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L. Lynn Hogue

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LAW IN A PARALLEL UNIVERSE: *ERIE'S*  
BETRAYAL, DIVERSITY JURISDICTION, GEORGIA  
CONFLICT OF LAWS QUESTIONS IN CONTRACTS  
CASES IN THE ELEVENTH CIRCUIT, AND  
CERTIFICATION REFORM

L. Lynn Hogue<sup>†</sup>

Judged from the perspective of federalism, the decision in *Erie Railroad Co. v. Tompkins*<sup>1</sup> was both a triumph and a great failure. In abandoning the approach of *Swift v. Tyson*,<sup>2</sup> which had left federal courts sitting in diversity "free to exercise an independent judgment as to what the common law of the State is—or should be,"<sup>3</sup> and requiring instead that federal courts apply the law of the state in which they sit, the Supreme Court traded nationalism, the nationalizing and homogenizing quality of federal common law, for federalism, a heightened sensitivity to states and their ability to formulate and enforce state law policies and interests. This shift de-emphasized fears of state parochialism and diversity, although Congress continued to assure a nonstate, federal alternative forum for the resolution of disputes between citizens of different states. The continued procedural assurance of diversity jurisdiction moved in a different direction from the legal theme of *Erie*.

The national emphasis of diversity jurisdiction was subordinated by *Erie* and the Supreme Court's extension of *Erie* in *Klaxon Co. v. Stentor Electric Manufacturing Co.*,<sup>4</sup> which requires adherence to state choice-of-law rules in diversity cases in the federal courts. National concerns were thus tempered because state law governs the claims tendered.

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<sup>†</sup> Professor of Law, Georgia State University College of Law, A.B., William Jewell College, 1966; M.A., University of Tennessee, 1968; Ph.D., 1972; J.D., Duke University, 1974. The author is a member of the Bars of Arkansas, Georgia, and North Carolina.

1. 304 U.S. 64 (1938).
2. 41 U.S. (16 Pet.) 1 (1842).
3. *Erie*, 304 U.S. at 78-79.
4. 313 U.S. 487 (1941).

Although *Erie* and *Klaxon* impose an obligation to follow state law, they provide no effective mechanism to resolve the practical problems of state law administration. What are federal courts to make of state law issues that are obscure because state-law precedent on point is lacking or because state courts have never spoken to the issue presented?<sup>5</sup> The answer in such instances is that the federal judge must “speculate”<sup>6</sup> in an effort to “predict state law.”<sup>7</sup> These speculations are only imperfectly subject to correction since there is no possibility of further review because of the absence of a federal question. As a consequence, federal district courts and courts of appeals can develop separate and distinct bodies of state law—true state law enforced in state court and an ersatz federal version of state law enforced in federal court. This legal dualism—making the version of the law applied in a case turn on the courthouse—was of the sort that *Erie* was supposed to end.

In addition, the existence of an alternative federal diversity jurisdiction allowed the continued impoverishment of state common law by siphoning away the opportunity to resolve cases at the state level that would enrich and refine the body of state law to which federal and state judges could refer with confidence. This separate body of state law articulated in federal courts in diversity cases developed at the expense of the state interest it was to serve and with no way to test its fidelity to or congruence with the state model it was obliged to follow under *Erie*. *Erie*'s promise has been betrayed.

This problem has particular relevance to the concern for the federal courts of appeals as a mechanism for the correction of

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5. Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992).

Finding the applicable state law, however, is a search that often proves elusive. Difficulty arises when the federal courts must predict how the highest court of the state would decide the issue. Even when there is a state supreme court decision on point, the direction is not always crystal clear. For example, the allegedly controlling decision of the state supreme court may be old and intervening doctrinal trends may call into question whether the state supreme court would follow it today. Further, the relevant language in the state supreme court's decision may be merely dictum, or the pertinent holding may have been joined by less than a majority of that court.

*Id.* at 1675-76 (footnotes omitted).

6. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 277 (2d ed. 1994).

7. See, e.g., Sloviter, *supra* note 5, at 1677-80.

error. The essence of the problem is simply stated. Because state law is not always settled or clear in a given case, diversity jurisdiction generates opportunities for error when federal courts speculate on the meaning of state law.<sup>8</sup> These speculations can be verified or corrected only by means of certification—referring the question to state courts for resolution. By serving as a source of error, federal diversity jurisdiction contributes to the very problem federal appellate courts are designed to solve. In diversity cases, federal appellate courts can combine a role of error correction with a hand in error creation or continuation. Perpetuation of federal diversity jurisdiction accepts this contradiction and the burdens that go along with it. So long as federally created error in the administration of state law at the appellate level remains an imbedded part of the system, any proposals for its reform in other respects must receive a qualified endorsement.

Two techniques suggest themselves as solutions to this problem. One is the curtailment of diversity jurisdiction. The other is certification of state law questions to state courts for definitive resolution.

Most recently, the Proposed Long Range Plan for the Federal Courts recommends the following:

eliminating diversity jurisdiction, except in actions involving aliens, interpleader actions, and cases in which the petitioner can clearly demonstrate the need for a federal forum. . . . Alternatively, eliminating diversity jurisdiction for cases in which the plaintiff is a citizen of the state in which the federal district court is located; undertaking a . . . study . . . to determine the desirability and impact of shifting to state courts appellate review of diversity cases in which review primarily involves the interpretation of state law (which may require encouraging states to revise their constitutions to permit such review); and [imposing more rigorous amount-in-controversy requirements].<sup>9</sup>

The discussion that follows the above recommendation includes a brief discussion of *Erie* and reflects *Erie* concerns: federal jurisdiction is “based solely on the identity of the parties [and] not on any substantive rights, privileges or immunities conferred

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8. CHEMERINSKY, *supra* note 6.

9. COMMITTEE ON LONG RANGE PLANNING, LONG RANGE PLAN FOR THE FEDERAL COURTS 29-30 (Mar. 1995) [hereinafter LONG RANGE PLAN].

by federal law . . . [furthermore], the substantive law to be applied in such cases is the statutory or common law of the state in question."<sup>10</sup>

Alternatively, Congress could pursue current proposals to limit the scope of diversity jurisdiction and thereby return more cases to the states for resolution. This route would preserve the states' proper role in the development of their common law and result in cost savings and case load reductions for the federal judicial system. The proposal emphasizes that diversity cases constitute a not insignificant portion of the total federal judicial workload, encompassing "one of every four civil cases filed in the federal district courts, about one of every two civil trials, about one of every ten appeals, and more than one of every ten dollars in the federal judicial budget."<sup>11</sup>

In a recent book, Professor Thomas E. Baker notes: "However people may view other aspects of the federal judiciary, few deny that its appellate courts are in a 'crisis of volume' that has transformed them from the institutions they were even a generation ago."<sup>12</sup> The idea to curtail diversity jurisdiction is not new,<sup>13</sup> and it may well be that prospects for reduction are not promising, as Professor Baker argues:

The elimination of diversity jurisdiction, an obvious yet controverted solution, would relieve approximately one-fourth of the district courts' dockets and one-tenth of the Courts of Appeals' dockets. Considering the history of this jurisdiction, however, no one should expect it to be abolished in an existing lifetime plus twenty-one years.<sup>14</sup>

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10. *Id.* at 30.

11. *Id.*

12. THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 31 (1994) [hereinafter RATIONING JUSTICE] (quoting REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (Apr. 2, 1990)).

13. See, e.g., Victor E. Flango & Craig Boersema, *Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads*, 15 U. DAYTON L. REV. 405 (1990); Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 B.Y.U. L. REV. 617, 630-31; Sloviter, *supra* note 5. A Department of Justice committee, chaired by then-Solicitor General Robert Bork, issued a report recommending *inter alia* "the abolition of diversity jurisdiction; the creation of administrative courts under [A]rticle I of adjudication and appeals under most federal regulatory laws; [and] the elimination of the Supreme Court's mandatory jurisdiction. . . ." RATIONING JUSTICE, *supra* note 12, at 37-38.

14. RATIONING JUSTICE, *supra* note 12, at 190 (footnote omitted).

The recommendations regarding diversity jurisdiction in the Proposed Long Range Plan for the Federal Courts, which appeared after the publication of Baker's book, largely track those of the earlier Report of the Federal Courts Study Committee.<sup>15</sup> What is significant about the new proposals is their sensitivity to the structural incongruities imposed on the federal courts by diversity jurisdiction on the one hand and the rule of *Erie* on the other.

Obviously, a curtailment of diversity jurisdiction merits serious consideration. Whichever method of curtailing diversity jurisdiction is chosen, it is time to undertake the task of fulfilling *Erie's* federalistic promise.

Certification provides an alternative solution to this legal dualism problem. In his opinion in *Clay v. Sun Insurance Office Ltd.*,<sup>16</sup> Justice Frankfurter encouraged a state-provided procedure by which federal courts could certify questions of state law to state appellate courts for definitive resolution. Rather than guessing about the content of the law they were to apply, federal courts could ask for answers. This solution, simple in its concept, ultimately has proved difficult to implement. The principal stumbling block has been the necessity of state implementation. Some states have found jurisdictional limitations in their own constitutions barriers to a certification procedure.<sup>17</sup>

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15. Compare REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38-42 (1990) (Congress should limit diversity jurisdiction "to complex multi-state litigation, interpleader, and suits involving aliens.") with LONG RANGE PLAN, *supra* note 9, at 29-32 (Congress should "diminish the impact of diversity jurisdiction . . . by eliminating diversity jurisdiction, except in actions involving aliens, interpleader actions, and cases in which the petitioner can clearly demonstrate the need for a federal forum. Diversity jurisdiction should also be retained for some consolidated 'mass tort' litigation. . . .").

16. 363 U.S. 207, 212-13 (1960).

17. *E.g.*, *Grantham v. Missouri Dep't of Corrections*, No. 72576, 1990 WL 602159 (Mo. July 13, 1990) ("[T]he United States District Court . . . has certified questions of Missouri law to [the Supreme Court of Missouri]. Notwithstanding the statutory provision, this Court's general jurisdiction is both established and limited by the Missouri Constitution. Those constitutional provisions do not expressly or by implication grant the Supreme Court of Missouri original jurisdiction to render opinions on questions of law certified by federal courts."); see also *Ward School Bus Mfg., Inc. v. Fowler*, 547 S.W.2d 394, 401 (Ark. 1977) (Fogleman, J., concurring) (holding jurisdiction of the Supreme Court of Arkansas is limited to appellate jurisdiction by the Arkansas Constitution).

Only forty-three states have provided for certification and thereby asserted control over the development of their common law in federal diversity cases. Of these forty-three, thirty-four states have certification procedures that provide for certification from a federal trial court or federal appellate court to the highest court in the state;<sup>18</sup> nine states, including Georgia, have certification procedures that provide for certification from a federal appellate court, but not from a federal trial court, to the highest court in the state;<sup>19</sup> and seven states have no certification procedures at all.<sup>20</sup> Thirty states and the District of Columbia have adopted the Uniform Certification of Questions of Law Act, which provides for certification from both federal trial and appellate courts.<sup>21</sup> Altogether, sixteen states have incomplete certification or none at all. It is within these states that problems arise. Consider the Eleventh Circuit's experience in trying to apply the correct conflict of laws rule in Georgia contracts cases as an example of *Erie* difficulties.

Both federal<sup>22</sup> and Georgia law<sup>23</sup> allow unresolved matters of

18. ALA. R. APP. P. 18; ALASKA R. APP. P. 407; ARIZ. SUP. CT. R. 27(a); COLO. APP. R. 21.1; CONN. R. APP. P. 4168; DEL. SUP. CT. R. 41; HAW. R. APP. P. 13; IDAHO APP. R. 12.1; IOWA CODE ANN. § 684A.1 (West 1987); KAN. STAT. ANN. § 60-3201 (1983); KY. R. CIV. P. 76.37; ME. REV. STAT. ANN. tit. 4, § 57 (West 1989); MD. CODE ANN., CTS. & JUD. PROC. § 12-601 (1989); MASS. SUP. CT. R. 1:03; MICH. APP. CT. R. 7.305; MINN. STAT. ANN. § 480.061 (West 1990); MONT. R. APP. P. 44; NEB. REV. STAT. § 24-219 (1989); NEV. R. APP. P. 5(a); N.H. SUP. CT. R. 34; N.M. STAT. ANN. § 34-2-8 (Michie 1990); N.D. R. APP. P. 47; OHIO SUP. CT. PRAC. R. 18; OKLA. STAT. ANN. tit. 20, § 1602 (West Supp. 1995); OR. REV. STAT. § 28.200 (1988); R.I. R. APP. P. 6; S.C. APP. CT. R. 228; S.D. CODIFIED LAWS ANN. § 15-24A-1 (Supp. 1994); TENN. SUP. CT. R. 23; UTAH R. APP. P. 41; VA. SUP. CT. R. 5:42; WASH. REV. CODE ANN. § 2.60.020 (West 1988); W.VA. CODE § 51-1A-1 (1994); WYO. STAT. § 1-13-106 (1988).

19. FLA. STAT. ANN. § 25.031 (West 1988); O.C.G.A. § 15-2-9 (1994); ILL. SUP. CT. R. 20; IND. CODE ANN. § 33-2-4-1 (Burns 1992); LA. SUP. CT. R. 12; MISS. SUP. CT. R. 20; N.Y. CT. R., § 500.17; TEX. R. APP. P. 114; WIS. STAT. ANN. § 821.01 (West 1994).

20. Telephone Interview with Tim Holthoff of the Arkansas Supreme Court Library (Mar. 7, 1995); Telephone Interview with John Rossi, Assistant Administrator of the California Supreme Court (Mar. 7, 1995); Telephone Interview with Mary Elizabeth McHaney, Deputy Clerk of the Missouri Supreme Court (Mar. 7, 1995); Telephone Interview with Joseph DeMarco, Administrative Analyst for the New Jersey Supreme Court (Mar. 7, 1995); Telephone Interview with Tom Davis of the North Carolina Supreme Court Library (Mar. 7, 1995); Telephone Interview with Zigmont Pines, Chief Legal Counsel for the Administrative Office of Pennsylvania Courts (Mar. 8, 1995); Telephone Interview with Larry Abbott, Deputy Clerk of the Vermont Supreme Court (Mar. 8, 1995).

21. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 1, 12 U.L.A. 21 (Supp. 1994).

22. See, e.g., *Lehman Bros. v. Schein*, 416 U.S. 386 (1974) (approving the use of an

state law—that is “questions or propositions of the laws of this state which are determinative of the case and [for which] there are no clear controlling precedents in the decisions of the [Georgia] Supreme Court”—to be certified to the Georgia Supreme Court for clarification.<sup>24</sup> This certification procedure, however, applies only to the Supreme Court of the United States and the federal courts of appeals. Further, certification is only to the Georgia Supreme Court; questions may not be certified to the Georgia Court of Appeals.<sup>25</sup> The limitation on the opportunity to certify to federal appellate courts has been rightly criticized as delaying resolution of questions of law at the expense of litigants.<sup>26</sup>

Though the traditional (*lex loci contractus*) approach had prevailed in Georgia since at least 1847,<sup>27</sup> for an eight-year period spanning the late 1970s and early 1980s various federal district courts,<sup>28</sup> the Court of Appeals for the Fifth Circuit, and later the Eleventh Circuit held that Georgia had adopted the “center of gravity” approach to choice-of-law in contract cases.<sup>29</sup>

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available Florida certification procedure to resolve an unsettled issue of state law on insider trading in a diversity case); *Lamb v. McDonnell-Douglas*, 712 F.2d 466, 470 (11th Cir. 1983) (holding, after certifying the issue to the Georgia Supreme Court for interpretation, the Georgia workers' compensation law controls a manufacturer's right to seek contribution and indemnity from an employer because an injury for which the plaintiff was eligible to receive benefits occurred in Georgia and “even though the employment relationship may have been localized in another state and the plaintiff may have been eligible for . . . benefits in another state”); *McClintock v. General Motors Acceptance Corp.*, 558 F.2d 732 (5th Cir. 1977) (using for the first time Georgia's certification procedure).

23. O.C.G.A. § 15-2-9 (1994).

24. *Id.* § 15-2-9(a).

25. *Id.* § 15-2-9(b).

26. See Robert H. Hall, *Federal Courts, State Law and Certification*, 23 GA. ST. B.J. 120 (1987).

27. *General Tel. Co. v. Trimm*, 311 S.E.2d 460, 461 (Ga. 1984) (citing *Cox v. Adams*, 2 Ga. 158 (1847)); *Peretzman v. Borochoff*, 200 S.E. 331 (Ga. Ct. App. 1938); *Tillman v. Gibson*, 161 S.E. 630 (Ga. Ct. App. 1931). In *General Telephone Co. v. Trimm*, the Georgia Supreme Court answered the certified question from the Eleventh Circuit Court of Appeals whether Georgia continued to adhere to the traditional rule of *lex loci contractus*. 311 S.E.2d at 461.

28. *Hayes v. Irwin*, 541 F. Supp. 397, 414 (N.D. Ga. 1982), *aff'd*, 729 F.2d 1466 (11th Cir. 1989), *cert. denied*, 469 U.S. 857, 105 S. Ct. 185, 83 L. Ed.2d 119 (1984); *Ryder Truck Rental, Inc. v. St. Paul Fire & Marine Ins. Co.*, 540 F. Supp. 66, 68 (N.D. Ga. 1982); *A-T-O, Inc. v. Stratton & Co.*, 486 F. Supp. 1323, 1326 (N.D. Ga. 1980); *Brown v. Inter-Ocean Ins. Co.*, 438 F. Supp. 951 (N.D. Ga. 1977); *Eldon Indus. v. Paradies and Co.*, 397 F. Supp. 535 (N.D. Ga. 1975).

29. *General Tel. Co. v. Trimm*, 706 F.2d 1117, 1119-21 (11th Cir. 1983) (citing *inter alia* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971)). In *General*



The federal appellate courts' error, concluding that Georgia had substituted the traditional rule for the center of gravity approach,<sup>30</sup> is traceable, although not exclusively, to a difficult, if not cryptic, passage in an opinion by the Georgia Court of Appeals in *Allen v. Smith & Medford, Inc.*<sup>31</sup> In *Allen*, the plaintiff sought to void a sale of securities under Georgia's blue sky laws.<sup>32</sup> The Georgia Court of Appeals concluded that the sale had taken place in Georgia even though the last act required to finalize the sale appeared to have taken place in Florida.<sup>33</sup> In its opinion on rehearing, the court struggled with the effect of the recent adoption of the Uniform Commercial Code (UCC), which contains its own choice-of-law provisions on Georgia's conflicts rule regarding sales.<sup>34</sup> The Georgia Court of Appeals held: "The general [or traditional] rule with regard to contracts has been repealed. Our courts may still apply the essence of that rule in other situations. But there is no law holding that such rule or rules is now applicable to our Georgia Securities Act."<sup>35</sup> In determining that Georgia law should apply, the Georgia Court of Appeals reversed the trial court's denial of plaintiff's motion for summary judgment.<sup>36</sup>

From *Allen* followed a spate of federal diversity cases all giving *Allen* an expansive reach and concluding that Georgia had abandoned the traditional rule in contracts cases generally in favor of the center of gravity or "grouping of contacts" approach.<sup>37</sup> In other cases, the federal courts took their choice-

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*Telephone Co. v. Trimm*, the Eleventh Circuit Court of Appeals provided a detailed background of Georgia's precedent regarding the rule of *lex loci contractus* and the federal courts' struggle to derive therefrom the proper controlling precedent. *Id.*; see, e.g., *Ryder Truck Rental, Inc. v. St. Paul Fire & Marine Ins. Co.*, 540 F. Supp. 66, 68-69 (N.D. Ga. 1982) (applying the center of gravity approach).

30. *General Tel. Co.*, 760 F.2d at 1119-20.

31. 199 S.E.2d 876 (Ga. Ct. App. 1973). For a discussion of the center of gravity approach, see *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954).

32. *Allen*, 119 S.E.2d at 877-79.

33. *Id.* at 880.

34. *Id.* at 880-81.

35. *Id.* at 881 (citation omitted). This is presumably because Georgia adopted the UCC. See *id.* at 879-80.

36. *Id.* at 880.

37. See, e.g., *United Am. Bank v. Gunter*, 620 F.2d 1108, 1119 (5th Cir. 1980) ("[T]he 'grouping of contacts' required under Georgia conflict of law principles establishes that Tennessee is the 'center of gravity' of this action . . ."); *Crompton-Richmond Co. v. Briggs*, 560 F.2d 1195, 1199 n.6 (5th Cir. 1977) ("Ga. Code Ann. § 20-209 specifying the *lex loci contractus* choice of law rule for Georgia courts . . . was repealed."); *Hayes v. Irwin*, 541 F. Supp. 397, 414 (N.D. Ga. 1982) ("[A]lthough

of-law cue from favorable references to the Restatement (Second) and inferred that Georgia had changed its choice-of-law rule.<sup>38</sup>

Under Georgia law only the United States Supreme Court and federal courts of appeals can certify questions of state law to the Supreme Court of Georgia.<sup>39</sup> When the Eleventh Circuit finally had an opportunity to certify the matter to the Supreme Court of Georgia, the court in *General Telephone Co. v. Trimm* held that the traditional rule had never been displaced and that “[t]he last act essential to the completion of the contract” determines which state’s law applies.<sup>40</sup>

Although the “center of gravity” system is a more recent development in choice of law cases, we are impressed with the findings of other jurisdictions that this approach is neither less confusing nor more certain than our traditional approach. Until it becomes clear that a better rule exists, we will adhere to our traditional approach.<sup>41</sup>

*Trimm* established that the UCC merely assimilated Georgia’s traditional choice-of-law rule for contracts cases into the UCC. It is clear that adoption of the UCC merely had the effect of applying Georgia’s ordinary conflict-of-laws rule to matters within the scope of the UCC, except when the UCC specifies another choice-of-law rule.<sup>42</sup>

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the Georgia courts have not officially adopted the more modern ‘governmental interest’ theory of conflicts, this court is persuaded that they would do so given the situation presented in this case.”), *cert. denied*, 469 U.S. 857 (1984); *Ryder Truck Rental, Inc. v. St. Paul Fire & Marine Ins. Co.*, 540 F. Supp. 66, 68 (N.D. Ga. 1982); *A-T-O, Inc. v. Stratton & Co.*, 486 F. Supp. 1323, 1326 (N.D. Ga. 1980) (“In choice of law, Georgia follows the ‘grouping of contracts’ or ‘center of gravity’ theory on which law should govern contracts.”); *Brown v. Inter-Ocean Ins. Co.*, 438 F. Supp. 951, 953 (N.D. Ga. 1977); *Eldon Indus., Inc. v. Paradies & Co.*, 397 F. Supp. 535, 538 (N.D. Ga. 1975) (“[T]he strong implication . . . is that the Georgia courts will now generally adhere to the ‘grouping of contracts’ theories expressed in the Restatement (Second) of Conflicts § 188 (1971).”).

38. *See, e.g., Nordson Corp. v. Plasschaert*, 674 F.2d 1371, 1374 (11th Cir. 1982) (“Like the Georgia Supreme Court in [*Nasco, Inc. v. Gimbert*], we look to the Restatement (Second) of Conflict of Laws § 187(2) (1971) to see if Georgia will honor the state law chosen by the parties.”). *Nasco* had merely cited the Restatement (Second) of Conflicts as paralleling or supporting Georgia law, not providing or serving as the source for Georgia law. *See Nasco, Inc. v. Gimbert*, 238 S.E.2d 368, 369 (Ga. 1977).

39. O.C.G.A. § 15-2-9(a) (1994); GA. SUP. CT. R. 37.

40. *General Tel. Co. v. Trimm*, 311 S.E.2d 460, 462 (Ga. 1984).

41. *Id.* (citations omitted).

42. *See* O.C.G.A. § 11-1-105 (1994). In addition to the general choice-of-law provision in article 1 of O.C.G.A. § 11-1-105(2), which states that “[w]here one of the

The conflicts diversity cases just reviewed illustrate the way in which appellate federal error can persist for want of adequate corrective mechanisms. Such error is not cost free. The systemic friction of diversity jurisdiction that arises because of the uncorrected error which divides the parallel universes of true state law on the one hand and speculative state law applied by federal trial and appellate courts on the other is an additional burden that violates the central premise of federalism—respect for state law.<sup>43</sup>

Publication of the Proposed Long Range Plan for the Federal Courts by the Committee on Long Range Planning of the Judicial Conference of the United States promises renewed attention to the problem of uncorrected anomalies in the state law applied in diversity cases.

RECOMMENDATION 8: The states should be encouraged to adopt certification procedures, where they do not currently exist, under which federal courts (both trial and appellate) could submit novel or difficult state law question to state supreme courts.<sup>44</sup>

The discussion following the recommendation correctly emphasizes federalism concerns as the reason for adopting certification. Although the recommendation is welcome as a renewed emphasis on the importance of certification as a technique for restoring *Erie's* federalism premise, it offers no way around the problem of state intransigence toward eliminating state constitutional barriers.

The effect of *Erie* and the evolution of parallel universes of state law beyond the effective supervision of state courts has been to disserve substantially the "Faith and Credit" to which state judgments, contributing in their mass to the state's common law, have been accorded. Congress has power under Article IV,

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following provisions of this title specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified," there are six other express provisions dealing with choice of law in the UCC. *See id.* §§ 11-2-402(2), 11-4-102(2), 11-4A-507(a)(1)-(3), 11-6-102(4), 11-8-106, 11-9-103.

43. Sloviter, *supra* note 5. "[T]he debate surrounding the future of diversity jurisdiction . . . should concentrate on a more important consideration: the unavoidable intrusion of the federal courts in the lawgiving function of state courts." *Id.* at 1675.

44. LONG RANGE PLAN, *supra* note 9, at 32.

Section 1 “by general Laws [to] prescribe the . . . Effect”<sup>45</sup> of state judgments. That power should be exercised to enact a federal statute imposing on state supreme courts an obligation to decide unclear issues of state law certified by federal courts, trial and appellate, for resolution. The obligation of state courts to enforce federal law is well settled.<sup>46</sup> By addressing the disrespect of state law, federalism, and the problems created in the wake of *Erie*, Congress can eliminate the parallel universe of state law and reduce the costs and inefficiencies attendant to the exercise of federal diversity jurisdiction.

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45. U.S. CONST. art. IV, § 1.

46. *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952) (FELA action brought in state court).