NOTE

DE FACTO SUPREMACY: SUPREME COURT CONTROL OF STATE COMMERCIAL LAW

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INTRODUCTION

THE standard civil procedure lesson on choice of law in federal courts begins with *Erie Railroad Co. v. Tompkins*, where Justice Brandeis famously declared "federal general common law" unconstitutional.[1] *Erie* ended the ninety-six year reign of *Swift v. Tyson*, which had held that federal courts could ignore state decisional law in cases of "general commercial law."[2] For Justice Brandeis, *Swift* relied on the "fallacy" that the "federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts 'the parties are entitled to an independent judgment on matters of general law.'"[3] Justice Holmes, on whom Justice Brandeis relied, wrote that

> [t]he common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but

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[1] 304 U.S. 64, 78–80 (1938). For an argument that the general law lives on after *Erie*, see Caleb Nelson, The Persistence of General Law, 106 Colum. L. Rev. 503 (2006). For an overview of the critiques of Justice Brandeis's opinion, see Caleb Nelson, A Critical Guide to *Erie Railroad Co. v. Tompkins*, 54 Wm. & Mary L. Rev. (forthcoming 2012), available at http://ssrn.com/abstract=2021489.

[2] 41 U.S. (16 Pet.) 1, 18–19 (1842).

[3] *Erie*, 304 U.S. at 79 (citing Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370–72 (1910) (Holmes, J., dissenting); Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532–36 (1928) (Holmes, J., dissenting)).

> the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.[4]

In Justice Holmes's estimation, the "authority and only authority is the State . . . the voice adopted by the State as its own should utter the last word."[5]

Justice Story may not have relied on any fallacy when he wrote *Swift*. Federal courts applied the general commercial law long before *Swift* made the practice explicit. Further, the general commercial law was not "the common law generally," but rather the sum of each of many separate jurisdictions deciding its own cases in order to create a uniform national body of commercial law. The general commercial law was, even at the time of *Swift*, a product of sovereign states.[6]

When an antebellum state court approached a question of commercial law, it looked not just to its own precedent but also to the precedents of other states, the United States, and foreign countries. State courts were particularly interested in creating *uniform* rules—rules that were consistent with the rules in other jurisdictions with which the state had commercial ties. Uniform rules aided commerce.

Each state court faced similar incentives to create a uniform rule—it only took a handful of them to create the necessary critical mass to ignite a chain reaction and attract the others. Some courts were particularly "massive"; the courts in New York, for instance, could nearly create a uniform rule all by themselves, so willing were other states to follow New York's lead.

The Supreme Court of the United States was the most "massive" of all courts because many state courts saw Supreme Court decisions as likely to attract other state courts and thereby create a uni-

[4] *Black & White Taxicab & Transfer Co.*, 276 U.S. at 533–34 (Holmes, J., dissenting).

[5] Id. at 535.

[6] For an overview and critique of the presumed link between *Erie*'s legal positivism and its holding *Swift* unconstitutional, see Jack Goldsmith & Steven Walt, *Erie* and the Irrelevance of Legal Positivism, 84 Va. L. Rev. 673, 674–75 (1998). This Note will not directly address the relationship between legal positivism and *Erie*'s constitutional holding; rather, it will suggest that because the general commercial law was the product of different entities (including the United States) acting within their jurisdiction, their actions should not offend legal positivism.

form rule. Even though the Supreme Court could not review most state court commercial law decisions, the state courts treated the decisions of the Supreme Court with great deference. At times, a Supreme Court decision on a question of commercial law would even cause a state court to *overrule itself* and acknowledge the Supreme Court's decision as its reason for doing so.

The willingness of state courts to follow the Supreme Court on questions of commercial law created a de facto supremacy for the Supreme Court, even where it could not directly review cases. State courts adopted the rule of the Supreme Court because they thought other state courts would adopt the rule of the Supreme Court; Supreme Court decisions in the antebellum era created actual uniformity simply because the state courts believed they would.

Uniform commercial rules among the state and federal systems were common throughout the antebellum period—contrary to the standard lesson of federal courts texts.[7] Justice Brandeis's conclusion in *Erie* that the "[p]ersistence of state courts in their own opinions on questions of common law prevented uniformity"[8] may have been true in 1938, but it was simply wrong in the antebellum period. Not only did state courts create a uniform commercial law,

[7] See, e.g., Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 554–55 (6th ed. 2009) ("In 1842, . . . the problems of conflicting applications of common law principles, even on matters of commerce, were already fully apparent. Consider . . . those rules of law that guide people in everyday affairs . . . . Swift appears to have had the effect of leaving people uncertain about such matters—of telling them that the rules by which they are to be judged, with respect even to basic obligations and powers, will depend upon the unpredictable circumstance of what court they can get into, or may be haled into."). A few scholars have disagreed, concluding that the federal courts, acting under *Swift*, promoted uniformity in state common law. See, e.g., Arthur John Keeffe et al., Weary Erie, 34 Cornell L.Q. 494, 504 (1949) (sampling post-*Swift* cases and concluding that "[t]he rule [of *Swift*] did promote uniformity to a substantial degree"). No less a figure than Judge Posner has suggested that the federal courts may have actually helped to create uniformity in state common law both before *and* after *Erie*. Letter from Richard Posner to Henry Friendly (Jan. 3, 1983), *quoted in* William Domnarski, The Correspondence of Henry Friendly and Richard A. Posner 1982–86, 51 Am. J. Legal Hist. 395, 403–04 (2011). This Note concludes that state and federal general commercial law was surprisingly uniform, at least in the antebellum period, and that at any rate *Swift* did not alter the way state and federal laws *became* uniform. See infra Part III.

[8] *Erie*, 304 U.S. at 74.

but the Supreme Court played a meaningful role in giving it substance.

This Note examines the treatment state courts gave to Supreme Court decisions on questions of commercial paper.[9] While other authors have attempted to explain Justice Story's decision in *Swift*,[10] and at least one has examined state court treatment of Supreme Court commercial precedent,[11] no commentator has explained *Swift* in light of state court treatment of Supreme Court decisions on commercial paper, the very issue at play in Justice Story's opinion.

Part I will show that contemporary state courts believed that the Supreme Court had access to the general commercial law long before Justice Story declared that it did. Part II will show that even though state courts shared a body of law with the Supreme Court, state court commercial law decisions were not subject to Supreme Court review.

Part III will seek to explain the tendency of state high courts to follow the Supreme Court on issues of general commercial law, even to the point of overruling their prior decisions, and even when the Supreme Court could not have overruled them. Even without a final arbiter, the general commercial law achieved remarkable uniformity. Part III will show that this uniformity was the result of each individual court promoting commerce by deciding its

[9] At the time of *Swift*, the commercial law dealt mostly with the regulation of commercial paper transactions. See Charles A. Heckman, Uniform Commercial Law in the Nineteenth Century Federal Courts: The Decline and Abuse of the *Swift* Doctrine, 27 Emory L.J. 45, 47 (1978) ("The overwhelming majority of cases in which the *Swift* doctrine was applied involved ordinary instruments to which private individuals and banks were parties."). Professor Heckman suggests that the *Swift* regime broke down when the federal courts extended it to other areas, such as torts, insurance, and railroad contracts. Id. at 45 & n.3. Since this Note primarily concerns the functioning of the *Swift* doctrine in the area of commercial law in the antebellum era, it will not address *Swift*'s application to other areas or its postwar breakdown.

[10] See, e.g., Randall Bridwell & Ralph U. Whitten, The Constitution and the Common Law: The Decline of the Doctrines of Separation of Powers and Federalism 68–70, 90–91 (1977); Tony Freyer, Harmony and Dissonance: The *Swift* & *Erie* Cases in American Federalism (1981); Grant Gilmore, The Ages of American Law 31–35 (1977); Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 245–52 (1977); William A. Fletcher, The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance, 97 Harv. L. Rev. 1513 (1984); Note, *Swift v. Tyson* Exhumed, 79 Yale L.J. 284 (1969).

[11] Fletcher, supra note 10.

cases in order to create a uniform general commercial law. Part III will further show that the state courts tended to treat Supreme Court decisions with a great deal of deference, coalescing around the Supreme Court position to create a de facto general commercial law supremacy for the Court.

I. THE EXISTENCE OF THE GENERAL COMMERCIAL LAW BEFORE *SWIFT V. TYSON*

Section 34 of the Judiciary Act of 1789 provides that "the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[12] Since *Erie Railroad Co. v. Tompkins*,[13] this statute has been held to direct federal courts to apply state substantive law in all diversity cases.

Ninety-six years earlier, federal courts enjoyed more freedom. *Swift v. Tyson* restricted the "laws of the several states" to "strictly local" issues, including state statutory law, judicial decisions interpreting that statutory law, and judicial decisions relating to rights and titles of real property.[14] Because Section 34 applied only to "strictly local" issues, federal courts decided diversity cases on the "construction of ordinary contracts or other written instruments, and especially . . . questions of general commercial law" without regard to state court decisions.[15] In cases of general commercial law, federal judges relied on "general reasoning and legal analogies" and "the general principles and doctrines of commercial jurisprudence."[16] *Swift* directed judges looking for guidance in cases of commercial paper "not [to] the law of a single country only, but of the commercial world."[17]

A. Modern Criticism of Swift

Justice Story has been roundly criticized for his opinion that the federal courts could apply the general commercial law. In *Erie*, Jus-

[12] 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (1982)).
[13] *Erie*, 304 U.S. at 78–80.
[14] 41 U.S. (16 Pet.) 1, 18 (1842).
[15] Id. at 18–19.
[16] Id. at 19.
[17] Id.

tice Brandeis declared the *Swift* position to be not only incorrect, but unconstitutional.[18] Professor Grant Gilmore described *Swift* as a "masterpiece of disingenuousness," suggesting that the doctrine of the general commercial law was "warmly welcomed and expansively construed . . . . For the next half century the Supreme Court of the United States became a great commercial law court."[19] Gilmore's use of "welcomed" and "became" imply that he believed the general commercial law sprang into existence out of Story's pen. Professor Morton J. Horwitz assigns Story a similar creative role by suggesting that Story's apparent resort to the "declaratory" notion of law—the idea that judges "find" preexisting legal principles—was inconsistent with Story's earlier treatise on the conflict of laws.[20] Horwitz argues that Story gave federal courts the general commercial law because he wanted "to establish an exclusive federal forum for commercial disputes."[21]

Professor William A. Fletcher responds that Story simply described the law as it existed when Section 34 was drafted.[22] According to Fletcher, "lawyers and judges in the early nineteenth century did not categorize all nonfederal law as state law within the meaning of section 34. There was a 'local' state law, to which the section applied, and a 'general' law, to which it did not."[23] Section 34 merely codified the *lex loci* principle, and its command to apply the "laws of the several states" applied only to "local" law.[24] That this non-local, non-federal "general" law was not mentioned at all in Section 34 shows "that its applicability was so obvious as to go

[18] 304 U.S. at 78–80.

[19] Gilmore, supra note 10, at 32–35.

[20] Horwitz, supra note 10, at 245–52. ("It was critical to my [earlier] argument . . . to demonstrate that [the declaratory theory] of law was actually in the process of eroding in the decades after 1780. Could Story really still have believed it when *Swift v. Tyson* was decided in 1842?").

[21] Id. at 252.

[22] Fletcher, supra note 10, at 1514; see also Charles A. Heckman, The Relationship of *Swift v. Tyson* to the Status of Commercial Law in the Nineteenth Century and the Federal System, 17 Am. J. Legal Hist. 246, 253–54 (1973) ("Contrary to what many people seem to assume in this century, there were precedents for the *Swift* decision.").

[23] Fletcher, supra note 10, at 1514; see also Heckman, supra note 22, at 253–54 ("[In an earlier commercial law case,] Chief Justice Marshall decided a question without reference to the laws of any of the states involved . . . .").

[24] Fletcher, supra note 10, at 1514.

without saying."[25] Fletcher argues that Section 34 required the application of "local" law in federal courts when it applied, required nothing otherwise, and merely restated the law as it stood at the time.

B. The General Commercial Law Predated Swift v. Tyson

Whatever its constitutionality or instrumental value in 1842, the general commercial law predated *Swift*. Both state and federal courts applied it, occasionally preferring general commercial law decisions from other jurisdictions to their own precedent. Justice Brandeis's statement that "[t]here is no federal general common law"[26] may have been prescriptive in 1938, but it was not descriptive of 1842.

State courts in the early nineteenth century acted as though a general commercial law existed. Courts spoke of the "general commercial law"[27] and, much more frequently, the "law-merchant"[28] or the "mercantile law."[29] To figure out what the general commercial law required, state courts would look beyond their own borders to the decisions of England,[30] the federal courts in the United States,[31] and sister states.[32] Justice Story's assertion in *Swift* that the federal courts could apply the general commercial law would not have surprised contemporary state judges.[33]

Consider *Coolidge v. Payson*, an 1817 Supreme Court case that, like *Swift*, dealt with the law of negotiable paper.[34] In a typical negotiable instrument transaction, *A* writes a note ordering *B* to pay money to *C*. Often *C*, rather than demanding the money himself, uses the note as currency and exchanges it to *D* for some consid-

[25] Id. at 1517.
[26] *Erie*, 304 U.S. at 78.
[27] See, e.g., Allen v. Merchants Bank, 22 Wend. 215, 240 (N.Y. 1839).
[28] See, e.g., Kimbro v. Lytle, 18 Tenn. (10 Yer.) 417, 428 (1837).
[29] See, e.g., Carnegie v. Morrison, 43 Mass. (2 Met.) 381, 406 (1841).
[30] See, e.g., Carrollton Bank v. Tayleur, 16 La. 490, 498 (1840); Greele v. Parker, 5 Wend. 414, 422 (N.Y. 1830) (citing Mason v. Hunt, (1779) 99 Eng. Rep. 192 (K.B.), 1 Doug. 297).
[31] See, e.g., Ontario Bank v. Worthington, 12 Wend. 593, 600 (N.Y. Sup. Ct. 1834) (citing Coolidge v. Payson, 15 U.S. (2 Wheat.) 66, 73 (1817)).
[32] See, e.g., Murdock v. Mills, 52 Mass. (11 Met.) 5, 10 (1846) (citing Goodrich v. Gordon, 15 Johns. 6 (N.Y. Sup. Ct. 1818)).
[33] See Fletcher, supra note 10, at 1519.
[34] 15 U.S. (2 Wheat.) 66.

eration.[35] The lawsuit usually ensues when *B* refuses payment to *D* (or some later endorsee).[36] The question in *Coolidge* concerned a letter from *B* to *A* promising to accept the bill before it was written, and on which *A* relied in writing the bill.[37] The Court held that the letter promising to accept the bill amounted to an acceptance, and that *D* was entitled to recover from *B* on account of that acceptance.[38]

State courts faced with the issue of implied acceptance raised in *Coolidge* would often cite to the Supreme Court. The courts made clear that the mercantile law stretched across jurisdictional boundaries. The Supreme Judicial Court of Massachusetts cited *Coolidge* to note that the question was one of mercantile law, and that the *Coolidge* position represented the law of this country and "a well settled principle of American mercantile law respecting bills of exchange."[39] Senator Beardsley, writing for the Court for the Correction of Errors of New York, cited *Coolidge* in noting that the "exposition of the law merchant in regard to acceptances by Ld. Mansfield . . . has been sustained by the English courts, and adopted by our own courts."[40] By "our" courts, Senator Beardsley did not mean the courts of New York alone, but the courts of the United States as distinguished from those of England.[41] The Su-

[35] See Tony A. Freyer, Negotiable Instruments and the Federal Courts in Antebellum American Business, 50 Bus. Hist. Rev. 435, 437 (1976) ("So important were these commercial instruments to business that a specialized body of rules governing their use gradually developed as part of the commercial law."); Harold R. Weinberg, Commercial Paper in Economic Theory and Legal History, 70 Ky. L.J. 567, 569–70 (1982) (noting the importance of negotiable instruments as a money substitute).

[36] These are, in essence, the facts of *Coolidge*. 15 U.S. (2 Wheat.) at 66–69.

[37] For a more detailed discussion of the problem of implied acceptance raised in *Coolidge*, see Freyer, supra note 35, at 440–43.

[38] The Court also held that a preexisting debt was valuable consideration for the taking of a note, deciding the question raised in *Swift*. *Coolidge*, 15 U.S. (2 Wheat.) at 73. *C* owed *D* money in the example above, but was unable to pay with cash. Instead of paying cash, *C* endorsed the note to *D*. The question was whether *D* gave valuable consideration to *C*, and therefore might be a bona fide holder in due course, taking free of the equities between the antecedent parties. *Coolidge* held that when one takes a note for a preexisting debt, he has given valuable consideration. Id. at 75.

[39] Murdock v. Mills, 52 Mass. (11 Met.) 5, 10 (1846).

[40] Greele v. Parker, 5 Wend. 414, 422 (N.Y. 1830).

[41] The New York court cites to *Coolidge* as well as its own precedent to describe the position taken by "our own courts." Id. Professor Fletcher describes how what courts once described as a "universal" law of commercial transactions became regarded as "uniquely American" "as early as 1810." See Fletcher, supra note 10, at 1519–20.

preme Court of Louisiana considered applying English rather than American law on this subject, but found the point moot, because "the Law Merchant of the two countries[] is not materially variant on this subject."[42] In each case, the state court made clear that *Coolidge* lived in the general commercial law, and that in determining the content of the general commercial law, a state court could look to the decisions of other jurisdictions.

State courts further acknowledged that they shared the commercial law with the Supreme Court when they described the *Coolidge* decision's effects. The Louisiana court held that *Coolidge* "laid down and settled" the issue of implied acceptance in America.[43] In another case, the court noted that "[b]efore the rule in relation to these collateral acceptances on a separate paper was extended to bills not yet in esse, it was required that the promise or undertaking should point to the specific bill or bills already drawn."[44] Not only did the Louisiana court share the body of commercial law with the Supreme Court, but the Supreme Court could have altered the commercial law within Louisiana.[45] Other courts also felt *Coolidge*'s effect: Senator Allen of New York cited *Coolidge* in holding that "[t]he question appears to have been settled by numerous decisions."[46] The Court of Appeals of Kentucky similarly decided that the issue was "well settled," citing to *Coolidge*.[47] These state decisions suggest that not only might the federal courts have had access to a shared commercial law, but that the Supreme Court might have had the power to change it. Chief Justice Marshall suggested as much when he wrote that it was "of much importance to merchants that this question should be at rest."[48] The Supreme Court could only have "settled" the question or put it "at rest" if it shared the mercantile law with the states.

[42] Carrollton Bank v. Tayleur, 16 La. 490, 498 (1840).

[43] Id. at 498–99.

[44] Von Phul v. Sloan, 2 Rob. 148, 149 (La. 1842).

[45] Parts II and III explain the mechanism by which the Supreme Court altered the general commercial law.

[46] Greele v. Parker, 5 Wend. 414, 420 (N.Y. 1830).

[47] Vance & Dicks v. Ward, 32 Ky. (2 Dana) 95, 96 (1834).

[48] *Coolidge*, 15 U.S. (2 Wheat.) at 75. Professor Crosskey describes *Coolidge* as an "important decision[] . . . in the field of commercial law." 2 William Winslow Crosskey, Politics and the Constitution in the History of the United States 852 (1953).

State courts spoke and acted as if the federal courts could access the general common law even before Justice Story declared it so in *Swift v. Tyson*. Professor Warren might have been correct when he wrote that the drafters of Section 34 intended to deny federal courts access to the general commercial law, but he was wrong to imply that prior to *Swift*, it was certain that Section 34 denied federal courts this access.[49] Chief Justice Marshall may not have explicitly stated in *Coolidge* that he was applying the general commercial law, but the state courts that applied the law in the years before *Swift* believed (1) that there was a general commercial law; (2) that by applying the general commercial law they could apply the precedent of the Supreme Court; and (3) that Supreme Court decisions should be accorded some kind of weight in the general commercial law decisions of the state courts. Just how much weight will be the subject of Parts II and III.

II. THE SUPREME COURT WAS NOT DE JURE SUPREME ON THE GENERAL COMMERCIAL LAW

If the state and federal courts shared the general commercial law, what were their relative positions within it? A single body of law might suggest a hierarchy: a final court of appeal to settle lower court disagreements.[50] In practice, though they shared a body of law with the Supreme Court, state courts did not treat Supreme Court decisions on that law as binding precedent—leaving the gen-

[49] See Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 84 (1923) ("Until Judge Story, in 1842, in *Swift v. Tyson*, decided that the word 'laws' in this section did not include the 'common law' of the State, and that the Federal Courts in a State were free to decide questions of general commercial law for themselves, it had never been held that there was even any doubt about the matter."). But see Fletcher, supra note 10, at 1517 ("That [the general common law] was not explicitly referred to in section 34 does not prove that it was not expected to be applied. Rather, the fact that it was not mentioned probably suggests quite the opposite—that its applicability was so obvious as to go without saying.").

[50] See Crosskey, supra note 48, at 711–12. ("[The Supreme Court's] authority to settle and declare in the last resort a uniform rule of civil justice can surely not be doubtful." (internal quotation marks omitted)). But see Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence 35–36 (Wythe Holt & L.H. LaRue eds., 1990) (arguing that most state court systems of 1787–89 were horizontal, rather than vertical, without a true appellate-review court).

eral commercial law without a unifying court to resolve disputes among its branches.[51]

A. Coolidge v. Payson *and* Townsley v. Sumrall*: Answering the Preexisting Debt Question in the Federal Courts*

Coolidge v. Payson answered another question in addition to the issue of implied acceptance: whether a preexisting debt might serve as valuable consideration for the transfer of a negotiable instrument.[52] The precise question at issue in *Coolidge* warrants some discussion here because the state courts of New York (and other states) later answered it differently despite the existing Supreme Court precedent.[53]

Consider the example of a negotiable instrument transaction above: *A* writes a note, drawing on *B* to pay *C*. *A* gives the note to *C*. *C* could take it to *B* and request payment, but instead *C* endorses the note to *D* in exchange for some valuable consideration. *D* now owns the right to order payment from *B*. When *D* comes to collect, *B* might rightly be nervous. The note has changed hands several times, and the provenance of *D*'s title to the note may not be clear. Perhaps *D* stole the note, or perhaps he acquired it by fraud. *B* might be unwilling to pay *D*.

The question of valuable consideration in *Coolidge* arose when the holder's title to the note was unclear. At the time, a bona fide holder of a negotiable instrument who received it for valuable consideration took it without regard to the equities existing between the antecedent parties (that is, he had a right to collect that was

[51] Fletcher, supra note 10, at 1558 ("The quasi-sovereignty of the states gave them autonomy in the creation and interpretation of nonfederal law. Not only were the states free to create local variations on the common law by statute; they were also free from the coordination and control of any central appellate tribunal."); see Nelson, supra note 1, at 505 ("Throughout the nineteenth century, the authority of the general law within any particular jurisdiction was often treated as a matter of that jurisdiction's law.").

[52] 15 U.S. (2 Wheat.) at 73 ("[T]he mere circumstance[] that the bill was taken for a pre-existing debt has not been thought sufficient to do away the effect of a promise to accept.").

[53] Presented here to show that the state courts did not feel obligated to follow Supreme Court precedent on the general commercial law, this precise disagreement between the Supreme Court and the courts of New York eventually led to *Swift* twenty-five years later. *Swift* and the relationship between the Supreme Court and the state courts will be the subject of Part III.

good against the world). So long as a holder gave valuable consideration in return for the note, he could demand payment even if the note had been stolen (or had some other cloud on its title).[54] Should *C* acquire the note by fraud or theft and then trade it with *D* for valuable consideration, *D* can be certain that he will get paid, and *B* must look to *C* for recourse.

The issue in *Coolidge* was whether release of a preexisting debt could serve as valuable consideration. Imagine that *C* owes *D* money but is short on cash. Instead, *C* gives the note in payment of the debt.[55] Did *D* give valuable consideration, and so become a holder for value free of the equities between the antecedent parties? Or does *D* take no better title than *C* had?

Chief Justice Marshall wrote in *Coolidge* that "the mere circumstance[] that the bill was taken for a pre-existing debt has not been thought sufficient to do away the effect of a promise to accept."[56] Justice Story, writing thirteen years prior to *Swift*, agreed in *Townsley v. Sumrall* that "as to the consideration, it can make no difference in law[] whether the debt for which the bill is taken is a preexisting debt[] or money then paid for the bill."[57] If the Supreme Court were, as Professor William Winslow Crosskey has suggested it was intended to be,[58] the head of the judicial system, these cases should "settle" the question just as *Coolidge* "settled" the question of implied acceptance.

B. New York Courts Reject the Supreme Court

Coolidge and *Townsley* did not settle the law for everyone. The courts in New York broke ranks to hold that a preexisting debt could not serve as valuable consideration. Justice Woodworth noted that the reason for the rule that a bona fide holder for valu-

[54] Justice Story thought this principle "so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support." Swift v. Tyson, 41 U.S. (16 Pet.) 1, 15–16 (1842).

[55] These are the facts of *Brush v. Scribner*. 11 Conn. 388, 388 (1836).

[56] 15 U.S. (2 Wheat.) at 73.

[57] 27 U.S. (2 Pet.) 170, 182 (1829).

[58] Crosskey, supra note 48, at 711 ("[T]he conclusion appears to be fully warranted that the Supreme Court of the United States was meant to be the head of a unified American system of administering justice.").

able consideration holds free of the antecedent equities "would seem to be[] that the innocent holder, having incurred loss by giving credit to the paper, and having paid a fair equivalent, is entitled to protection."[59] But a holder who took the note and in return released an antecedent debt "made no advances, nor incurred any responsibility on the credit of the paper he received, [and his] situation will be improved if he is allowed to retain, but if not, [he] is in the condition he was before the paper was passed[.]"[60] Chancellor Kent had written below that the exception for bona fide holders relied "on grounds of commercial policy," and "ought not to be carried beyond the necessity that created it."[61] Chief Justice Spencer wrote that "by the usual course of trade, not that the holder shall receive the bills or notes thus obtained[] as securities for antecedent debts, but that he shall take them in his business, and as payment for a debt contracted at the time."[62]

Justice Story noted in *Swift* that the exact position of the New York courts after *Coddington v. Bay* was not clear,[63] and on this point he was correct. What is clear is that the courts of New York neither followed nor bothered to distinguish *Coolidge*, a case that was directly on point in the shared commercial law[64] and of which the Senators and Justices were probably aware. Whatever the power of the Supreme Court in the domain of the general commercial law, the Supreme Court of New York did not feel bound by a prior Supreme Court decision.

During the 1830s, the New York courts solidified their position on antecedent debts. In 1833, the Supreme Court of Judicature of New York decided *Rosa v. Brotherson*.[65] Piecing together segments of Justice Woodworth's and Chief Justice Spencer's opinions in *Coddington*, Chief Justice Savage held that

> the holder of a note negotiable on its face, who receives it in payment of a precedent debt or responsibility incurred, takes it subject to all the equities existing between the original parties. In the

[59] Coddington v. Bay, 20 Johns. 637, 645 (N.Y. 1822).
[60] Id.
[61] Bay v. Coddington, 5 Johns. Ch. 54, 58–59 (N.Y. Ch. 1821).
[62] *Coddington v. Bay*, 20 Johns. at 651.
[63] *Swift*, 41 U.S. (16 Pet.) at 17.
[64] See supra note 38 and accompanying text.
[65] 10 Wend. 85 (N.Y. Sup. Ct. 1833).

> language of the commercial law, he has not *paid value* for it, and therefore is in no better situation than the payee.[66]

Chief Justice Savage explicitly held that he was deciding a case "of the commercial law," and yet ignored *Townsley*, decided just four years earlier in the Supreme Court, which held that "as to the consideration, it can make no difference in law[] whether the debt for which the bill is taken is a pre-existing debt[] or money then paid for the bill."[67] If the New York courts believed themselves bound by the Supreme Court on questions of general commercial law, they could not have ignored *Townsley*'s clear conclusion that a preexisting debt could serve as valuable consideration.

New York was not alone; other states joined the New York courts in declaring freedom from the possibility of binding Supreme Court precedent.[68] In Vermont, the state high court wrote that "[t]he decisions of the national tribunal are not indeed of any binding authority upon the general rules of the law merchant in a state court."[69] The court of Tennessee, working within the "law-merchant," cited the "great case" of *Coddington v. Bay*, "so fully discussed and so well considered" to recognize that taking negotiable paper for a preexisting debt is not in "due course of trade" such that the holder takes free of the equities of the antecedent parties.[70] In Ohio, the Supreme Court cited *Coddington v. Bay* to hold that a preexisting debt could not serve as valuable consideration, even though the losing counsel argued otherwise on the strength of *Coolidge* and *Townsley*.[71]

In all of these cases, a state supreme court decided a case of the general commercial law directly (and at times, explicitly) contrary to the decisions of the Supreme Court of the United States. While they may have considered themselves to be working within the same body of law as the Supreme Court, the state high courts did

[66] Id. at 86 (emphasis added).

[67] Id.; *Townsley*, 27 U.S. (2 Pet.) at 182.

[68] See Fletcher, supra note 10, at 1561 ("State courts generally followed common law decisions by the United States Supreme Court, but they were quite explicit in stating that they did not do so because of any legal compulsion.").

[69] Atkinson v. Brooks, 26 Vt. 569, 580 (1854).

[70] Kimbro v. Lytle, 18 Tenn. (10 Yer.) 417, 428 (1837).

[71] Riley v. Johnson, 8 Ohio 526 (1838), overruled by Carlisle v. Wishart, 11 Ohio 172 (1842).

not act as though they were bound by Supreme Court precedent on cases involving the general commercial law.

III. DE FACTO SUPREMACY AND *SWIFT V. TYSON*

Part I showed that state high courts treated the *Coolidge* holding as a relevant decision in a shared "general commercial law," often describing the point as "established," "settled," or "laid down," and following the Supreme Court disposition. But Part II showed that a Supreme Court decision on the general commercial law does not necessarily "establish," "settle," or "lay down" anything, and that state courts could and did decide cases adversely to existing Supreme Court precedent on issues of general commercial law. Those two Parts describe two court systems sharing a common law but without a common head, neither with power to overrule the other. Professor William Winslow Crosskey called the suggestion that the Constitution intended such a system "ridiculous," and the likelihood that it would be "in any way at all satisfactory in its results" small.[72]

While the Supreme Court could not enforce a uniform general commercial law through the standard procedure of taking appeals and overruling lower courts the way Crosskey imagines the Constitution intended,[73] state high courts tended to conform their own rulings to those of the Supreme Court on the general commercial law because uniformity of the general commercial law was more important to each court than the policies of its own state.[74] State courts' voluntary alignment with the Supreme Court allowed the Court to exercise a de facto supremacy over the general commercial law, declaring the law not only in the lower federal courts, but in the state courts as well.

[72] Crosskey, supra note 48, at 865.

[73] Id. at 711.

[74] To the extent that this thesis requires a theory of what the judges believed they were doing, this Note will not discuss it. For one view, see Richard A. Posner, Economic Analysis of Law (7th ed. 2007). This Note proposes that the state judges were acting to promote uniformity in the pursuit of commercial interests because they explicitly stated as much in their opinions.

A. State High Courts and the Anti-Commercial Interest

State high courts followed the Supreme Court not because they were bound to, but because they found it in their states' commercial interest to do so. The state courts, not the Supreme Court, drove the charge for uniformity.

Professor Morton J. Horwitz disagrees, arguing that Justice Story used *Swift* to gain power over the general commercial law in order to create uniformity and promote commerce. Horwitz argues that Story used the *Swift* decision to achieve his "grandest aspirations . . . to establish an exclusive federal forum for commercial disputes, which would not only provide uniformity and certainty but would also take these disputes out of what might otherwise be an uncongenial anticommercial environment often found in state courts."[75] While Horwitz's claim that Story could not have believed the "declaratory" theory of law when he wrote *Swift* lies beyond the scope of this Note,[76] the record shows that Story probably did not intend to use *Swift* to gather all commercial disputes within the federal courts.

Horwitz claims that Justice Story used *Swift* to "impose a pro-commercial [sic] national legal order on unwilling state courts."[77] This claim relies on two assumptions: that the *Swift* decision changed something about the relationship between state and federal courts and that the state high courts were unwilling to promote commercial interests on their own. Nineteenth-century state courts would have accepted neither assumption.

Swift could have changed the relationship between state and federal courts in two ways. First, the federal courts could have gained access to the general commercial law when they did not have it previously. Horwitz argues that Story asserted access to the general commercial law so that the federal courts could use a combination of pro-commercial holdings and the diversity jurisdiction

[75] Horwitz, supra note 10, at 252; see Gilmore, supra note 10, at 33–34 (describing how, after *Swift*, "the Supreme Court of the United States became a great commercial law court").

[76] Horwitz, supra note 10, at 245–48.

[77] Id. at 250. Contra Bridwell & Whitten, supra note 10, at 95 ("Certainly, it is apparent that no desire to force a national procommercial jurisprudence on the states was behind the *Swift* decision.").

to "establish an exclusive federal forum for commercial disputes."[78] Justice Brandeis agreed in *Erie Railroad Co. v. Tompkins*.[79] But at least as far as the state courts were concerned, the federal courts had access to the general commercial law for at least thirty years before *Swift*.[80] In declaring that federal courts had access to the general commercial law, Justice Story gave the federal courts nothing more than they already had.

Second, *Swift* could have either given the Supreme Court supremacy over the general commercial law or withdrawn it. But Part II of this Note showed that the Supreme Court did not exercise de jure supremacy over the general commercial law either before or after the *Swift* decision.[81]

Horwitz next assumes that state courts were unwilling to go along with a pro-commercial legal order. Horwitz describes how state courts had shown anti-commercial tendencies on the issues of negotiability and usury.[82] In fact, not only were the state courts interested in promoting commercial interests with their holdings, they were often explicit about doing so. Rather than working to retard commercial interests, state high courts attempted to further their states' commercial interests by creating a uniform system of negotiable paper. For example, the Supreme Court of Errors of Connecticut recognized a preexisting debt as valuable consideration because "that paper which cannot be safely taken in payment of debts, cannot be said to have a free circulation," and the goal of the "commercial world" was that paper would be "as free in its circulation as the coin it represented."[83]

This case deserves special note because of the cavalier way in which the Connecticut high court treated the law of New York, which it might have applied. While the court expressed some doubt about the position of the New York courts upon the issue, it sug-

[78] Horwitz, supra note 10, at 252. Professor Crosskey argues that the Supreme Court lost its perch atop all court systems in the nation because of its geographic remoteness, the limited number of federal courts, and the "very niggardly extent" of federal jurisdiction. Crosskey, supra note 48, at 754. All of these things would similarly limit the federal courts' ability to take exclusive jurisdiction of commercial matters.

[79] 304 U.S. 64, 74–75 (1938).

[80] See supra Part I.

[81] See supra Part II.

[82] See Horwitz, supra note 10, Chapter VII.

[83] Brush v. Scribner, 11 Conn. 388, 393 (1836).

gested that were the court to apply the law of New York, it would have to adhere to the position that an antecedent debt could not constitute a valid consideration.[84] The Supreme Court of Connecticut avoided the issue by holding that despite the fact that the parties and the transaction belonged to New York, since the applicability of New York law was not addressed below, the high court would not order a new trial to decide it.[85]

The court's decision reveals its conception of the character of the law merchant, as well as the pursuit of commercial goals within it. The court wrote that the "question whether this case was to be governed by the laws of *New-York* [sic]" was never raised in the court below, and "the judge who presided, informs us, that it was not in fact made, although these decisions were alluded to, *as evidence of the common law*."[86] While the court acknowledged that New York law might control, since no party specifically argued that point, the court defaulted to the general commercial law. In the general commercial law, New York decisions merited treatment as evidence, as would the decisions of the Supreme Court, the high courts of sister states, and the courts of England.[87] The court acknowledged that a state might have a law of its own to apply to negotiable instruments, but when presented with the choice, the court not only maintained the existence of a general commercial law but applied it as a default in a case of negotiable instruments.

That state courts did apply the general commercial law was the subject of Part I; *why* the Connecticut court felt free and even compelled to apply the general commercial law to a case that may have been controlled by New York law drives the current inquiry. The court, quoting Lord Mansfield, suggested an answer: To do otherwise "would tend to destroy trade, which is conducted *every-where* [sic], by bills of exchange. Until we find[] that this law has been over-ruled, we cannot doubt what is the common law principle."[88]

[84] Id. at 406.
[85] Id. at 407.
[86] Id. (second emphasis added).
[87] Id. at 390–402.
[88] Id. at 402 (emphasis added) (internal quotation marks omitted); see also Freyer, supra note 10, at 6–7 (describing how the principle of negotiability was "essential to antebellum business"). See generally Freyer, supra note 35.

The court adopted the rule that tends to protect trade "*everywhere*" over the New York rule, which was adopted by New York courts, based on New York policies, and presumably meant for application to transactions taking place in New York between New York parties. This case demands application of the New York rule as much as any case could. Yet the Connecticut court sidesteped the New York rule and applied the rule of the general commercial law instead because to do otherwise would tend to destroy trade.

The Delaware Superior Court used similar reasoning to reject the position of the New York courts before *Swift* was decided. In *Bush v. Peckard*, the court wrote:

> It is better for the interests of trade and commerce, and it is the policy of the law, that the circulation of negotiable paper should be free from embarrassment, and that the innocent holder for a valuable consideration, without notice of fraud or want of consideration, should not be affected by any equities between the original parties.[89]

The Rhode Island Supreme Court expressed concern for commercial interests in *Bank of the Republic v. Carrington* when it described its motivation for following the *Swift* decision:

> It is often quite as important to business men in commercial transactions, that they should be able to pay or secure their debts, and make use of current paper for these purposes, as it is that they should make new purchases, or sell such paper sometimes at ruinous sacrifices, for the purpose of raising money with which to pay their debts.[90]

Contrary to Professor Horwitz's conclusion, neither court adopted the *Swift* rule to further parochial interests, the interests of "moral restraint,"[91] or "common justice and honesty."[92] The Delaware Superior Court wanted free circulation to promote "the interests of

[89] 3 Del. (3 Harr.) 385, 389 (Del. Super. Ct. 1841).

[90] 5 R.I. 515, 521 (1858).

[91] Chancellor Kent defended usury legislation, which was anti-commercial, on grounds of "moral restraint." James Kent, Opinion of Chancellor Kent on the Usury Laws, 9–11 (Albany, J. Munsell 1837).

[92] Rhodes v. Risley, 1 N. Chip. 44, 46 (Vt. 1791). Horwitz gives "common justice and honesty" as the most important source of resistance to the negotiability of notes. Horwitz, supra note 10, at 218.

trade and commerce." The Rhode Island Supreme Court adopted the *Swift* position because it better accommodated the needs of the "business men in commercial transactions." In neither case did the state high court espouse "outright local prejudice" or "mercantile rivalry" the way Professor Freyer suggests that they did.[93] Instead, both state high courts worked to promote trade, commerce, and the interests of business.

Justice Story could not have meant to remove these general commercial law cases to federal court through *Swift* because the federal courts could have heard these general commercial law cases before *Swift*. Story was also unlikely to move them to federal court out of fear of anti-commercial state courts because the state courts did not appear to have been anti-commercial: they routinely followed the decisions of the Supreme Court precisely *because* those decisions promoted commerce.

B. The Uniformity of the General Commercial Law as an End

The state high courts sought to further commerce, but it is the *way* they sought to further commerce that illustrates the power of the Supreme Court to control the general commercial law. Courts deciding points of commercial law often chose a position not so much because they believed it was inherently pro-commercial, but because they wanted to unify the general commercial law on a sin-

[93] Freyer, supra note 10, at 20 (explaining how parochial and anti-commercial interests created uncertainty in state commercial law); Freyer, supra note 35, at 436 ("Rivalry among state legislatures and the unsettled conditions of local law contributed to uncertainty in the commercial law of the states, which generated challenges to the transferability of negotiable instruments around the country."). Freyer notes that in addition to the anti-commercial bias of judges, there may have been a parochial bias of juries as well. Freyer, supra note 10, at 20. This Note will not address the procedural differences between state and federal courts and is prepared to grant that Story might have reasonably thought that procedural bias could cause state trial courts to be hostile fora for commercial cases. Whether state and federal juries looked that different in practice is, of course, debatable. The point remains that like Horwitz, Freyer fails to explain how the state high courts achieved uniformity on the questions presented in *Coolidge* and eventually *Swift* in the face of such alleged anti-commercial sentiment on the part of the judges. This Note suggests that the uniformity among state high courts was actually the result of a *pro*-commercial interest, shown both by the judges' words and their actions.

gle rule.[94] In the courts' opinions, the commercial benefit of a universal rule dominates the substantive effect of the rule itself. In short, it was more important for a court to dress like everyone else than it was to look at what it was wearing.

The Supreme Court of Vermont illustrated this point in *Atkinson v. Brooks*.[95] Dealing first with the question of whether "there is an essential difference in principle between taking a current note or bill in payment, and as security for a prior debt then due," the court examined the question closely and decided in the negative, suggesting that "it seems strange that such a question should ever have been raised."[96] But having weighed the question initially, the court went on:

> The more important question growing out of the case is, perhaps, what is the true commercial rule established upon this subject? And it is of vital importance in regard to commercial usages[] that they should, as far as practicable, be uniform throughout the world. And such is necessarily the ultimate desideratum, and will inevitably be the final result. It is, therefore, always a question of time as to uniformity in such usages. The basis of such uniformity is convenience and justice combined.[97]

While the court did address the merits, this passage suggests that, had the consensus in the general commercial law been the position of the New York courts, Vermont would have ignored its view on the merits and toed the line with New York in the interest of furthering commerce by creating uniformity. At the very least, the Vermont court seems to have cared as much about promoting uniformity as it did about the effects of its answer to the preexisting debt question.

Consider also the case of *Carlisle v. Wishart*, in which the Ohio Supreme Court held that a preexisting debt might serve as a valuable consideration, not because the policy has a particular *intrinsic*

[94] See Freyer, supra note 35, at 436 ("The clarity and uniformity of the commercial law thus influenced the circulation and use of negotiable instruments, which in turn had an impact upon the reduction of uncertainty in business throughout the entire trading network."); see also Heckman, supra note 9, at 47 (noting the importance of uniform laws of negotiable instruments for the national economy).

[95] 26 Vt. 569 (1854).

[96] Id. at 575–78.

[97] Id. at 578.

value, but because it furthers uniformity of the law—and uniformity of the law furthers commerce.[98] *Carlisle* overruled an earlier Ohio case, *Riley v. Johnson*, which accepted the New York court's position on the question of preexisting debt.[99] The Ohio court in *Carlisle* reviewed the holding of *Swift*, and this paragraph followed:

> It is believed that the law, as thus settled by the highest judicial tribunal in the country, will become the uniform rule of *all*, as it now is of *most* of the states. And, in a country like ours, where so much communication and interchange exists between the different members of the confederacy, to preserve uniformity in the great principles of commercial law[] is of much interest to the mercantile world.[100]

In pursuit of uniformity, the court rejected its past substantive position. Agreement with sister jurisdictions dominated legal substance in the court's decision; uniformity so furthered the goal of commerce that the court overruled itself to join the consensus.

Courts believed that they could promote commerce by establishing a uniform system of general commercial law. In the pursuit of uniformity, courts (like those that decided *Carlisle* and *Atkinson*) would join the consensus, even if joining the consensus required them to ignore their views on the merits or overrule their own precedent.

C. The Impact of the Supreme Court on Uniformity

State courts, in the pursuit of uniformity, created the general commercial law by coalescing around a single position. Supreme Court decisions in general, and *Swift* in particular, helped to create uniformity by creating centers of gravity that state courts could gather around.

While many commentators have examined *Swift*'s role in defining the position of the federal courts,[101] the role of the state courts

[98] 11 Ohio 172 (1842).

[99] Riley v. Johnson, 8 Ohio 526, 529 (1838).

[100] *Carlisle*, 11 Ohio at 191–92.

[101] See, e.g., Freyer, supra note 10, at 38 ("The *Swift* decision established expressly a rule governing federal judges' choice of law."); Horwitz, supra note 10, at 250–52 (suggesting that *Swift* was an attempt to "establish an exclusive federal forum for commercial disputes"); see also Lawrence M. Friedman, A History of American Law

in the general commercial law has been largely ignored. Professor Fletcher examines state marine insurance cases and concludes that state courts both sought uniformity in the marine insurance cases and gave great deference to the Supreme Court in deciding the proper rule.[102] This Note suggests that similar principles operated on negotiable instruments law, a position that Fletcher rejects without examining any negotiable instrument cases.[103] He concludes that *Swift* may have in fact been a reaction to a lack of uniformity among the states in cases of negotiable instruments.[104] But the lack of uniformity on the preexisting debt question prior to *Swift* was an anomaly, not the rule;[105] in general, the very mechanism of uniformity that Fletcher observes in marine insurance cases in the early nineteenth century operated in negotiable instrument law as well throughout the antebellum period.

The Supreme Court could exercise no de jure authority over state courts in the general commercial law.[106] Instead, the state courts, acting individually to promote uniformity in the general commercial law, created a de facto system of Supreme Court supremacy.[107] A state high court facing a question of negotiable paper would often settle on the rule that most created uniformity in the system. The relevant system would stretch beyond state borders; negotiable paper must freely travel between "the different members of the confederacy."[108] A state high court, looking to promote uniformity in the relevant system, would observe decisions from other jurisdictions, looking for a consensus to join. This Section de-

192 (2005) ("The Supreme Court . . . moved to unify the commercial law of the country. It hoped that a single body of law would emerge under federal hegemony.").

[102] Fletcher, supra note 10, at 1572–75.

[103] Id. at 1516.

[104] Id.

[105] Modern federal courts treatises generally disagree and suggest that uniformity was actually the exception, rather than the rule. See, e.g., Fallon et al., supra note 7, at 554–55.

[106] See supra Part II.

[107] Professor Heckman argues that state-court freedom to ignore decisions of federal courts actually caused the *Swift* regime to break down. Heckman, supra note 9, at 50. He cites a number of cases where state courts exercised that freedom to ignore the holding in *Swift*. Id. at 50 n.28. Most of these cases were decided in the postwar period. Heckman fails to explain why during the antebellum era state courts often exercised that freedom not to disagree with the federal position, but to join it.

[108] *Carlisle*, 11 Ohio at 191–92.

scribes how, in deciding commercial cases within its own jurisdiction, the Supreme Court could exercise great power to create consensus, and eventually uniformity, in the commercial law.

1. State High Courts Followed the Consensus

A state high court would have had an easy decision where the law had been largely "settled" by earlier courts.[109] For example, a state court coming late to the question of whether a letter written by a drawee promising to accept would serve as an acceptance would find a largely universal agreement on that question, starting with *Wilson v. Clements* in Massachusetts,[110] *Coolidge v. Payson* in the Supreme Court,[111] and *Goodrich v. Gordon* in New York.[112] A state court first hearing the issue in 1840 would have felt constrained to join the majority.

The history of the implied acceptance issue after *Coolidge* supports that conclusion. Cases subsequent to those cited above unanimously hold that a letter promising to accept, once relied on by a third party, may bind the drawee as an acceptance.[113] This result was not inevitable; the Massachusetts court believed that many treatise writers and English judges took the opposite position.[114]

[109] Professor Nelson notes this phenomenon when he writes that "[a]ccording to many courts, then, a series of decisions could settle the law in a way that individual judges would not dare to reject." Caleb Nelson, *Stare Decisis* and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1, 34–35 (2001). Nelson rejects the notion that the later judge would stick with the consensus merely for precedent's stake; instead, he argues that the consensus suggests that earlier judges might have correctly decided those cases in accordance with "external sources." Id. at 28–35. Nelson includes natural reason, customs, or divine revelation as possible "external sources." Id. at 23. Later in the antebellum period, "external sources" gave way to greater reliance on "internal sources," like stare decisis, to control judges' discretion. Id. at 42–45. State-court decisions in the antebellum period suggest that judges might have considered instrumental concerns as well as "external sources" and stare decisis in making their decisions. See supra Sections III.A & III.B; see also Horwitz, supra note 10, Chapter I.

[110] 3 Mass. (1 Tyng) 1, 11 (1807).

[111] 15 U.S. (2 Wheat.) 66, 75 (1817).

[112] 15 Johns. 6, 12–13 (N.Y. Sup. Ct. 1818).

[113] See, e.g., Beach v. State Bank, 2 Ind. 488, 492 (1851) (describing the rule in *Coolidge* as an "established legal principle[]"); Vance v. Ward, 32 Ky. (2 Dana) 95, 96 (1834); Franklin Bank v. Lynch, 52 Md. 270, 278–79 (1879) (finding that the rule in *Coolidge* "seems to be well established in this country"); see also Overman v. Hoboken City Bank, 30 N.J.L. 61, 68–69 (N.J. Sup. Ct. 1862) (collecting cases).

[114] See Storer v. Logan, 9 Mass. (8 Tyng) 55, 58 n.3 (1812) (collecting cases). But see Greele v. Parker, 5 Wend. 414, 422 (N.Y. 1830) (suggesting that the English courts

But as the New York Court for the Correction of Errors wrote when it decided to remain in the majority: "the question appears to have been settled by numerous decisions;"[115] it was "a well settled rule of the commercial law,"[116] whose purpose is to "accommodate[] the mercantile transactions of the country."[117] Both the Chancellor and the two Senators who wrote in *Greele v. Parker* began not with the merits of the position, but by noting that the question was "well settled."[118] Because a critical mass of courts had already settled on the position taken in *Coolidge*, the New York court found further discussion of the merits unnecessary.

Once a number of courts had coalesced around a position on the general commercial law, the widely held desire to create a uniform system of general commercial law would compel other states to join. Each state, individually pursuing its interest in attracting commerce, would seek to join in the previously "settled" rules of the other states. The individual desire to join the uniform rule prevented outliers and minority coalitions from forming once a rule was established. Once established, uniformity in the general commercial law was stable.

2. Supreme Court Power to Shape the Consensus

State high courts acknowledged the Supreme Court's considerable power to set the consensus position. Even as they forcefully denied the Supreme Court any traditional binding authority,[119] state courts explicitly held that the Supreme Court "settled" the preexisting debt issue.[120]

sustained the position that a letter promising to accept might serve as an acceptance for a non-existing note).

[115] *Greele*, 5 Wend. at 420.

[116] Id. at 416.

[117] Id. at 420.

[118] Id. at 416.

[119] See supra Part II.

[120] See Kennedy v. Geddes, 8 Port. 263, 269 (Ala. 1838) ("[W]e do not feel authorised [sic] to go beyond the clear and precise rule laid down by Chief Justice Marshall . . . ."); Carrollton Bank v. Tayleur, 16 La. 490, 498–99 (1840) ("After many decisions in both [England and the United States] on these collateral acceptances, predicated on the facts of each particular case, the rule has been laid down and settled by the Supreme Court of the United States, in [*Coolidge*].").

The Supreme Court exercised considerable power to shape the general commercial law, even without appellate review of the state courts.[121] The Court was widely reported and cited. The lower federal courts spread out across a vast geography, and not only could the Supreme Court overrule them, but Supreme Court Justices sat on the circuit courts. Once the Supreme Court decided a particular issue of general commercial law, a state high court could be sure that whatever its decision on the same issue, the federal courts would agree with the Supreme Court. Given the choice to side with the entire federal court system or a sister state on a given issue, the state would often side with the federal system. The Supreme Court exercised more "gravity" over cases of general law than other courts; its decisions tended to attract the other state courts.

State court decisions support this view of Supreme Court gravity. In Louisiana, the supreme court wrote that "[a]fter many decisions in both [England and the United States] on these collateral acceptances, . . . the rule has been laid down and settled by the Supreme Court of the United States[] in *Coolidge v. Payson*."[122] The court notes that prior to *Coolidge*, the question had been addressed in both countries. But it took the Supreme Court to "settle" it. The court goes on to describe why: "We believe . . . as in fact is expressed in [*Coolidge*] itself, that this question being considered of much importance to merchants, it was intended to be put at *rest* . . . ."[123] The Louisiana high court looked to the Supreme Court because the Supreme Court exercised more gravity than the courts that had previously entered opinions on the subject. In short, the opinion of the Supreme Court, while not binding in a formal way upon the Supreme Court of Louisiana, gave the state court a reason to decide the case one way rather than another as it pursued its goal of promoting commerce through uniformity.

Carlisle shows the most extreme example of a state court responding to Supreme Court gravity.[124] The Ohio Supreme Court had previously held that a preexisting debt could not serve as good

[121] See Fletcher, supra note 10, at 1572–75 (describing the deference state courts gave to the Supreme Court on questions of marine insurance law even as they recognized that the Supreme Court could not bind them).

[122] *Carrollton Bank*, 16 La. at 498–99; see also Heckman, supra note 22, at 253–54.

[123] *Carrollton Bank*, 16 La. at 499 (emphasis added).

[124] 11 Ohio at 181.

consideration,[125] relying on *Rosa v. Brotherson*.[126] After briefly examining the state of the law in New York, the court turned to the opinion in *Swift*, where Justice Story had written that a preexisting debt could serve as a valuable consideration in a negotiable paper transaction.

> It is believed that the law, as thus settled by the highest judicial tribunal in the country, will become the uniform rule of *all*, as it now is of *most* of the states. And, in a country like ours, where so much communication and interchange exists between the different members of the confederacy, to preserve uniformity in the great principles of commercial law, is of much interest to the mercantile world.[127]

The court stressed that the Supreme Court decision "settled" a question upon which courts disagreed. While the state courts had not succeeded in creating a "uniform" rule across the entire country on their own, even though they desired to, the Ohio court believed that the Supreme Court's opinion tipped the balance to one side, and that the remaining state courts would coalesce around *Swift*. Not only did the Ohio court articulate this policy, it set out to fulfill it by overruling its own decision in *Riley*, decided just four years earlier.[128]

The high court of Vermont also believed the Supreme Court to have great force to unify the general commercial law. In another preexisting debt case, the Supreme Court of Vermont described precisely the position advocated here. First, the Vermont court acknowledged that "it is certainly desirable that, in regard to commercial law of such extensive application in the every day transactions of business, the law of the American states should also be uniform."[129] After asserting that commerce requires uniformity, the Vermont court noted that *Swift* was not de jure binding: "The decisions of the national tribunal are not indeed of any binding authority upon the general rules of the law merchant in a state court, further than they commend themselves to our sense of reason and

[125] *Riley*, 8 Ohio at 529.
[126] 10 Wend. 85 (N.Y. Sup. Ct. 1833).
[127] *Carlisle*, 11 Ohio at 191–92.
[128] Id. at 192.
[129] *Atkinson*, 26 Vt. at 580.

justice."[130] This position was not unusual; states routinely ignored the decisions of the Supreme Court, often noting the Supreme Court's lack of de jure authority.[131]

The Vermont high court followed *Swift* anyway because the goal of uniformity virtually demanded obedience to an applicable Supreme Court decision:

> But such a decision as that of *Swift v. Tyson*, upon such a subject, could scarcely fail to be regarded as of very considerable force, and, if sound in principle, would, *almost of necessity*, ultimately form the basis of that uniformity of commercial law in these states which, sooner or later, must from its very great convenience, ultimately prevail.[132]

The Vermont court found the Supreme Court's decisions on the general commercial law so powerful that, as long as states sought unity in the general commercial law, the position of the Supreme Court would "almost of necessity" prevail. And it would prevail even though, as the Vermont court acknowledges, the Supreme Court could exercise no direct binding authority over the state courts on questions of general commercial law.

When a state high court came upon an issue of general commercial law where either a critical mass of state courts or a Supreme Court decision and a smaller number of state courts had uniformly decided the issue, the state court could promote uniformity by joining the majority. The letter of acceptance issue in *Coolidge* followed this path. While state courts observed some disagreement on the subject,[133] all of those who decided the issue agreed with the Supreme Court that a letter promising to accept would amount to an acceptance.[134]

While the Supreme Court could exercise no de jure supremacy on questions of general commercial law, in practice the state high

[130] Id.

[131] See supra Part II.

[132] *Atkinson*, 26 Vt. at 580–81 (emphasis added).

[133] In *Carnegie v. Morrison*, 43 Mass. (2 Met.) 381, 406 (1841), Chief Justice Shaw wrote that "the present law of England . . . is at variance with what seems to be the law of this country." Justice Story also noted that the contemporary law in England was in question. Joseph Story, Commentaries on the Law of Bills of Exchange § 249 (Boston, Little, Brown and Co. 3d. ed. 1853).

[134] Story, supra note 133, §§ 249, 251, and sources therein.

courts gave the decisions of the Supreme Court de facto binding authority. The state high courts sought uniformity to promote commerce. Uniformity requires that a critical mass of jurisdictions hold the same rule. These cases show that the number of jurisdictions required to create a critical mass was much smaller when one of those jurisdictions was the federal court system, and quite possibly the Supreme Court might have formed a critical mass by itself on a given issue. Once the Supreme Court weighed in, state high courts flocked to its position in the interest of uniformity. Through this mechanism, the Supreme Court exercised de facto supreme authority over the general commercial law, and the power to regulate, indirectly, the commercial dealings of the entire country.

3. Clash of the Titans: The Bipolar Consensus

The general commercial law did not achieve consensus on the preexisting debt question, despite the fact that the Supreme Court addressed the issue in *Coolidge*.[135] Why, if the Court was able to "settle" the implied acceptance issue addressed in *Coolidge*, did the Court fail to "settle" the issue of preexisting debt?

The Court did not settle the issue of preexisting debt in *Coolidge* because it did not generate the critical mass required to convince the state courts that the path to uniformity was through the Supreme Court. First, Chief Justice Marshall's treatment of the preexisting debt question in *Coolidge* failed to set the tone that his treatment of the implied acceptance question did. Second, the courts of New York, arguably wielding almost as much influence over the general commercial law as the Supreme Court,[136] took the opposite position before *Coolidge* had established the critical mass required to create uniformity across the entire country.

The Supreme Court's considered and forceful discussion of the implied acceptance issue in *Coolidge* added to its gravity in the state courts. The Court cited no fewer than six English cases in its six-page discussion of the letter of acceptance issue; the preexisting debt issue warranted no citations, no analysis, and nothing more than an assertion that "the mere circumstance[] that the bill was

[135] 15 U.S. (2 Wheat.) at 73.

[136] See Fletcher, supra note 10, at 1566–70 (describing the "great deference" states deciding marine insurance cases gave to the decisions of New York).

taken for a pre-existing debt has not been thought sufficient to do away [with] the effect of a promise to accept."[137] In fact, a state court reading the opinion might have thought that the Court held only that a preexisting debt did not affect the validity of the *acceptance*, while leaving the question of whether a preexisting debt might serve as valuable consideration for another day.[138] The weakness of the Court's disposition led some courts to ignore its conclusion as to the preexisting debt question while citing its conclusion as to the letter of acceptance issue.[139] As long as there was some uncertainty about the position of the Supreme Court on the preexisting debt question, state high courts were unwilling to coalesce around that position as a way to achieve uniformity.

State high courts looking for uniformity on the preexisting debt question avoided *Coolidge* for a second reason: strong competition. Once the New York courts had solidified their position on the preexisting debt question, the Supreme Court faced another court with substantial gravity. When a state court held to the position that a preexisting debt could not constitute a valid consideration, it always relied on the courts of New York.[140] State high courts in search of uniformity did not care where the uniformity came from,

[137] *Coolidge*, 15 U.S. (2 Wheat.) at 73.

[138] In *Ontario Bank v. Worthington*, the Supreme Court of Judicature of New York distinguished *Coolidge* on these grounds, suggesting that there is a distinction between a drawer who advances money in return for the acceptor's promise to accept his bill and the holder who takes the bill in return for a preexisting debt. 12 Wend. 593, 600 (1834). The New York court ignored the case of *Townsley v. Sumrall*, 27 U.S. (2 Pet.) 170, 182 (1829), where the Supreme Court held that "it can make no difference in law[] whether the debt for which the bill is taken is a pre-existing debt[] or money then paid for the bill." One suspects that the New York court could not have distinguished this case as easily. The Supreme Court itself took the position that *Coolidge* settled the question of whether a preexisting debt might serve as consideration for a bill of exchange in *Swift*, 41 U.S. (16 Pet.) at 20 (1842), as did a number of state courts that followed it. See, e.g., Brush v. Scribner, 11 Conn. 388, 403 (1836); Johnson v. Barney, 1 Iowa 531, 535 (1855).

[139] The New York courts accepted *Coolidge* as settling the question of acceptance of a non-existing bill in *Parker v. Greele*, 2 Wend. 545, 548 (N.Y. Sup. Ct. 1829), and by two of the three authors of *Greele v. Parker*, 5 Wend. 414, 420–22 (N.Y. 1830), but famously rejected the authority of the *Coolidge* decision on the question of whether a preexisting debt could serve as a valid consideration in return for a bill of exchange in *Ontario Bank v. Worthington*, 12 Wend. 593, 600 (N.Y. Sup. Ct. 1834).

[140] See, e.g., *Riley*, 8 Ohio at 528, overruled by Carlisle v. Wishart, 11 Ohio 172 (1842).

but rather simply sought the jurisdiction and the rule most likely to attract a large number of followers.

New York's elevated position within the nineteenth-century commercial world, its forceful opinions, and Chief Justice Marshall's relatively weak treatment in *Coolidge* combined to create a rift in the general commercial law. Until *Swift*, neither court could attract enough support to show the supporters of the other court that they had picked the wrong horse in the race to uniformity.

4. Dissenting Courts Tend to Join the Consensus

Swift shows the raw power of the nineteenth-century Supreme Court. Not, as some have argued, because it was the first time the Supreme Court had asserted a right to the general commercial law,[141] but rather because it shows the Supreme Court's ability to "settle" an issue of general commercial law nationwide, and therefore regulate the commercial law of the United States in a way Congress may not have been able to under nineteenth-century conceptions of the commerce power.[142] The Supreme Court did not regulate commerce by increasing the jurisdiction of the federal courts or by creating another body of law for them to use,[143] but by changing the substantive general commercial law of the states. Dissenting states, driven by the desire for a uniform system, would feel virtually compelled to join the Supreme Court.

[141] See, e.g., Erie R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938).

[142] See Erwin Chemerinsky, Constitutional Law § 3.3 (3d ed. 2006) (noting that while some Supreme Court cases continued the broad interpretation of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), others took a more restricted view, for example, *United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1869).

[143] But see *Erie*, 304 U.S. at 75, 78–79 (objecting to the *Swift* doctrine on the grounds that it abused the diversity jurisdiction and that it incorrectly gave federal courts access to a "transcendental" body of law); see also Horwitz, supra note 10, at 250 ("Not only had the Supreme Court furthered commercial interests and overriden [sic] state policies long before *Swift v. Tyson* through manipulation of legal remedies, but Justice Story had also tried from the beginning to advance these interests through an expansion of federal jurisdiction. . . . Neither *DeLovio* nor *Swift* could ever fulfill the grandest aspirations of its author—the desire to establish an exclusive federal forum for commercial disputes, which would not only provide uniformity and certainty but would also take these disputes out of what might otherwise be an uncongenial anti-commercial environment often found in state courts.").

Swift decided the preexisting debt question directly, acknowledging but refusing to follow the law of New York.[144] That Justice Story felt no compulsion to stand by the laws of New York would not have surprised any of his contemporary judges on the state bench; they themselves often sought answers in the law merchant, the general commercial law, or the mercantile law.[145] Nor was Justice Story announcing the "declaratory" theory of law[146] when he wrote that the decisions of the state courts "are, at most, only evidence of what the laws are; and are not of themselves laws."[147] One could more plausibly argue that Justice Story wrote this to suggest that no state exercises complete authority over the content of the general commercial law; rather, the interests of each jurisdiction in a uniform system determine the content of the general commercial law. Any given state's decisions might bind litigants from that state, but if those decisions were adverse to the majority view, one would expect, first, that no other court would feel compelled to follow them, and, second, that the minority state would eventually move to join the majority position on that particular issue.

State court decisions support the second of these predictions; once the Supreme Court weighed in on the question of antecedent debt in *Swift*, state courts began to abandon the New York position in search of what they believed to be greater uniformity with the Supreme Court. In Vermont, the high court held that a preexisting debt might serve as a good consideration, citing *Swift*.[148] The court

[144] *Swift*, 41 U.S. (16 Pet.) at 16–19.

[145] Supra Part I.

[146] Professor Horwitz notes that *Swift* has been "regularly identified as expressing the so-called 'declaratory' theory of law." Horwitz, supra note 10, at 245. Horwitz rejects the notion that Story might have believed such a theory, arguing that Story's 1834 treatise on the conflict of laws "reflects recognition of a fundamental erosion of the declaratory theory of law." Id. at 245–49. This Note suggests that state courts viewed themselves as selecting their law with an eye toward the general commercial law—that is, the law of the other jurisdictions in the economic system. This thesis is not inconsistent with Horwitz's view of the place of the declaratory theory of law in *Swift*, but it does suggest that Horwitz errs in his conclusion that Story sought to promote commerce by collecting commercial cases in federal court and thus save them from anti-commercial state courts.

[147] *Swift*, 41 U.S. (16 Pet.) at 18.

[148] *Atkinson*, 26 Vt. at 580–81; see also Bank of Mobile v. Hall, 6 Ala. 639, 644 (1844); Gibson v. Conner, 3 Ga. 47, 51 (1847); Blanchard v. Stevens, 57 Mass. (3 Cush.) 162, 166–69 (1849); Love v. Taylor, 26 Miss. 567, 574 (1853). See generally *At-*

decided not only that the point is "now to be pretty generally conceded, that one who takes a note or bill indorsed while current, in payment and extinguishment of a pre-existing debt, must be regarded as a holder for value," but also that "[t]his is certainly the general course of decision upon the subject."[149] The Ohio Supreme Court reversed itself after *Swift* was handed down.[150] The Supreme Court of Maine relied on *Swift* "as reported in the daily papers" to hold that payment of a preexisting debt might serve as consideration, even though the court acknowledged that if the law of New York were to apply to the New York plaintiff and New York defendants in that case, the result would be different.[151]

Once *Swift* addressed head-on the question of preexisting debts, the state courts moved to align themselves with the Supreme Court's position. But what of the New York courts themselves, the other heavyweight who caused all the trouble? Justice Story noted in *Swift* that the New York position had eroded in the cases immediately preceding his decision.[152] In the year following *Swift*, the Supreme Court of New York once again visited the question of whether a preexisting debt might be good consideration for a bill of exchange in *Stalker v. McDonald*.[153] The Chancellor wasted no time in approaching *Swift*, first asserting the traditional relationship between the state and federal courts when their laws conflicted. On federal questions, he held, the state court would follow the guidance of the Supreme Court. On local questions, the court would follow its own decisions even when the Supreme Court

kinson, 26 Vt. at 581 (collecting cases). A handful of state courts joined in without directly relying on *Swift*. See, e.g., Naglee v. Lyman, 14 Cal. 450, 454 (1859).

[149] *Atkinson*, 26 Vt. at 574–75.

[150] *Carlisle*, 11 Ohio 172. The Ohio court later altered its position once again, adopting the position that Justice Catron took in *Swift*, 41 U.S. (16 Pet.) at 23 (Catron, J., dissenting), that while one who gave notes in payment of a preexisting debt received valuable consideration, one who gave notes as collateral security for a preexisting debt did not. Roxborough v. Messick, 6 Ohio St. 448 (1856).

[151] Norton v. Waite, 20 Me. 175, 176–78 (1841).

[152] *Swift*, 41 U.S. (16 Pet.) at 17 (citing Bank of Salina v. Babcock, 21 Wend. 499 (N.Y. Sup. Ct. 1839); Bank of Sandusky v. Scoville, 24 Wend. 115 (N.Y. Sup. Ct. 1840)). In these cases, the New York Supreme Court of Judicature weakened if it did not overturn the previous holdings in *Ontario Bank v. Worthington* and *Rosa v. Brotherson*.

[153] 6 Hill 93 (N.Y. 1843).

would disagree.[154] On its face, this position does not inspire controversy.

In the following sentence, the New York court asserted the now-familiar position that the general commercial law existed outside of the local law,[155] and ought to be determined primarily by choosing the law that would create the greatest uniformity in the pursuit of commerce:

> On a question of commercial law, however, it is desirable that there should be, as far as practicable, uniformity of decision, not only between the courts of the several States and of the U.S., but also between our courts and those of England, from whence our commercial law is principally derived, and with which country our commercial intercourse is so extensive. I have, therefore, thought it my duty to re-examine the principles upon which the decision of this court in *Coddington v. Bay*, was founded . . . .[156]

Chancellor Walworth did not consider the question of bills of exchange to be one of the "local" law; instead, the pursuit of uniformity required that the New York Supreme Court revisit its precedent on the occasion of a contrary decision of the Supreme Court of the United States.

The court then did something that can only be explained by reference to a principle of de facto Supreme Court supremacy on the general commercial law: it *distinguished Swift*. Justice Story had taken the position that a preexisting debt could serve as consideration regardless of whether the endorser pledged the notes as payment of the debt or as security for it.[157] The New York court held that its position had always been that notes pledged as collateral security for an antecedent debt were not given for valuable consideration.[158] Chancellor Walworth then decided that what Justice Story wrote "respecting the transfer of a negotiable note as a mere security for the payment of an antecedent debt[] was not material

[154] Id. at 95.

[155] See Fletcher, supra note 10, at 1514.

[156] *Stalker*, 6 Hill at 95.

[157] *Swift*, 41 U.S. (16 Pet.) at 19–20 ("[W]e are prepared to say[] that receiving it in payment of, or as security for[,] a pre-existing debt[] is according to the known usual course of trade and business.").

[158] *Stalker*, 6 Hill at 97–98.

to the decision of any question then before the court, and is, therefore, not to be taken as a part of its judgment in that case."[159] In other words, Justice Story's opinion did not conflict with the laws of New York, and therefore the New York court avoided a choice between the two. By splitting the question in half, taking one piece and forcing *Swift* onto the other piece, Chancellor Walworth could assert that he had served the purposes of uniformity.

The New York court's treatment of the *Swift* decision provides a test for the theory of de facto Supreme Court authority described above. As Chancellor Walworth observed, if the general commercial law were akin to a "federal question," the Supreme Court's decisions would bind the courts of the states in general and New York in this case. But Chancellor Walworth rejected the Supreme Court's binding (that is, de jure) authority on the general commercial law; at the most, a contrary decision by the Supreme Court created a "duty to re-examine" the contrary state law to determine if a conflict actually existed.[160]

Nor did the New York high court consider the general commercial law to be of the "local" variety, on whose points the decisions of the state high court "are to be followed in preference to those of any other State or country, or even of the U.S."[161] If it had believed that a question of negotiable instruments was "local," *Swift* would have been irrelevant to the resolution of the issue, and there would have been no writ of error designed to cause the court to "conform to the opinion of Mr. J[ustice] Story."[162] If the New York court had believed the issue to be "local," the case would never have required decision in the first place.

Instead, the New York court treated *Swift* precisely as a court that believed in the de facto supremacy of the Supreme Court over the common law would. Two plausible theories explain the court's treatment of *Swift*. In the first, the New York court looked to the goal of uniformity and decided that despite *Swift*, the weight of the decisions favored the prior New York position. In the second, and probably more likely, the New York court decided that *Swift* erred

[159] Id. at 95.
[160] Id.
[161] Id.
[162] Id.

on the merits, and the court attempted to resolve that error while doing as little damage to uniformity as possible.

Under the first theory, the court, acting in the pursuit of "uniformity of decision, not only between the courts of the several States and of the U.S., but also between our courts and those of England,"[163] examined the relevant weight of authority and decided that the value of uniformity in the commercial law between England and New York dominated the value of uniformity between New York and the federal courts. This theory explains Chancellor Walworth's extensive treatment of the cases of England and his insistence that he could not find "an actual decision in the English reports which is in conflict with the uniform course of decisions on this subject in this State."[164] Under this theory, the New York court, having examined the landscape, decided that the best chance for uniformity in the commercial law required its adherence to the laws of England. This theory explains why the court did not "examine the reports of most of our sister States in reference to this subject."[165] As far as New York was concerned, the relevant uniformity existed between New York and England, not New York and Maryland.

Alternatively, the Supreme Court of New York may have believed that Justice Story erred on the merits. Under this theory, the New York court distinguished *Swift* (rather than simply noting its disagreement) because it felt the need to preserve uniformity even as it deviated from the *Swift* position; to simply ignore or hold adversely would damage uniformity and hurt commerce. This explains the court's citations to *Homes v. Smyth*[166] and *Norton v. Waite*,[167] at least the first of which the court believed to articulate the position that when a holder received a note for absolute payment of a preexisting debt, he was a holder for valuable consideration, while a holder who received a note merely as security would not have been.[168] Chancellor Walworth might have held the Maine decisions forth as proof that the position the New York court took

[163] Id.
[164] Id. at 100.
[165] Id. at 111.
[166] 16 Me. 177 (1839).
[167] 20 Me. 175 (1841).
[168] *Stalker*, 6 Hill at 111.

in *Stalker* could rationally exist alongside the Supreme Court's decision in *Swift*; a uniform system could have held that one who gives a note for payment of a preexisting debt receives valuable consideration, but one who gives a note as security against a preexisting debt does not.[169]

Chancellor Walworth seemed to be feeling the Supreme Court's influence through the desired goal of uniformity in pursuit of commerce. The New York court did not need to distinguish *Swift* unless the decision would otherwise have constrained the New York court in some way; if *Swift* did not restrict the New York court, Chancellor Walworth would not have needed to observe his "duty to re-examine" the New York decisions on point.

Stalker shows the powerful effect of the Supreme Court's de facto authority to control the general commercial law.[170] Not only did the New York court feel the need to address a Supreme Court decision on the general commercial law, but it felt the necessity to both distinguish the case and justify its opinion by claiming complete uniformity with the English law. If the Supreme Court were binding in the traditional de jure way, the attempt to distinguish *Swift* by declaring part of Justice Story's opinion to be dicta would have almost certainly been reversed on appeal. On the other hand, if the Supreme Court had no more authority over the general commercial law than it had over questions of "local" law (or than a sister state had over the general commercial law), the New York court would likely not have mentioned it at all.[171] Instead, the New

[169] The New York court might have believed such a position to be "uniform," in which case the theory of de facto supremacy would only create uniformity insofar as courts could justify to others that their positions would create uniformity.

[170] See also Goodman v. Simonds, 19 Mo. 106, 116–17 (1853) (following *Stalker v. McDonald*, 6 Hill 93 (1843), to hold that when the debt is taken as collateral security, rather than payment of preexisting debt, it is not a valuable consideration); Roxborough v. Messick, 6 Ohio St. 448 (1856) (same). But see Blanchard v. Stevens, 57 Mass. (3 Cush.) 162, 168 (1849) ("If, however, the case had been one of a note taken as collateral security, it is difficult for us to perceive any sound reason for a different result."); *Atkinson*, 26 Vt. at 576 ("According to the general commercial usage, there is, then, no essential difference in principle, whether a current note or bill is taken in payment, or as collateral security for a prior debt, provided the note is, in both cases, truly and unqualifiedly negotiated, so as to impose upon the holder the obligation to conform to the general rules of the law merchant, in enforcing payment.").

[171] The court mentioned in passing the contrary decision of the Connecticut court, *Brush v. Scribner*, 11 Conn. 388 (1836), but only in reference to that decision's appearance in *Swift*. *Stalker*, 6 Hill at 111.

York court acknowledged the power of the Supreme Court to enforce uniformity over the general commercial law and felt that it had to justify any divergence from a Supreme Court decision.

CONCLUSION

After seventy-two years of *Erie Railroad Co. v. Tompkins*, a world of federal court access to general commercial law might be hard to imagine. Such a system not only existed, it existed before *Swift* and continued after it, largely unchanged. *Swift* did, however, give something new to state courts: a decision on an important but unsettled question of negotiable paper.

While state courts often asserted that the Supreme Court could not bind them on questions of general commercial law, they just as often acknowledged a desire for a uniform system of commercial law. In pursuit of a uniform commercial law, a state would adhere to a position that sister courts had "settled" even where that position conflicted with that state's view of the merits or even its prior opinions. The Supreme Court exercised great power to "settle" issues. When the *Swift* decision came down, it shook the commercial world; courts overruled themselves or at least felt compelled to distinguish the Supreme Court. In 1842, courts were split on the issue; within twenty years of *Swift*, the great majority of jurisdictions had joined the Supreme Court's "settled" position.

Critics often charge that Justice Story intended to claim exclusive federal jurisdiction over commercial disputes, but the Supreme Court did not assert any new power or authority in *Swift*. Even though the Supreme Court lacked de jure supremacy over any state court on any of the general commercial law issues, the desire of each individual state to further commerce by creating a uniform general commercial law gave the Supreme Court de facto supremacy over the entire system. State court pursuit of uniformity gave the Supreme Court more power than even Justice Story's critics could imagine: de facto authority to set the general commercial law not just in federal diversity actions of mercantile law, but in all state and federal actions of mercantile law.