Green on Erie

Michael Steven Green (William and Mary Law School) has posted Horizontal Erie and the Presumption of Forum Law on SSRN.

> *According to Erie Railroad v. Tompkins and its progeny, a federal court interpreting state law must decide as the state's supreme court would. In this Article, I argue that a state court interpreting the law of a sister state is subject to the same obligation. It must decide as the sister state's supreme court would.*
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> *Horizontal Erie is such a plausible idea that one might think it is already established law. But the Supreme Court has in fact given state courts significant freedom to misinterpret sister-state law. And state courts have taken advantage of this freedom, by routinely presuming that the law of a sister state is the same as their own—often in the face of substantial evidence that the sister state's supreme court would decide differently. This presumption of similarity to forum law is particularly significant in nationwide class actions. A class will be certified, despite the fact that many states' laws apply to the plaintiffs' actions, on the ground that the defendant has failed to provide enough evidence to overcome the presumption that sister states' laws are the same as the forum's. I argue that this vestige of Swift v. Tyson needs to end.*
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> *Applying horizontal Erie to state courts is also essential to preserving federal courts' obligations under vertical Erie. If New York state courts presume that unsettled Pennsylvania law is the same as their own while federal courts in New York do their best to decide as the Pennsylvania Supreme Court would, the result will be the forum shopping and inequitable administration of the laws that are forbidden under Erie and its progeny. As a result, federal courts have often held that they too must employ the presumption of similarity to forum-state law, despite its conflict with their obligations under vertical Erie. Applying horizontal Erie to state courts solves this puzzle.*

The paper is forthcoming in the *Michigan Law Review*.

He had posted few weeks before Erie's Suppressed Premise .

> *The Erie doctrine is usually understood as a limitation on federal courts' power.*

This Article concerns the unexplored role that the Erie doctrine has in limiting the power of state courts.

According to Erie Railroad Co. v. Tompkins, a federal court must follow state supreme court decisions when interpreting state law. But at the time that Erie was decided, some state supreme courts were still committed to Swift v. Tyson. They considered the content of their common law to be a factual matter, concerning which federal (and sister state) courts could make an independent judgment. Indeed, the Georgia Supreme Court still views its common law this way. In order to explain Brandeis's conclusion in Erie that state supreme court decisions bind federal courts, even when the state supreme court does not want them to be binding, a premise must be added to his argument – one that limits state supreme court power in this area.

The missing premise is a non-discrimination principle that is a hitherto unrecognized – but essential – part of the Erie doctrine. A state supreme court can free federal courts of the duty to follow its decisions only if it is willing to free domestic courts of the same duty. It cannot discriminate concerning the binding effect of its decisions on the basis of whether the effect is in domestic or federal court.

A similar puzzle arises when a federal court interprets unsettled state law. The Supreme Court has suggested that a federal court should predict how the relevant state supreme court would decide. But many state supreme courts – including the New York Court of Appeals – have indicated that they do not care if federal (or sister state) courts use the predictive method concerning their unsettled law. Here, too, the non-discrimination principle latent in Erie explains how the Supreme Court can demand that federal courts adopt the predictive method, whatever a state supreme court has said about the matter.

The Article ends by briefly discussing the transformative effect that Erie's non-discrimination principle should have for choice of law, where Swift v. Tyson remains ubiquitous.

The paper is forthcoming in the *Minnesota Law Review*.