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Justice Iredell, Choice of Law, and the Constitution-A Neglected Encounter

Michael G. Collins

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I. INTRODUCTION

In cases governed by state law, federal courts are supposed to apply state law consistent with the state courts' elaboration of it. So says the Rules of Decision Act—originally section 34 of the 1789 Judiciary Act[1]—at least as construed by the modern Supreme Court in *Erie Railroad v. Tompkins*.[2] Prior to *Erie*, federal courts exercised considerable independence in the interpretation and administration of state law. The perceived vice of the decision that *Erie* overturned—*Swift v. Tyson*[3]—was its unwillingness to apply the unwritten law of the state as declared by its highest court. *Erie* viewed *Swift* as holding that the "laws" of the several states which the federal courts were bound to apply under section 34 did not include their decisional law "in matters of general jurisprudence."[4] Modern scholarship, however, has suggested that *Swift* may have been faithful to early understandings that the "general common law" was something apart from state law (as well as federal law), and thus not subject to section 34's command.[5] Still others have suggested that section 34 was itself a

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1. "[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Act of Sept. 29, 1789, § 34, 1 Stat. 73.

2. 304 U.S. 64 (1938).

3. 41 U.S. (16 Pet.) 1 (1842).

4. *Erie*, 304 U.S. at 71.

5. *See* 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, 1539 (1984).

command to the federal courts to apply an amalgam of "American" common-law principles, as opposed to the common law of any particular state.[6]

In the search for the earliest judicial elaborations of section 34, many accounts begin with the Supreme Court's brief (and not particularly well known) opinion in *Brown v. Van Braam*.[7] There, counsel had argued that the "laws" of the several states referred to in section 34 included a state's common law as well as its statutory law; the Court itself, however, made no reference to section 34 in concluding that state law applied to the case before it.[8] Nevertheless, in an article on which *Erie* would later rely, Charles Warren emphasized this argument of counsel in *Van Braam* as evidence of early understandings of section 34 and the role of state law in the federal courts.[9] In addition, the leading book-length study of the framing of the 1789 statute also treats *Van Braam* as "the first reported civil case citing section 34."[10] And, beginning with its second edition, the Hart & Wechsler Federal Courts casebook has commenced its treatment of section 34 with a note on *Van Braam*.[11] Echoing Warren, the editors observe that counsel raised a point "of particular interest" when he argued that the "laws" of the states included their unwritten as well as their written law.[12] William Crosskey's elaborate discussion of the federal courts and the common law also begins with *Van Braam*, but for various reasons, Crosskey discounts its significance for the interpretation of section 34.[13]

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6. *See* WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789, at 83–84; 140–41 (Wythe Holt & Lewis H. LaRue eds., 1990); *see also* G. EDWARD WHITE, 3–4 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, 133–34 & n.201 (1988) (finding some explanatory force in Ritz's treatment).

7. 3 U.S. (3 Dall.) 344 (1797).

8. *Id.* at 352. For doubts whether *Van Braam* ultimately relied on section 34, see RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 79 (1977). The history of the *Van Braam* litigation is recounted in 7 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 798–810 (Maeva Marcus, et al. eds., 2004) (1985).

9. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 88 n.85 (1923); *see also Erie*, 304 U.S. at 73 n.5, 86 (referring to Warren's article). Professor Purcell's treatment of *Erie* downplays the Court's reliance on Warren. *See* EDWARD PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 106, 342 n.78 (2000).

10. RITZ, *supra* note 6, at 156.

11. *See* RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 623 (5th ed. 2003) [hereinafter HART & WECHSLER].

12. *Id.*

13. 2 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 822 (1953).

These traditional accounts, as well as other accounts,[14] overlook an earlier and far more detailed treatment of this provision and the problem of choice of law in the federal courts: Justice James Iredell's 1795 Circuit Court decision in *United States v. Mundell*.[15] The decision has managed to fly under the radar of most federal courts scholars, despite its thorough discussion of the application of section 34 to civil cases and the constitutional underpinnings for requiring resort to state law in matters not governed by federal law.[16]

In the course of the opinion, as discussed below, Iredell reaches a number of important and interrelated conclusions. First, he determines that state law, including its common law as well as its statute law, should apply in cases governed by section 34 when federal law is silent. Indeed, Iredell intimates that section 34 simply reinforced what would have occurred in federal court anyway, given the absence of any supreme federal law to displace what he considers to be otherwise applicable state law. In this respect, the decision appears to foreshadow the later conclusions of *Erie*. Second, he provides a lengthy analysis of the possible sources of the "laws of the several states," and concludes that federal courts should apply the common law of a relevant state, as opposed to some amalgam of "American" law unrelated to a particular state's state law. Nevertheless, because Iredell recognizes that the states had affirmatively adopted and adapted a largely similar English common law through various reception provisions, his opinion appears to assume that federal courts might properly construe and apply this shared or general common law in cases before them—but ostensibly as a matter of the law of a relevant state. In this respect, *Mundell* bears more of a kinship to *Swift* by its assumption that federal courts would have an interpretive role respecting the general law that was held in common by the various states. Finally, Iredell rejects an argument in the case before him that, because the underlying civil litigation involved the United States as the complaining party, a uniform rule of decision should be fashioned to better accommodate federal interests. Instead, he concludes that the

14. *See, e.g.*, Fletcher, *supra* note 5, at 1539.

15. United States v. Mundell, 27 F. Cas. 23 (C.C.D. Va. 1795) (No. 15,834).

16. *Mundell* is rarely cited, and typically not for its bearing on section 34. The Supreme Court has twice cited *Mundell*, each time for its bearing on jury trial rights in actions for statutory penalties. *See* Tull v. United States, 481 U.S. 412, 418 (1987); Hepner v. United States, 213 U.S. 103, 108 (1909). Counsel once cited *Mundell* for its bearing on section 34. *See* Schreiber v. Sharpless, 110 U.S. 76, 78 (1884).

law of the relevant state should apply absent legislation by Congress.

In this Essay, I will first address why the decision's treatment of section 34 might have been overlooked, and then I will attempt to develop Justice Iredell's constitutional and statutory understanding of choice of law in the federal courts. I will then sketch *Mundell*'s potential impact on early understandings of the Rules of Decision Act and the role of federal courts in the articulation and implementation of state law.

II. THE *MUNDELL* OPINION

A. BACKGROUND

Mundell has probably been neglected because it was a criminal case. As such, it might appear to be an unlikely candidate for revealing early judicial understandings of the role of state law in civil litigation in the federal courts.[17] In fact, in one of the very few references to *Mundell* in connection with section 34, Supreme Court historian Julius Goebel treated the decision as having "held . . . that section 34 applied to criminal trials."[18] But that characterization is inaccurate. Admittedly, *Mundell* itself involved a federal prosecution. Federal officials had brought an indictment in the Circuit Court for the District of Virginia against Joseph Mundell for physically resisting and assaulting a federal marshal who was serving process on him in connection with an earlier civil action brought against Mundell by the United States.[19] But the *Mundell* court's treatment of section 34 did not directly concern the criminal case before it. Rather, as discussed below, the provision was relevant only to the court's discussion of the applicable law in the prior civil suit against Mundell that gave rise to the criminal proceeding.

The underlying civil suit upon which the criminal action was based was "an action of debt" brought by the United States to

17. Some argue that section 34 was specifically designed to apply to criminal cases. *See* RITZ, *supra* note 6, at 98; Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267, 296–98 (1986); *see also* PETER S. DUPONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 39 (1824).

18. JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 610 (1971).

19. *See* Act of April 30, 1790, 1 Stat. 112, § 22 (criminalizing obstruction of service of process). The writs that the deputy marshal served were writs of capias ad respondendum.

recover damages and statutory penalties for Mundell's nonpayment of duties and revenues he owed the United States arising out of his operation of a still.[20] Although the earlier action was a suit for a penalty, Justice Iredell did not hesitate in labeling it a civil suit.[21] As discussed in *Mundell*, the issue in the earlier federal civil proceeding was whether, in an action of debt commenced by arrest of the defendant, the serving officer could demand bail—failing which, the defendant could be jailed—and whether state law supplied the relevant rule on that question. Congress had not indicated whether bail could be required in civil cases brought by the United States. And if bail was not required under the relevant law, then—according to Iredell—failure to post bail and physical resistance thereafter would not be illegal.[22] Thus, the *Mundell* case addressed the more ordinary problem of the role of state law in civil cases in federal courts, albeit not in a diversity case, but in a civil suit in which the United States was the plaintiff.

B. THE APPLICABILITY OF SECTION 34

With respect to the civil suit, the court saw the question as whether "in this case the law of Virginia alone is to be the rule by which we are to decide whether bail was demandable or not. . . . [or], that some general law must be the rule, it not being supposable that in a case of this kind congress meant to refer to any local laws of the particular states, which might be inapplicable in all their circumstances to the cases of the United States."[23] Iredell acknowledged that this might be an area in which Congress could legislate directly, by insisting on bail (or jail) in civil suits brought by the United States. But he proceeded to note that it might be preferable in a new republic, consisting of different pre-existing legal systems, "to refer generally to the laws of the different states . . . as well in cases of general and local con-

20. *Mundell*, 27 F. Cas. at 25.

21. *Id.* at 26 ("[T]he proceeding in question was not a proceeding in a criminal case, . . . but was, in truth, a civil suit.") Actually, there were two civil suits: one for nonpayment of duties, and one for a statutory penalty for violation of revenue laws. The court observed that because the marshal had insisted on bail for both, it was a sufficient defense to the criminal proceeding if bail was improperly required for either. *See also infra* note 37.

22. *Id.* at 32 ("[W]e cannot give judgment against the defendant without saying that the marshal had a right to require special bail."). Mundell resisted the marshal's effort to commit him for nonpayment of bail, not the service of process itself. *Id.* at 24.

23. *Id.* at 27.

cern," both to save legislative energy and to accommodate prevailing expectations within the different states.[24]

In addition, Iredell rejected the suggestion that the matter of bail was covered by federal statutes relating to the practice and procedures of the federal courts. "[N]onadmission of bail," he said, is a subject "so important, and [one] in which the liberties of the citizens are so concerned that a power merely of directing the practice of the courts cannot justly be extended to a case of this kind."[25] Having concluded that he was dealing with a rule of decision rather than a rule of practice, Iredell then concluded that a civil action for debt brought by the United States involved a trial "at common law" to which section 34 was directed. He rejected the argument that an action on a statute—here, a federal statute for a penalty—might be something other than an action at common law, deciding that the phrase "at common law" in this part of section 34 was used merely to distinguish suits in "admiralty" and actions in "equity."[26]

C. "[T]HE LAWS OF THE SEVERAL STATES"

Iredell then launched into a lengthy treatment of what constituted "the laws" of Virginia—the state whose laws he supposed would apply in a federal civil proceeding arising in that state, in the absence of a controlling federal treaty, statute, or constitutional provision. He argued that state law would consist of all of the pre-existing law that the state had received at earlier points in time, along with any modifications thereafter. Thus, at the time of its original settlement, the law in the state of Virginia ("as in others") consisted of English statute law and English common law unaltered by statute, "so far as they were applicable to [the state's] situation." At the time of the 1776 Revolution, however, the statutory law would also have included relevant interim colonial legislation.[27] The latter, Iredell said, was on an equal plane with the former, and therefore he thought it preferable to speak of all of this as "the common and statute law of Virginia generally than [to] speak of any part of it . . . as the common and statute law of England."[28] This common and statute law of England thus "adopted" as Virginia law was "repealable

24. *Id.*
25. *Id.*
26. *Id.* at 28.
27. *Id.* at 29.
28. *Id.*

in the very same manner as any special act of the Virginia assembly," but it remained a part of state law until altered through "the authority of the people" acting either directly or through their representatives.[29]

Although Iredell does not get into the details of Virginia's adoption of English law, it was formally accomplished in a May, 1776 ordinance which stated that "the common law of England" and "general" (but not "local") English statutes made "in aid of the common law," as well as colonial legislation "now in force . . . shall be the rule of decision" until legislatively altered.[30] Interestingly, the language and structure of the reception provision[31] resembles the language and structure of an early draft of the 1789 Rules of Decision Act that was famously unearthed by Charles Warren. In that draft, "the Statute law of the several States in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise," would provide the "rules of decision" in federal courts, absent controlling federal law.[32] The Virginia reception provision thus dictated the common and statute law that would supply the "rule of decision" for state courts in much the same way that the federal "rules of decision" statute dictated the application of the common and statute laws of each state for federal courts, in cases where they applied.

Iredell went on to argue that events subsequent to this reception, including the Revolution, did not fundamentally alter the content of this pre-existing state law, although the new form of government it ushered in might mean that some such law was no longer applicable to "the new situation of the people."[33] Similarly, the Constitution (and before it, the Articles of Confedera-

29. *Id.* For similar views of the common law's reception, see Livingston v. Jefferson, 15 F. Cas. 660, 665 (C.C.D. Va. 1811) (8,411) (Marshall, Circuit Justice); United States v. Worrall, 2 U.S. (2 Dall.) 384, 394 (C.C.D. Pa. 1798) (Chase, Circuit Justice).

30. Ordinances of Virginia Convention [May 1776], 9 HENING'S STATUTES AT LARGE, ch. 5, 127 (1821).

31. The full text of the 1776 reception provision reads:

> And be it further ordained that the common law of England, all statutes or acts of parliament made in aid of the common law prior to [1607], and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony.

Id.

32. *See* Warren, *supra* note 9, at 86.

33. *Mundell*, 27 F. Cas. at 30.

tion) did not fundamentally alter the state's pre-existing law, except insofar as it was "plainly inconsistent" with powers transferred to the federal government. As for powers not surrendered, "the laws of the states . . . remained unaltered." Furthermore, Iredell suggested that as a constitutional matter, pre-existing state law in areas of new federal cognizance would also remain in force until such time as federal legislative authority was actually exercised, absent a "manifest inconsistency" with the unexercised grant of federal power.[34] As an example, Iredell offered the area of bankruptcy. Although he supposed that that particular grant of federal power was likely exclusive, Iredell speculated that it would not pre-empt the operation of pre-existing state bankruptcy laws unless and until Congress acted. He then suggested that the law regarding bail in civil actions brought by the United States "is perhaps of this nature."[35]

The discussion of supremacy was central to Iredell's treatment of section 34, because Iredell came close to concluding that under the Constitution, state law would usually have operated of its own force in federal courts, even without reference to section 34. "[U]ntil [Congress] made a law concerning such subject, the state law in relation to it would have been in force."[36] But given section 34's "express reference" to state law as the rule of decision, Iredell stated that had no doubt about the applicability of state law. In this regard, section 34 confirmed what would have happened under Iredell's approach to federal supremacy and the displacement of state law more generally: State law, which included much of English common law, remained the law of the land in Virginia (in state and federal courts alike), unless and until displaced by the supreme law of the land.

On the merits, Iredell concluded that Virginia law—in this case a state statute—would not have required bail in a civil action of debt for a statutory penalty. As a result, resistance to a federal officer seeking to arrest a party for failure to offer bail in such an action was lawful. The federal criminal action against Mundell was therefore dismissed.[37]

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34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 31–32. The court held only that bail was not requirable on the suit seeking to recover the statutory penalty for nonpayment of revenues (as opposed to the claim for unpaid duties). *Id.*

III. *MUNDELL*'S SIGNIFICANCE

A. GENERAL LAW AS STATE LAW

The opinion in *Mundell* is important from a number of perspectives. First, the treatment of section 34 was necessary to the decision in *Mundell* because the criminal action turned on the applicability of state law in the earlier civil action that gave rise to it. In addition, Iredell stated (if only in elaborate dicta, given his ultimate reliance on a state statute), that a state's "laws" under section 34 would include its common law as well as its statute law, just as counsel would later argue in *Van Braam*. Also, Iredell's constitutional analysis suggests that absent the intervention of positive federal law, state law would ordinarily supply the relevant rule of decision in cases brought in federal court.

More importantly, Iredell seemed to suppose that federal courts applying state law under section 34 would apply the law of a particular state. Although much of that law would include the common law and statute law of England and would be shared with other states,[38] some would be more peculiarly Virginia's, insofar as it might differ from English law. But both would be applicable in federal courts in cases in which Virginia law applied. By focusing on the reception of the common law in a particular state, Iredell articulated a theory by which a broodingly omnipresent version of the common law shared with other states could operate within each state as a matter of positive state law. This general common law, applicable by statute in individual states unless departed from, would therefore also be applicable in the federal courts, consistent with section 34 and consistent, presumably, with the Constitution.[39]

This approach of Iredell's contrasts somewhat with that urged by scholars who have maintained that section 34 was a directive to federal courts to apply "American Law"—an amalgam of the states' laws—rather than the laws of any particular state.[40] Their focus is on the textual reference in section 34 to the laws of "the several states" (supposedly referring to them collectively)

38. *See* Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791, 802–03 (1951) (noting that Virginia's reception provision served as the model for many other states).

39. *Cf.* Larry Kramer, *On Finding (and Losing) Our Origins*, 26 HARV. J.L. & PUB. POL'Y 95, 100–02 (2003) (noting that reception of the common law by states made independent federal court interpretation of it unproblematic).

40. *See* RITZ, *supra* note 6, at 83–84; 140–41.

rather than the laws of "the respective states" (to refer to them individually).[41] However, the several-versus-respective distinction went unmentioned by Iredell who assumed the applicability of the law of a particular state under section 34. Indeed, Iredell went to considerable lengths to explain why federal courts would be applying the common law of a particular state under section 34, even when much of that law might be shared by the other states as well.[42]

To be sure, the net result of Iredell's approach to choice of law in *Mundell*—in which federal courts would have to construe this shared common law in applying a particular state's common law—might often parallel the result of focusing on an amalgam of states' laws. But the latter focus would seem to disable the application of a particular state's law even when the state had clearly departed from whatever the amalgam (or "American") rule was. In fact, focusing on the supposed distinction between the laws of the "several" states versus the "respective" states raises doubts whether a federal court could *ever* apply the law of the state in which it sits—including its statutory law—unless it conformed to the general rule. By contrast, Iredell's approach not only expressly preserved the possibility of legislative change within a state, but as discussed below, it arguably preserved the possibility (narrow though it might be) that a state's courts could depart from the general common law in a way that federal courts would ultimately have to respect.

B. JUDICIAL DEPARTURES FROM THE GENERAL LAW

Nevertheless, to say that the common law of a state would apply under section 34 said little about whether a state's latest judicial decisions would necessarily supply an authoritative exposition of that state's common law. As another federal court

41. Id. at 83–84.

42. Iredell had made similar arguments elsewhere. In a South Carolina grand jury charge for a federal common law prosecution, he stated that the law of nations was "in full force in this state" because of the state's reception of the common law, and thus could supply the relevant rule of decision under section 34. *See* Justice Iredell's Charge to the Grand Jury of the Circuit Court for the District of South Carolina (May 12, 1794), *in* 2 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789-1800, at 454, 468–69 (Maeva Marcus ed., 1988) (1985); *see also* Palmer, *supra* note 17, at 299–301 (arguing that Iredell relied on state law to supply the rule of decision for certain federal common law crimes). Similarly, in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), Iredell urged in dissent that, absent congressional legislation, the State of Georgia should be immune in a suit for assumpsit brought by an individual, unless something "peculiar" to the law of Georgia allowed for it, or if principles "common to all the States" (including, presumably, Georgia), did so. *Id.* at 434–35 (Iredell, J., dissenting).

put it a few years after *Mundell*, even if the "laws" referred to in section 34 included the common law of a given state, "it will not be contended that we are bound by the opinions of the state courts on common law points, unless their decisions have been ancient, universal and without variation—so as to truly constitute the law of the land."[43]

Mundell is not altogether clear about the extent to which a given state's decisional law might play a role settling the meaning of, or departing from its previously adopted common law. For Iredell, states could readily depart from English common law by passing a statute.[44] And he acknowledged that a state's judiciary might be able to depart from English common law, at least to the extent that its judiciary might conclude that the common law was not suited to a state's "new situation." But unlike the ease with which a state might legislatively depart from such common law, Iredell's analysis suggests that a state's judicial departure from its pre-existing or received common law would not be easy. Iredell had justified the state's reception of the common law as an exercise in popular sovereignty,[45] to be undone only in a comparable manner by the people or by its representatives exercising their delegated authority.

Iredell's reluctance to acknowledge easy judicial departure is, of course, consistent with an older, discovery-oriented view of common-law decisionmaking that was still prevalent in the late Eighteenth Century.[46] Instances of judicial articulation and elaboration of the common law would not readily have been perceived as lawmaking or as necessarily involving change in the law. Although such a view tends to slight state decisional law as dispositive evidence of the meaning of a state's common law, it is in rough harmony with Justice Story's later recognition in *Swift v. Tyson* that judicial opinions are not laws, but only some "evidence" of what the laws are.[47] In addition, Iredell's division of

43. United States v. Conyngham, 25 F. Cas. 599, 601 (C.C.D. Pa. 1801) (14,850).

44. "The [received] common and statute law of Virginia . . . [is] repealable in the very same manner as any special act of the Virginia assembly." *Mundell*, 27 F. Cas. at 29. The Virginia reception provision actually purported to make legislative change the only mechanism for alteration in the received common law. *See supra* note 31.

45. *See* William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329, 332 n.19 (1995) (citing *Mundell* as illustrative of Iredell's views on popular sovereignty).

46. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 245 (1977) (arguing that *Swift*'s "declaratory" theory of the common law was reflective of eighteenth-century understandings about the nature of law, but that it was in sharp decline even as Justice Story (re)articulated it in 1842).

47. *Swift*, 41 U.S. (16 Pet.) at 18.

the common law into (1) a common law shared with other states and (2) a common law more uniquely a state's own, echoes the "general law" versus "local law" dichotomy of *Swift*.[48] With respect to the judicial elaboration of the shared or general part of the common law, federal courts would presumably be engaged in the same interpretive exercise as would the state courts. But with respect to the more unique or local part, the federal courts were presumably more constrained.

Mundell's correspondence with *Swift*, however, is not perfect. *Swift* seemed to suppose that the general commercial law which it applied was neither state nor federal in character.[49] It thus appeared to read section 34 as inapplicable in such cases, concluding that the apply-state-law command of section 34 was operative only when "local" law was applicable. Indeed, this is how William Fletcher has described early understandings of section 34 more generally.[50] If it is correct to read *Swift* as having concluded that such general law operated outside of state law,[51] then the decision appears to leave little room for a particular state's judicial departures from the general commercial law ever to be binding on the federal courts, even when the departure became clear and settled. Perhaps such an analysis could have been limited to law that was more multinational in character (such as the law merchant at issue in *Swift*); but it appears to have been applied outside of such areas, certainly in the wake of *Swift*[52] if not before. And in *Swift* itself, Justice Story independently construed the general commercial law even on the assumption that

48. *See* Fletcher, *supra* note 5, at 1516–18 (noting the prevalence of the local law/general law dichotomy prior to *Swift*).

49. *See* MICHAEL CONANT, THE CONSTITUTION AND THE ECONOMY 138–40, 146–47 (1991) (suggesting that section 34 was inapplicable to cases involving "the law merchant" because of its international character). Alternatively, one might say that section 34 was applicable in *Swift*, but that section 34's limit on the application of "state laws" to cases "where they apply" just meant that *state laws* were inapplicable.

50. *See* Fletcher, *supra* note 5, at 1516–18; 1527–28 (arguing that section 34's reference to state "laws" was widely understood to implicate only local law, and that general law was neither local nor federal law). Fletcher's emphasis was on the continuity of *Swift* with earlier decisional law, to counter suggestions that *Swift* was somehow aberrational.

51. *See Swift*, 41 U.S. (16 Pet.) at 18. It is not clear from *Swift* itself whether Story was saying that he was ultimately applying New York law (regarding which New York decisional law was evidence), or something else altogether. *See* John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 526 (2000) (noting that *Swift* sometimes appears to view the general law as operating outside of state law).

52. *See* TONY ALLEN FREYER, HARMONY & DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM 45–75 (1981) (chronicling *Swift*'s "expansion" into noncommercial areas).

state decisional law had "fully settled"[53] the point in question differently.

Iredell, however, had stated that section 34 would require reference to state law "as well in cases of general and local concern."[54] And he expressly indicated that the shared or general common law was ultimately state law, not something apart from it. The view that the general common law applied in federal courts under section 34 was in fact state law was one that had some pre-*Swift* adherents,[55] but it seemed to become prominent only in the latter part of the Nineteenth Century.[56] Iredell also indicated that states might depart from the general common law when it did not suit their circumstances, indicating that state courts might identify such departures. His approach therefore appears to leave open the possibility for federal courts to incorporate (under section 34) a state's clear judicial departures from the once-shared general law, in a way that *Swift* arguably does not.[57] But because *Mundell* did not deal with such a situation, one can only speculate how Iredell might have handled the prospect.

C. STATE LAW AND FEDERAL GOVERNMENTAL LITIGATION

Finally, the *Mundell* opinion is significant insofar as it deals with an example of what today would implicate a question of

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53. *Swift*, 41 U.S. (16 Pet.) at 18.

54. *See supra* text at note 24.

55. *See, e.g.*, Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 687–91 (1834) (Thompson and Baldwin, JJ., dissenting) (indicating that the common law, as received by a state, could supply the rule of decision in a federal copyright case in that state, without implicating any "common law of the United States" (whose existence the majority denied)); United States v. Worrall, 2 U.S. (2 Dall.) 384, 394 (C.C.D. Pa. 1798) (Chase, Circuit Justice) ("[T]he common law of England, is the law of each state, so far as each state has adopted it; and it results from that position, connected with the Judicial act, that the common law will always apply to suits between citizen and citizen, whether they are instituted in a Federal, or State, Court."); *see also* FREYER, *supra* note 52, at 28.

56. *See, e.g.*, Chicago, Milwaukee & St. Paul Ry. Co. v. Solan, 169 U.S. 133, 136 (1898) (stating that federal court decisions on matters of general jurisprudence are "uncontrolled" by state court decisions, "[b]ut the law to be applied is none the less the law of the State" (quoting Smith v. Alabama, 124 U.S. 465, 476–77 (1888))); *see also* Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1026–27 & n.59 (1953) (gathering similar authority from same era); *cf.* FREYER, *supra* note 52, at 71–75 (noting late-nineteenth century debate over the source of the general common law applied by the federal courts).

57. On the other hand, even for Iredell, commercial law might have been a category unto itself in multistate transactions like that in *Swift* and perhaps less subject to state judicial change; and for Story, it might have been possible for a persistent line of state decisions to render "local" what was formerly "general." If so, perhaps their two approaches converge.

federal common law. That is, in civil suits by the United States, post-*Erie* federal courts have sometimes developed genuinely federal common law when Congress could have enacted the relevant rule of decision, but for one reason or another, did not do so. In fashioning federal common law, a court might construct a uniform rule based on general law principles, or adopt the law of the relevant state, thus opting for a non-uniform federal rule. But so characterized, a state's law is said to be operating not of its own force, but by presumed congressional choice.[58]

Iredell probably did not see it that way. He acknowledges that Congress has unexercised regulatory power in this setting, but he seems to regard state law as continuing to operate of its own force until it is displaced by a federal statute, a treaty, or the Constitution. Iredell's implication that section 34 reinforced the constitutional structure—that state law governs unless displaced by one of the three types of supreme federal law—is hard to miss. On the other hand, his suggestion that the first Congress might have found it preferable in a new republic "to rely on existing rules of decision" could indicate that Iredell viewed section 34 as a gap-filler in which Congress affirmatively chose state law as the interim measure of federal law, at least in those areas that Congress might properly reach (as in *Mundell* itself).

But Iredell's reluctance to look elsewhere than to state law to fashion a rule of decision for the federal government, even in an area of conceded federal competence, seems inconsistent with any suggestion—hotly contested at the time—that the common law had somehow been received as federal law at the federal level in the same way that it had been received as state law at the state level.[59] Instead, Iredell seems to suppose that the common law available as a decisional rule for federal courts was that of a particular state rather than "the common law" in the abstract.[60]

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58. For a discussion of the phenomenon, see HART & WECHSLER, *supra* note 11, at 685–704.

59. In the mid-1790's, there was a much voiced fear (largely stemming from prosecutions for federal common law crimes) that the common law might be federal law and that Congress would have broad legislative powers coterminous with it. *See* Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1011, 1083–93 (1985). Although Iredell signed on to some of those common law prosecutions, Robert Palmer has suggested that Iredell relied on relevant state common law to supply the rule of decision—not on "the common law" divorced from state law, nor on "federal" common law. *See* Palmer, *supra* note 17, at 299–301; *cf.* DUPONCEAU, *supra* note 17, at 101–02 (indicating that a "national" but nonfederal common law might have applied in many such cases).

60. *See also* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, app. 380 (1803) (recounting parade of horribles were the common law understood to be part of

Iredell closed his opinion in *Mundell* by criticizing the absence of a uniform rule from Congress, and lamenting the fact that "a man guilty of a most daring violation of the peace of the country, and an inhuman assault upon an innocent and meritorious officer, should escape punishment proportioned to his offence."[61]

IV. CONCLUSION

The decision in *United States v. Mundell* is strong early constitutional and statutory authority for the application of a particular state's statutory and common law in civil litigation in the federal courts—even in litigation brought by the United States. At the same time, the decision appears to assume that a state's pre-existing common law consists of elements that would be widely shared by other states, and that federal courts would be called upon to interpret and apply this largely uniform general law under Section 34. Iredell's focus on the states' reception of the common law also provides a positive law basis for application of the general law by state courts and by federal courts applying state law. In addition, *Mundell*'s implication that a state's inherited common law is not easily altered by state judicial decisionmaking is consistent with an independent role for federal courts in the interpretation and administration of a state's pre-existing common law, at least until that law becomes settled otherwise.

For some, the fighting issue surrounding section 34 has involved the "statutory" versus "common law" distinction highlighted in *Erie*; and for others it has been the "local" versus "general" distinction highlighted by *Swift*. But Iredell's approach to state law—which appears to treat even the general or shared common law as a species of state law from which states might depart—highlighted but did not resolve a different yet related question: At what point could a state's judicial elaboration of its general common law become binding on the federal courts? In the decades following *Swift*, the answer to that question seemed to be, if not "never," then "hardly ever." That, in turn, would give rise to what became a long smoldering federalism-based challenge to *Swift*—a challenge that might have been blunted under an approach which seemed to recognize that even the

federal law as opposed to the law of each state).

61. *Mundell*, 27 F. Cas. at 32.

more general common law was genuinely state law, and as such, not altogether immune from state judicial alteration.[62]

62. *See, e.g.*, Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, *passim* (1892) (Field, J., dissenting) (denying federal courts "an independent judgment" regarding state common law when the law of the state has been "settled" by "repeated adjudications," but allowing such independent judgment when state law was "unsettled").