Texas law. But this ignores critical differences between a state court that adopts a "novel or strange" legal theory[187] in the interpretation of its own state's law and a state court that adopts such a theory in the interpretation of sister state's law. A state judge has unmatched expertise in his or her state's own law,

[182] This could likely be because the petitioner in *Wortman* did not even mention the cases that permitted review in the context of judgment enforcement. Brief for Petitioner, *Wortman*, 486 U.S. 717 (No. 87-352). One wonders how the Court would have distinguished the two lines of cases had it been forced to do so.

[183] See Laycock, supra note 4, at 258 ("[T]his interpretation of sister-state law cried out for serious review under the Court's sensible rule from other contexts: an evasive or insubstantial ground of decision that avoids a federal right is not an adequate and independent state ground immune from Supreme Court review.").

[184] See supra notes 32–37 and accompanying text.

[185] Allstate Ins. Co. v. Hague, 449 U.S. 302, 327 (1981) (Stevens, J., concurring in the judgment).

[186] Id.

[187] *Wortman*, 486 U.S. at 749 (O'Connor, J., concurring in part and dissenting in part).

faces no pressure to construe it to match another state's law, and is answerable to the state's political forces for "novel or strange" interpretations, which presumably encourages caution before deviating from expected interpretations. By contrast, a state judge interpreting sister state law lacks the same expertise in that law, may likely be motivated to construe it to match his or her own state's law,[188] and will face no political repercussions for a novel or strange interpretation of that law. Thus, although novel or strange interpretations of state law can be expected on occasion, the opportunity to contest those interpretations before judges who face pressure to conform to that state's law, and not to another state's law, is part of that expectation. When state courts are given free rein to adopt novel or strange constructions of sister state law (that they are constitutionally required to apply) that have never been adopted in *any* jurisdiction,[189] and they exercise that power, they violate the parties' expectations.

Supreme Court review should be available in such circumstances. Recall that the Kansas Supreme Court reached its conclusion that Texas, Oklahoma, and Louisiana law was no different than Kansas law only after being reversed for applying Kansas law to every claim before it, and that the reversal was predicated on the United States Supreme Court's belief that application of each of those laws would likely result in a lower rate of interest.[190] The Kansas Supreme Court's subsequent disagreement with respect to each state's law, made without citation to favorable precedent,[191] certainly can be said to lack the "fair support"[192] necessary when other constitutional rights are at stake. This should have sufficed to cause the United States Supreme Court to question the Kansas Supreme Court's constructions, and to then make its own determination on the proper construction of those laws. A state high court's interpretation of state law that "has not the slightest support in prior [state] decisions"[193] can trigger Supreme Court review when other constitutional

[188] See Green, supra note 3, at 1269 (discussing the presumption of similarity to forum law frequently employed by state courts interpreting sister state law).

[189] *Wortman*, 486 U.S. at 746 (O'Connor, J., concurring in part and dissenting in part) (explaining that the Kansas court produced "no case from *any* jurisdiction adopting [its] theory").

[190] Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 831 (Stevens, J., concurring in part and dissenting in part).

[191] *Wortman*, 486 U.S. at 746 (O'Connor, J., concurring in part and dissenting in part).

[192] Broad Power Co. v. South Carolina ex rel. Daniel, 281 U.S. 537, 540 (1930).

[193] *Bouie*, 378 U.S. at 356.

rights are at stake. When such an interpretation threatens the constitutional right to the application of sister state law, Supreme Court review should be similarly triggered. Demanding more than a lack of "fair support" to find a contradiction of "clearly established" sister state law, as the *Wortman* Court did, leaves the constitutional right to the application of certain state law comparatively and unjustifiably vulnerable to evasion by state courts.

CONCLUSION

The constitutional limitations on choice of law, although minimal, are still deserving of protection from state court misconstructions of sister state law. *Wortman* enabled the Kansas Supreme Court to dodge the constitutional limitations through novel and unsupported interpretations of sister states' laws that would likely have triggered review by the United States Supreme Court were a different constitutional right at stake. If the party asserting a violation of a constitutional right by a state court's novel and unsupported theory of state law must prove that the specific theory was already considered and rejected in that state to show the necessary contradiction of "clearly established" law, the Constitution offers little protection, as there are an uncountable number of novel legal theories state courts could use to unpredictably alter the law. That is why, when most constitutional rights are at stake, the Supreme Court requires only that the state court's construction lacked "fair support" to merit review. That should be the rule when a violation of the constitutional right to the application of a specific state's law is alleged.

A compelling argument can be made that state courts should be obligated to faithfully interpret sister state law in all instances when they apply sister state law, not just when the Constitution requires the application.[194] Although this may logically follow from *Erie Railroad Co. v. Tompkins*,[195] it lacks the strong constitutional grounding present when only constitutionally required applications of sister state law are at issue.[196] Furthermore, if the obligation stems only from *Erie*, the standard

[194] Green, supra note 3, at 1238–39.

[195] 304 U.S. 64 (1938).

[196] Professor Green recognizes that even if his main argument that state courts should be obligated to faithfully interpret sister state law in all circumstances is wrong, that obligation should still apply to instances when the Constitution requires the application of sister state law. Green, supra note 3, at 1291.

of review in *Wortman* can be justified on the basis that the Supreme Court's standard of review of alleged *Erie* violations is similarly minimal.[197] But when the obligation stems from the constitutional right to the application of sister state law, a much higher standard of review for misconstructions is justified.

As a result of the minimal constitutional limitations on choice of law, cases involving a deprivation of such a constitutional right by a misconstruction of sister state law will be uncommon. And whether or not one will ever reach the Supreme Court again is uncertain. But should the Supreme Court get the chance to reexamine this issue, it ought to disregard *Wortman*'s precedential foundation as outdated in light of subsequent legal developments, and instead conclude that the constitutional right to the application of sister state law merits the same protection that other constitutional rights receive.

[197] Id. at 1265. Indeed, Professor Green states that "[b]ecause the Kansas state court apparently tried to predict how sister state supreme courts would have decided and its predictions probably were not plain error, the Supreme Court [in *Wortman*] had no power of review." Id. at 1266 n.130.