

# Making State Law in Federal Court

Benjamin C. Glassman\*

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\*. Assistant United States Attorney and Appellate Coordinator, U.S. Attorney’s Office for the Southern District of Ohio; Adjunct Professor of Law at the University of Cincinnati College of Law; J.D., Harvard Law School; B.A., Rice University. I am indebted to Richard Fallon, Martha Minow, John Neiman, Stephanie Tai, and Suja Thomas, all of whom provided helpful comments on an earlier draft of this article. In addition, this work has benefited from conversations with Michelle Bock, Adam Feibelman, Janet Halley, and Michaela White. Errors, however, are mine alone. This article does not represent the views of the U.S. Attorney’s Office.

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Disputes litigated in federal court frequently must be decided at least in part according to state law. But the precise content of the state law at issue is not always clear. Sometimes state courts have not addressed the issue to be decided in federal court. Other times state courts have addressed the issue but have reached contradictory conclusions. Uncertainty can result from other postures as well; for example, parties might agree that a certain principle of state law applies to their case but disagree as to how that principle should be applied to the facts at hand.

How should a federal court ascertain and apply state law in these circumstances? Civil procedure mavens know that the task of the federal court is to predict how the state supreme court would decide the issue. Upon examination, however, this response answers very little. To which sources should a federal court turn in order to ascertain state law? Does legal authority outside the sources of state law constrain how the federal court understands the sources themselves? If sources of state law point in opposite directions, how should the federal court choose among them?

The federal appellate courts have proposed widely divergent instructions, and the few commentators who have addressed this ubiquitous problem have offered similarly varying visions of the principles at stake. Many courts have tried to deny the relevance of their own judgment, instead reciting, for example, that they should observe doctrinal trends in the state law, or else that they should do the opposite—treating state law as static. Other courts have sought to restrict liability. Still others think that whenever state law is unclear, they should follow the plurality approach of other jurisdictions that have addressed the issues. Several commentators have argued that federal courts’ engagement with unsettled state law is problematic for a number of reasons, including constitutional ones.<sup>1</sup> Other arguments, however, might be advanced that federal courts possess superior technical competence and that they can therefore resolve confusion among state courts. Upon close examination, all of these arguments are flawed.

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1. E.g., Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after Erie*, 15 U. PA. L. REV. 1459, 1516 (1997).

The purpose of this article is to illuminate these questions and to propose, broadly, an answer. Federal courts can neither escape unsettled state law nor decide state-law questions in ways that are substantively correct. Instead, the federal court should consider various sources of state law—primarily the opinions of state courts—as data, with state law as the function that connects them. Where no binding federal precedent has already configured the data in question, the judgment as to how they ought to be connected is the federal court’s alone, and it should exercise that judgment according to its own view of the best result. This approach makes the best sense of the Supreme Court’s governing case law on unsettled state law in federal court.

Before reaching the merits, however, one must understand the problem. Part I begins by identifying the issues raised by the presence of unsettled state law in federal court. This Part explains why state law arises in federal court and why that presence is problematic for federal courts. It then provides the texture of the varying types of problems that state law may pose in federal court before explaining why one possible solution to those problems, certification, is impractical.

Part II details what the United States Supreme Court and the United States Courts of Appeals have said about the task of federal courts in ascertaining and applying state law. This Part may serve as a resource for current federal courts regarding the history and state of the law, in addition to setting the stage for grappling with the fundamental question.

Part III proceeds to address directly that fundamental issue, not fully resolved by current explication in cases and commentary, of how a federal court ought to approach the task of ascertaining and applying unsettled state law. Two basic, opposed positions might be or have been advanced: first, federal courts have superior institutional competence and should therefore instruct state courts regarding the proper resolution of unsettled state-law issues; second, federal courts are incompetent to opine on unsettled state-law issues and should therefore employ every artifice to avoid doing so. Part III also explains why these positions are untenable. I then elaborate my own view—federal courts must exercise their own independent judgment in resolving state-law issues according to their own calculations of best outcomes—and explain why it best comports with the first principles embodied in the Supreme Court’s decisions. Understanding this approach also enables resolution of other nettlesome problems, such as the meaning of “prediction” of state law and the proper weight for district courts to accord federal appellate predictions.

## I. IDENTIFYING THE PROBLEM OF STATE LAW IN FEDERAL COURT

A glance at the sources of federal court jurisdiction reveals the avenues through which state law enters federal court.<sup>2</sup> District courts have federal question

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2. The list of jurisdictional statutes in this paragraph is not exhaustive, however. Indeed, the litigation of adversary proceedings in bankruptcy is increasingly a forum for the federal

jurisdiction to hear cases that arise under the Constitution or federal laws.<sup>3</sup> In addition, they have diversity jurisdiction to hear disputes between parties from different states when the amount in controversy exceeds \$75,000.<sup>4</sup> Finally, Congress has authorized federal district courts to exercise supplemental jurisdiction over state law claims that are related to other claims that confer one of the other types of jurisdiction.<sup>5</sup> A federal court must apply the appropriate state law to claims that are before it pursuant to diversity or supplemental jurisdiction. This may seem self-evident, but before 1938 it was not.

### A. *Understanding Erie*

Throughout the second half of the nineteenth century, federal courts sitting in diversity decided cases with reference to their own views about the law, unless the relevant state had passed a statute that spoke directly to the issue at hand.<sup>6</sup> This is because legal thinking at that time conceptualized the common law as a single entity. This categorical system was premised on a number of allegedly pre-political foundational concepts, such as “liberty” and “property,” from which an expanding logic of analogy spread to reach the correct resolution of any particular case. Thus, lawyers imagined that state courts in different states adjudicating matters of contract law were in fact applying the same general law of contracts. Justice Holmes’s criticism of this “fallacy” well captures the concept:

Therefore I think it proper to state what I think the fallacy is.—The often repeated proposition of this and the lower Courts is that the parties are entitled to

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exposition of unsettled state law. See *infra* notes 43 & 44 and accompanying text. District courts have original, but not exclusive, jurisdiction over disputes arising under or related to the Bankruptcy Code. 28 U.S.C. § 1334(b).

State law can sneak into federal court in less expected places as well. The Tenth Circuit recently held that it was obliged to interpret an arguably ambiguous state statute in order to decide the validity of a traffic stop in a federal criminal case. *United States v. DeGasso*, 369 F.3d 1139, 1145-46 (10th Cir. 2004). The dissenting judge in *DeGasso* argued that the federal court should not have attempted this task in a federal criminal case because it was inconsistent with due process. See *id.* at 1151, 1154-55 (Baldock, J., dissenting). Assessing whether the majority or the dissent has the better view is, unfortunately, beyond the scope of this article.

3. 28 U.S.C. § 1331 (2000). Even federal questions often require the determination of state law for their resolution. For example, the procedural component of the Due Process Clause protects entitlements that are created by state law, so due-process claims predicated on state-law entitlements may turn on deciphering what, exactly, state law provides. Last Term, the Supreme Court concerned itself with such a question of Colorado law in *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2803 (2005).

4. 28 U.S.C. § 1332.

5. 28 U.S.C. § 1367.

6. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 529-31 (1928) (Holmes, J., dissenting).

an independent judgment on matters of general law. By that phrase is meant matters that are not governed by any law of the United States or by any statute of the State—matters that in States other than Louisiana are governed in most respects by what is called the common law. It is through this phrase that what I think the fallacy comes in.

Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeal, from the State Courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was.<sup>7</sup>

Though on its face neither liberal nor conservative, such classical legal thought provided the intellectual structure for many reactionary decisions by the Supreme Court at the turn of the century,<sup>8</sup> and these decisions provided the impetus for progressive thinkers to undermine the hegemony of classical legal thought.<sup>9</sup> Critical doctrinal writers, philosophers, institutional economists, and empiricists all contributed to the intellectual movement of legal realism. By the 1930s, legal realists had effected a paradigm shift in legal thought. Lawyers no longer believed that a single common law existed separate from the courts that expounded on it. Instead, they recognized that law is, ultimately, what courts say in fact. Thus, by 1938, it no longer made conceptual sense for a federal court sitting in diversity to decline to consider a state law rule of decision on the rationale that, unless contravened by a specific state statute, the common law is what it is.

This change helps to explain the Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*.<sup>10</sup> The defendant in that case contended that Pennsylvania law

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7. *Id.*; see also *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 399 (Field, J., dissenting) (1893) ("I cannot assent to the doctrine that there is an atmosphere of general law floating about all the States, not belonging to any of them....").

8. See generally ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895* (Torchbook 1976) (1960) (reciting in detail a progressive critique of turn-of-the-century jurisprudence).

9. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870 - 1960: THE CRISIS OF LEGAL ORTHODOXY* (1992); BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998).

10. 304 U.S. 64 (1938). I use "helps to explain," rather than "explains," deliberately. Professors Goldsmith and Walt have argued that extant legal historical evidence does not support the proposition that the turn to legal positivism or legal realism caused the result of *Erie* in any strong sense. See Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998). Indeed, one can find examples in the pre-*Erie* case law of federal courts behaving in a much more nuanced manner than my overview here might suggest. What Professors

provided the rule of decision, but the district court disagreed, since the rule at issue was a matter of common law.<sup>11</sup> After the court of appeals affirmed the judgment of the district court, the Supreme Court reversed.<sup>12</sup> First, it considered the Federal Judiciary Act of 1789, which provided: “The laws of the several States, except where the Constitution, treaties, or statutes of United States 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.”<sup>13</sup> The Court held that the Act’s reference to “laws of the several States” included not only the statutes passed by the states’ legislatures, but also the common law as articulated by the states’ courts.<sup>14</sup>

Second, the Court held the requirement that federal courts apply state substantive law to all claims that do not arise under federal law is a constitutional requirement.<sup>15</sup> Justice Brandeis explained:

There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.<sup>16</sup>

For this reason, the Court declared that “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State.”<sup>17</sup> It added, finally, that “whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”<sup>18</sup>

It is worth pausing to weigh in on the precise holding of *Erie*. Its conclusion on statutory construction was that Congress had mandated that federal courts apply state substantive law unless a federal question was at issue. Its constitutional conclusion was that, even had Congress not mandated such a rule, the Constitution granted federal courts no particular common lawmaking power over the states. Once one

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Goldsmith’s and Walt’s article fails to acknowledge, however, is the basic point, entirely consistent with the sort of nuance one can easily uncover, that under a classical conception of law, there is no dissonance between a federal court applying its own “general” notions of the common law in place of state rules of decision because, axiomatically, the two cannot differ.

11. *Erie*, 304 U.S. at 70.

12. *Id.* at 70, 80.

13. *Id.* at 71 (quoting Federal Judiciary Act, 28 U.S.C. § 725 (1789)).

14. *Id.* at 78.

15. *Id.*

16. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

17. *Id.*

18. *Id.*

recognizes that law does not exist apart from the courts that pronounce it, these conclusions are uncontroversial.<sup>19</sup>

Because of *Erie*'s broad language and central place in American constitutional law, however, overstating its holding is easy. Congress may not have the power simply to authorize federal courts to develop a single common law, but it certainly has the power under the Commerce and Necessary and Proper Clauses to authorize federal courts to develop federal common law in particular areas.<sup>20</sup> Consider, for example, the Employment Retirement Income Security Act ("ERISA"),<sup>21</sup> where Congress has preempted state law that regulates insurance and authorized federal courts to craft a body of federal common law in order to flesh out the statute.<sup>22</sup> The constitutional rule of *Erie*, then, is that absent authorization from Congress,<sup>23</sup> federal courts cannot fashion common law rules of decision.

Understating *Erie*'s holding can also be tempting, however, particularly in dealing with the instant subject. Specifically, as we will see,<sup>24</sup> courts and

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19. Nevertheless, the precise textual basis for *Erie*'s constitutional holding has generated academic controversy. See, e.g., John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

20. I recognize that there is some tension between this statement and the Court's comment in *Erie* that "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts." 304 U.S. at 78. But the answer is to take the latter statement at face value. The Constitution does not contain a clause authorizing Congress to declare common-law rules, but it does have clauses authorizing Congress to legislate matters that affect interstate commerce and that are necessary and proper ways to implement those powers.

21. 29 U.S.C. § 1001 et seq. (2000).

22. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) ("[W]e have held that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" (citation omitted)); *Weiner, D.P.M. v. Klais & Co., Inc.*, 108 F.3d 86, 92 (6th Cir. 1997) ("Courts have recognized that Congress intended for the judiciary to develop and apply a federal common law to actions premised on the contractual obligations created by ERISA plans. . . . However, federal common law is developed under ERISA only in those instances in which ERISA is silent or ambiguous.").

23. Of course, simply because no clause in the Constitution purported to grant Congress the power to declare substantive common-law rules of decision does not, by itself, explain why federal courts are prohibited from doing so. The necessary additional explanation is, perhaps, less than obvious to the extent that it is not initially intuitive. One explanation is that the Constitution makes the federal government one of limited powers, so we should not assume that the courts have powers that are not explicitly mentioned. Another concerns the separation of powers inherent in the constitutional structure; if Congress is without power to declare a law of general application, federal courts do not have any greater lawmaking authority. And to the extent that Congress does have such power under certain circumstances (for example, where the law is a regulation of interstate commerce), Congress can act only in specified ways—for example, through bicameralism and presentment. These procedural safeguards would be circumvented if federal courts were able to determine simultaneously that federal lawmaking were permissible and also make the law.

24. See *infra* Part III.C.5.a. for discussion on how *Erie* instructs federal courts to apply state

commentators sometimes conceptualize *Erie* as a straightforward instruction to federal courts that their task in applying state law is to make a sociological guess as to what a state's supreme court would decide. One scholar, for example, recently claimed that *Erie* "mandated that a federal court faced with questions of state law should endeavor to resolve those questions as it believes that the high court of the state whose law is in question would resolve them."<sup>25</sup> Following this premise, he argued that federal appellate courts should give deference to federal trial courts' declarations of state law because federal trial courts are more likely to be able to intuit how the state supreme court would opine in the future.<sup>26</sup>

But the Court simply made no such pronouncement in *Erie*. It said that "the law to be applied in any case is the law of the State," and it said that a state supreme court was capable of setting forth that law in a decision.<sup>27</sup> The Court in *Erie* did not, however, state that what a state supreme court will in fact decide at some future time constitutes "the law of the State" at present, nor did it tell federal courts to endeavor to resolve state-law questions in the same manner it believes the state supreme court would.<sup>28</sup>

### B. How Does Ascertaining State Law Pose a Problem?

Having contextualized *Erie*, its paradoxical effect becomes apparent. Understanding that common law is what courts say and not some brooding omnipresence, the *Erie* Court required federal courts to apply the law of the relevant state when that law provides the applicable rule of decision. In practice, then, the federal court must ascertain "the law" of the relevant state. This very undertaking presumes that the state's law is out there, somewhere, and that it is discoverable. The effect is arguably paradoxical because, in turning away from the idea that the common law exists as an entity apart from the courts that announce it, *Erie* instructs federal courts to treat the common law in precisely this manner—that is, as an entity that exists and can be discovered—albeit at a statewide level instead of a universal one.

One might sensibly object at this point that the preceding discussion makes much ado about nothing. After all, a federal district court does not invent federal law from whole cloth. It researches precedent and attempts to determine the extent to which

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law in line with what that state's supreme court would decide.

25. Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. CAL. L. REV. 975, 978 (2004).

26. *Id.* at 1008.

27. *Erie*, 304 U.S. 64, 78 (1938).

28. Professor Michael C. Dorf has reached the same conclusion. See Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 709 (1995) ("The *Erie* Court takes federal judges as its audience and instructs them to apply state, rather than federal, law in diversity cases. But it says almost nothing about how to ascertain state law.").



applicable precedent controls the particular facts of the case before it, or at least the direction to which such precedent points. And it proceeds in the same manner when it must rule on a question of state law. Thus, the argument goes, there is no functional difference between the determination and application of state and federal law in federal court.

This objection is roughly correct,<sup>29</sup> but it proves too little. The objection is only roughly correct on its own terms because a federal district court seeking to ascertain federal law knows to look to the decisions of the United States Supreme Court and then the decisions of the United States Court of Appeals for the circuit in which the district court sits.<sup>30</sup> Only when these two sources do not determine the outcome of the federal question in the district court will that court look for guidance—not binding authority—to the opinions of other courts of appeals and district courts. The appropriate sources of state law are not so clear cut.<sup>31</sup>

The objection proves too little because the federal court may ascertain and apply federal precedent with the twin confidences that, first, whatever it decides *is* the law until changed by the court of appeals and, second, a disappointed litigant may appeal the decision to the court of appeals and then to the Supreme Court, so eventually the final decision will be an authoritative statement of federal law. When the same federal court determines and applies state law, it can have neither confidence. Although its decision “is the law” in the sense that it binds the litigating parties, it is not straightforwardly the law of the state because the federal court is not authorized to make state common law. Nor, indeed, is any court in the chain of appeals so authorized. Thus, though from the most extremely realist perspective, a federal court determining state law might in fact be doing the same thing it does in determining federal law, the two determinations and their applications are of quite different kinds.

### *C. Examples of State Law in Federal Court*

Upon which types of state law questions are federal courts routinely required to pass? Answering this question is important in order both to understand the difficulty faced by federal courts in addressing issues of state law and to evaluate and apply the rules that govern such practice. I do not mean to answer the question by any statistical analysis. Instead, my goal here is to provide some texture to the nature of troubling state-law questions that arise in federal court.

In doing so, I hope that three points become apparent. The first is that hard state-law issues present themselves from all directions—diversity and supplemental jurisdiction, as well as federal questions that necessarily incorporate state law.

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29. See *infra* Part III.C.3.

30. This proposition is so well ingrained that it is not remotely controversial. Upon closer inspection, however, it is not obvious. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818-19 (1994).

31. See *infra* Part II.B.

Second, the nature of the difficulty posed varies. State authorities may directly conflict; they may provide seemingly inconsistent, or at least inconclusive, guidance as to the application of a legal standard upon which all agree; they might articulate the standard in question in slightly different, if not necessarily conflicting, ways; or there might be no state authority on a particular point at all.<sup>32</sup> Third, another problem hovers over all of these—the proper regard for federal appellate precedent on specific state-law issues that are otherwise unclear.

One situation that is easy to identify as a problem for federal courts is where intermediate state appellate courts directly conflict on a point of legal doctrine. Such conflict may be explicit, or different lines of conflicting state authority might exist alongside each other without recognition of the split. In the first half of this decade, for example, the Southern District of Ohio was frequently faced with a case of explicit state-law conflict that arose in federal court under federal question jurisdiction. A plaintiff would bring suit against a former employer under federal civil rights laws, and the defendant would respond by seeking to compel arbitration pursuant to an agreement that the former employee had signed. The Federal Arbitration Act tells courts to enforce valid agreements to arbitrate, even when jurisdiction is premised on civil rights laws, but validity is determined according to state law.<sup>33</sup> Throughout the 1990s and into the first few years of this decade, Ohio intermediate appellate courts were in direct conflict as to whether the “continued employment” of an at-will employee constituted consideration for an employee’s mid-employment agreement to a new term imposed by her employer,<sup>34</sup> such that the arbitration agreement was valid and enforceable. Because large companies increasingly force their employees to sign arbitration agreements, federal courts were frequently forced to wrestle with this question in precisely this posture,<sup>35</sup> although the doctrinal split could have just as easily reared its head in a diversity suit to enforce a covenant not to compete<sup>36</sup>—at least until 2004, when the Ohio Supreme Court weighed in.<sup>37</sup>

A second type of state law question concerns understanding the sort of evidence that satisfies a particular legal standard. For example, a Tennessee statute forbids a

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32. See generally Clark, *supra* note 1, at 1468-69 (stating various ways in which determination of state law poses problems for federal judges).

33. 9 U.S.C. § 2 (2000).

34. Compare *Prinz Office Equip. Co. v. Pesko*, 1990 WL 7996 (Ohio App. 9 Dist.) (“Ohio does not recognize continued employment as valid consideration.”), with *Fin. Dimensions, Inc. v. Zifer*, 1999 WL 112792 (Ohio App. 1 Dist.) (holding that “continued employment” is valid consideration).

35. *E.g.*, *Raasch v. NCR Corp.*, 254 F. Supp. 2d 847, 863 (S.D. Ohio 2003).

36. *E.g.*, *Avery Dennison Corp. v. Kitsonas*, 118 F. Supp. 2d 848, 851 (S.D. Ohio 2000).

37. See *Lake Land Employment Group of Akron, LLC v. Columber*, 101 Ohio St. 3d 242, 280-82 (2004). This doctrinal issue and the Ohio Supreme Court’s decision is discussed in greater detail *infra* Part III.A.

physician from offering expert testimony in a medical malpractice case unless he or she has knowledge of “[t]he recognized standard of acceptable professional practice in the profession and specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury . . . occurred.”<sup>38</sup> One Tennessee appellate court held that a proposed expert did not satisfy this standard where he opined that the standard of care in Jackson, Tennessee was effectively a national standard.<sup>39</sup> Another Tennessee appellate court held that a proposed expert satisfied this standard where he testified that Memphis, Tennessee and Lexington, Kentucky were similar communities because both had regional medical centers.<sup>40</sup> With these two precedents serving as the only state authority on point, how should a federal court sitting in diversity in Tennessee rule when a proposed expert opines that he knows the relevant standard of care because Nashville, Tennessee, and St. Louis, Missouri are both regional medical centers *and* because the applicable standard of care is a national one? Recognizing the *Erie* issues at stake, the Sixth Circuit had no cogent answer to this question when confronted with it.<sup>41</sup>

Although I have described this second sort of case in terms of the problem of recognizing sufficient evidence, the difficulty such a case poses for federal district courts is roughly analogous to that posed by any case that requires an application of a general and undisputed rule, phrased at a high level of generality, to particular facts.<sup>42</sup> The state supreme court may not have taken a sufficient number of cases to establish the margins of tolerable diversity in any easily discernible way. At the same time, state intermediate appellate courts may seem to establish quite divergent margins, or they may develop different legal sub-rules in order to guide the major legal determination.

Novel, rather than simply unsettled, issues of state law may also arise in federal contexts. For example, substantial attention has recently been devoted to litigating whether a particular state would consider a corporation to be “injured” by the fraudulent prolongation of its existence where the corporation was already insolvent before any fraudulent activity took place. The Third Circuit answered the question affirmatively where Pennsylvania law was concerned, even though it recognized that no Pennsylvania court—nor even any federal court opining on Pennsylvania law—

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38. TENN. CODE ANN. § 29-26-115(a)(1) (2000).

39. *Mabon v. Jackson-Madison County Gen. Hosp.*, 968 S.W.2d 826, 830 (Tenn. Ct. App. 1997).

40. *Wilson v. Patterson*, 73 S.W.3d 95, 105 (Tenn. Ct. App. 2001).

41. *See Sommer v. Davis*, 317 F.3d 686, 694-95 (6th Cir. 2003) (noting that neither the “possibility” that “the standard of care for surgery involving spinal fusion is in fact uniform nationwide” nor the federal court’s “policy views of medical malpractice litigation control this case,” citing *Erie*, and deferring to the district court under an abuse-of-discretion standard).

42. *See Antonin Scalia, The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186 (1989).

had addressed the question.<sup>43</sup> Other federal courts have subsequently opined on the law of other states with respect to “deepening insolvency.”<sup>44</sup> The issue has arisen almost exclusively in federal bankruptcy court, and each federal court that weighs in has written effectively on a blank slate insofar as guiding state authority is concerned.<sup>45</sup>

Federal courts trying to apply unsettled state law also struggle with another problem, the proper weight to be accorded to earlier opinions on the state-law issue by the federal circuit court of appeals. This problem afflicts both district courts and circuit courts—the former because they are inferior courts and the latter because of the rule to which all federal circuit courts adhere that one panel may not overrule an earlier one.<sup>46</sup> Does a federal circuit court precedent on a matter of state law control subsequent federal cases faced with that state-law issue? Does the answer to this question differ depending on whether the state courts have addressed the question between the first and the second federal opinion?

One commentator has answered the first question in the negative, arguing that “district court judges . . . must always look first at the most recent state pronouncements to decide a diversity case, rather than relying on circuit court ‘precedent.’”<sup>47</sup> According to this commentator, “federal circuit court determinations of state law have no precedential value.”<sup>48</sup> Federal district courts have generally not been this bold, although Judge Weinstein of the Southern District of New York has

43. Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 349 (3d Cir. 2001)

44. E.g., *In re Exide Techs., Inc.*, 299 B.R. 732, 751 (Bankr. D. Del. 2003) (“I must first determine whether a deepening insolvency claim is cognizable under Delaware law.”).

45. See *In re LTV Steel Co., Inc.*, 2005 WL 2573515, 20 (Bankr. N.D. Ohio 2005); *In re Parmalat Sec. Litig.*, 385 F. Supp. 2d (S.D.N.Y. 2005); *Corporate Aviation Concepts, Inc. v. Multi-Science Aviation Corp.*, 2004 WL 1900001 (E.D. Pa. 2004).

46. On the point of obeisance by inferior federal courts, see Caminker, *supra* note 30, and authorities discussed therein; with respect to one panel binding later ones, see, for example, *Dingle v. Bioport Corp.*, 388 F.3d 209, 215 (6th Cir. 2004) (“A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.”); Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1017-18 (2003) (“Litigants feel precedent’s preclusive effect most keenly in the courts of appeals, which candidly describe their approach to stare decisis as ‘strict,’ ‘binding,’ and ‘rigid.’ This rigidity comes largely from the rule, followed in every circuit, that one panel cannot overrule another.”) (footnote omitted).

47. Note, *Determination of State Law in Diversity Cases: Salve Regina College v. Russell*, 105 HARV. L. REV. 309, 318 (1991).

48. *Id.*; see also Nikiforos Mathews, *Circuit Court Erie Errors and the District Court’s Dilemma: From Roto-Lith and the Mirror Image Rule to Octagon Gas and Asset Securitization*, 17 CARDOZO L. REV. 739 (1996) (advocating the position that if a district court thinks that a federal appellate prediction of state law is wrong, the district court should simply defy the appellate precedent).

opined in passing that “a decision by the Second Circuit is not binding on this court in determining a question of state law.”<sup>49</sup> On the other hand, in a recent opinion for the Seventh Circuit, Judge Easterbrook vigorously insisted that by treating a prior Seventh Circuit precedent on an issue of state law “as having no more than persuasive force, the district court made a fundamental error. In a hierarchical system, decisions of a superior court are authoritative on inferior courts.”<sup>50</sup>

Judge Easterbrook’s opinion is one of several recent federal appellate decisions that also address the second question identified above, the effect of intervening state-court decisions. According to the Seventh Circuit in that case, intervening decisions by state intermediate appellate courts “assuredly . . . do not themselves liberate district judges from the force of our decisions,” and should not cause the court of appeals to reconsider: “Instead of guessing over and over, it is best to stick with one assessment until the state’s supreme court, which alone can end the guessing game, does so.”<sup>51</sup> The Ninth Circuit, by contrast, did reconsider its earlier decision where intervening state appellate decisions had reached the contrary result, ultimately reaching this contrary conclusion.<sup>52</sup> Circuit court precedent dictated reconsideration under these circumstances, all of which troubled Judge O’Scannlain sufficiently to concur separately. “I find myself in the perplexing position,” he confessed, “of being bound by a precedent counseling that I need not be bound by a precedent.”<sup>53</sup>

Clearly, the circuit courts themselves are confused as to the appropriate weight of their own previous predictions of state law. This confusion compounds that inherent in the task itself. The state law to be applied in federal court is thus frequently unclear along one or more of several directions.

#### D. *Why Certification Is Not the Answer*

In one thorough study of state law in federal courts, Professor Bradford R. Clark concluded that the best way for federal courts to handle unsettled state law is to “employ a presumption in favor of certifying unsettled questions of state law to state courts whenever state law authorizes this procedure.”<sup>54</sup> This refers to a process whereby a federal court can certify a particular question of state law to the state’s highest court.<sup>55</sup> Certification procedures are a matter of state law.<sup>56</sup> The vast majority of all states have a certification procedure, but each state’s procedure differs

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49. *In re E. & S. Dists. Asbestos Litig.*, 772 F. Supp. 1380, 1409 (E.D.N.Y. & S.D.N.Y. 1991).

50. *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004).

51. *Id.*

52. *In re Watts*, 298 F.3d 1077, 1082-83 (9th Cir. 2002).

53. *Id.* at 1083 (O’Scannlain, J., concurring).

54. Clark, *supra* note 1, at 1564.

55. *Id.*

56. *Id.*

slightly on such matters as which court (district or appellate or both) may certify which questions (dispositive or not, no controlling precedent in the state supreme court or no precedent at all) at which stage of proceedings to which court.<sup>57</sup>

Professor Clark argues that employing a presumption in favor of certifying unsettled questions of state law to state courts best captures the principles of *Erie*.<sup>58</sup> First, certification ensures that unsettled questions of state law will be decided by states, not the federal government, thereby implementing what Professor Clark refers to as *Erie's* principle of "judicial federalism."<sup>59</sup> At the same time, it permits federal courts to exercise properly their jurisdiction over cases that include state-law questions, rather than, for example, abstaining until the state-law issues have been decided.<sup>60</sup>

Certification has received a lot of attention from the bench, bar, and academy, but it does not solve district courts' problems of finding and applying state law.

### 1. Certification as a Hindrance to Processing Cases

The strongest, and most practical, consideration working against routine certification is the delay that it would add to federal court proceedings. One very important function of federal district courts is to process cases. District judges recognize that although the litigants before them want their cases decided correctly under the law, in large part they simply want the cases to be *decided*. Indeed, Rule 1 of the Federal Rules of Civil Procedure explains that the rules are designed to secure not only the "just" determination of every action, but also its "speedy" determination.<sup>61</sup>

Although the proposition that district courts and litigants appearing before them are highly concerned with the promptness of a decision is not readily provable with empirical data, Congress's enactment of the Civil Justice Reform Act of 1990 does demonstrate its centrality.<sup>62</sup> According to Senator Joseph Biden, one of the principal architects of the legislation, it was designed to address "[c]ourt congestion[, which] has become pronounced, particularly for civil cases, as crowded dockets and

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57. *Id.* at 1544, 1548 (referring to D.C. CODE ANN. § 11-723 (1987); IOWA CODE ANN. §§ 684 A.1 (West 1987); KAN. STAT. ANN. § 60-3201 (1994); MD. CODE ANN., CTS. & JUD. PROC. § 12-603 (Supp. 1996); MINN. STAT. ANN. § 480.061 (West 1990); NEB. REV. STAT. § 24-219 (1995); OKLA. STAT. ANN. tit. 20, §§ 1601-12 (West 1991 & Supp. 1994); OR. REV. STAT. § 28.200 (Supp. 1996); WASH. REV. CODE ANN. § 2.66.020 (West 1988)).

58. *Id.* at 1564.

59. *Id.* at 1465.

60. *Id.*

61. FED. R. CIV. P. 1 ("These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.")

62. 28 U.S.C. §§ 471-482 (1994).

inefficient procedures combine to make litigation expensive and delays lengthy.<sup>63</sup> Section 476 of the Act, for example, requires the Administrative Office of the United States Courts to prepare a list every six months that reports to the public, among other things, the number of motions that have been pending in each district court for longer than six months and the number and names of cases that have not been terminated more than three years after being filed.<sup>64</sup>

Certification substantially adds to the time necessary for a federal court to resolve dispositive motions. A 1977 law review article fixed the additional time at, on average, fifteen months.<sup>65</sup> And although one commentator in 1994 reported that “the time required for a state court to answer a certified question was approximately six to seven months,”<sup>66</sup> the next year another was able to cite cases in which state courts had taken “an inordinately long time to answer questions”<sup>67</sup>—ranging from thirteen months to six years.<sup>68</sup> Any of these figures, however, represents a substantial amount of time in the life of a federal case. Indeed, the Sixth Circuit stated as much in *American Fidelity Bank & Trust Co. v. Heimann*, when it refused to certify a question of state law to the Kentucky Supreme Court in consideration, in part, of “the inevitable delay inherent in the certification process.”<sup>69</sup> Concurring in *Lehman Brothers v. Schein*, Justice Rehnquist similarly observed that certification “entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court.”<sup>70</sup>

Part of the problem with the added delay of certification is (1) the potential for greater unfairness and (2) the removal of the case from the realities of why parties litigate. This was eloquently expressed over forty years ago by Justice Douglas in his dissent in *Clay v. Sun Insurance Office Limited*:

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63. Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285, 1286 (1994).

64. 28 U.S.C. § 476.

65. David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 326-27 (1977) (“my own calculations from a 1976 study indicate that it has taken an average of fifteen months from federal certification to federal application of the state response”).

66. Geri J. Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 333 (1994) (citing a study by the Federal Judicial Center).

67. Bruce M. Selya, *Certified Madness: Ask a Silly Question...*, 29 SUFFOLK U. L. REV. 677, 681 (1995).

68. *Id.* at 681 n.18.

69. 683 F.2d 999, 1002 (6th Cir. 1982).

70. 416 U.S. 386, 394 (1974) (Rehnquist, J., concurring). In *Lehman Brothers*, a divided Second Circuit had reversed the district court because it disagreed with the lower court’s interpretation of unsettled Florida law. *Id.* at 389. The Supreme Court vacated the judgment of the Court of Appeals and remanded for reconsideration of the propriety of certification under these circumstances. *Id.* at 391-92. Justice Rehnquist agreed with this outcome, but concurred separately to indicate that he did not think that certification was necessarily appropriate. *Id.* at 392. On remand, the Second Circuit did certify the state-law questions. *Schein v. Chasen*, 519 F.2d 453 (2d Cir. 1975).

Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttleing the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled—absent unique and rare situations—to adjudication of their rights in the tribunals which Congress has empowered to act.<sup>71</sup>

The delay added by certification can, in other words, introduce or exacerbate an element of unfairness in litigation if parties do not have equal financial resources to prosecute or defend the claims at issue.<sup>72</sup>

Even where parties have roughly equal litigation resources, moreover, certification delay can hinder settlement. As we know from sources too voluminous to reproduce here in any detail, “most cases settle.”<sup>73</sup> Justice Douglas’s dissent in *Clay* captures the idea that often parties in federal court are far less concerned about the niceties of particular state-law doctrines than they are about establishing the basic legal framework within which to conduct negotiations aimed at resolving their dispute.<sup>74</sup>

Major information deficits—such as a reasonable assessment of the likelihood that a dispositive motion will be granted in whole or part—can prevent meaningful settlement negotiations.<sup>75</sup> Where (1) parties to a suit in federal court are willing or even eager to settle, (2) a dispositive motion is pending, and (3) the motion depends at least in part on an unsettled issue of state law, certifying the question to the appropriate state court is a major waste of the time of the district court, the state court, and the parties; this is because the parties will settle as soon as the information gap has closed, no matter who decides the unsettled question (state court or federal court)

71. 363 U.S. 207, 228 (1960) (Douglas, J., dissenting).

72. Another potential unfairness may afflict out-of-state litigants, since the primary purpose of the diversity jurisdiction is to assure an out-of-state litigant that he or she will receive adjudication in a neutral forum, which necessarily assumes that state courts may not treat out-of-state litigants fairly. See Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1740 (2003) (arguing that one conception of certification “is inconsistent with the fundamental purpose of diversity jurisdiction, which is to afford out-of-state residents the opportunity to have cases heard in a neutral forum”).

73. Marc Galanter & Mia Cahill, “*Most Cases Settle: Judicial Promotion and Regulation of Settlements*,” 46 STAN. L. REV. 1339 (1994).

74. *Cf. id.* at 1341 (“In reality, most cases that enter the system are resolved short of full-dress adjudication by a process of maneuver and bargaining ‘in the shadow of the law.’”).

75. See, e.g., Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 336 (1999) (“[I]ncreased information about the judge’s decision-making would increase the likelihood of settlement.”).



and no matter which way it is decided.<sup>76</sup> Routine certification is therefore impractical.

## 2. Other Objections to Certification

Routine certification is also objectionable from the perspective of the state court system. Constantly answering questions certified from federal courts would likely overwhelm state supreme courts. In one oft-cited opinion, District Judge Cabranes remarked that “[i]t would impose an unreasonable and unnecessary burden on the Connecticut Supreme Court if the certification process were to be invoked routinely whenever a federal court was presented with an unsettled question of Connecticut law.”<sup>77</sup>

Apart from the potential for overburdening, there is often little reason to suspect that state supreme courts would want to opine on much of the unsettled state law in federal court. The purely doctrinal question whether continued employment constitutes sufficient consideration to support an agreement to arbitrate or not to compete, for example, had occurred in any number of cases in Ohio state court, but the Ohio Supreme Court declined to allow a discretionary appeal on the issue for well over a decade after a split of authority arose.<sup>78</sup> Recurring questions of state law may remain unsettled because the state supreme court wants more lower courts to weigh in on the issue before it wades into the fray.<sup>79</sup> Or they may remain unsettled because they involve applying a general rule to particular facts, and the state high court does not want to spend its time defining the borders of the application of a known rule. In either situation, we should ask why a state supreme court would prefer to receive a question from a federal court when it could have, at least as easily, accepted the same question from its own appellate courts.

This highlights one obvious reason why certification is not a panacea: the state supreme court may refuse to answer the question certified.<sup>80</sup> Another obvious problem deserving mention is that several states will receive certified questions only

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76. Cf. Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221 (1999) (lamenting this fact).

77. L. Cohen & Co., Inc. v. Dun & Bradstreet, Inc., 629 F. Supp. 1419, 1423 (D. Conn. 1986).

78. E.g., *Canter v. Tucker*, 670 N.E.2d 1001 (Ohio 1996) (table decision) (refusing to allow a discretionary appeal in a case that raised the question, identified the split of authority, and then decided that continued employment was sufficient consideration).

79. The United States Supreme Court often appears to take this approach. See, e.g., *Avis Rent A Car System, Inc. v. Aguilar*, 120 S. Ct. 2029, 2033 (2000) (Thomas, J., dissenting from the denial of certiorari) (“My colleagues are perhaps dissuaded from granting certiorari by the paucity of lower court decisions addressing [the legal issue presented].”).

80. See, e.g., Selya, *supra* note 67, at 681 & n.19 (listing cases in which the state supreme court refused to answer and gave either no explanation or a terse one for its refusal).

from federal appellate courts.<sup>81</sup> District courts seeking answers to questions of unsettled state law from those states are therefore on their own.

### 3. Highly Political versus "Common" Questions in State Law

In assessing the costs and benefits of certification, one should also consider the difference between the types of cases used by Professor Clark to extol its virtues with the types of routinely arising cases that call for federal courts to ascertain state law. He criticizes *Bulloch v. United States*,<sup>82</sup> for example, as a case in which the state's power to decide its own law was usurped by the federal court.<sup>83</sup> In *Bulloch*, unmarried cohabitants sued the federal government for loss of consortium in district court under the Federal Tort Claims Act.<sup>84</sup> The government moved to dismiss the case on the ground that New Jersey law controlled pursuant to the Act, and that under New Jersey law, only married people could sue for loss of consortium.<sup>85</sup> Unable to find a state court case that squarely addressed the issue, the district court ultimately decided that New Jersey law permitted a claim for loss of consortium by unmarried cohabitants.<sup>86</sup> A couple years later, two New Jersey state courts did address the question in *Bulloch* and came to the opposite conclusion.<sup>87</sup> "In a case like *Bulloch*," according to Professor Clark, "a federal court's erroneous prediction that the state's highest court would recognize a cause of action for loss of consortium on behalf of unmarried cohabitants raises serious judicial federalism concerns."<sup>88</sup>

Whether cases like *Bulloch* do, indeed, raise such concerns is a question to which I shall return in Part III. Here, however, I want to draw attention to how easy it is to recognize that the unsettled state-law question in *Bulloch* involved competing, contentious, and public political considerations. Whether unmarried cohabitants should be treated by courts in the same manner as a married couple is a controversial political issue. Legislatures at the state and federal level have debated and sometimes passed statutes aimed to define and "protect" the legal status of socially traditional marriage. Candidates for political office take public stands on issues related to whether a married couple should be treated differently than unmarried cohabitants.

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81. *E.g.*, TEX. R. APP. P. 58.1 ("The Supreme Court of Texas may answer questions of law certified to it by any federal *appellate* court . . .") (emphasis added); Paul A. LaBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999, 1000 n.4 (1985).

82. 487 F. Supp. 1078 (D.N.J. 1980).

83. Clark, *supra* note 1, at 1054-05.

84. *Bulloch*, 487 F. Supp. at 1079.

85. *Id.* at 1079.

86. *Id.* at 1079-80.

87. Childers v. Shannon, 444 A.2d 1141 (N.J. Super. Ct. Law Div. 1982); Leonardis v. Morton Chem. Co., 445 A.2d 45 (N.J. Super. Ct. App. Div. 1982).

88. Clark, *supra* note 1, at 1504.

In short, whether the law should treat unmarried cohabitants differently than a married couple is a political hot-button issue. When a federal court addresses such an issue of unsettled state law, it is easy to charge that the federal court is usurping the state's constitutional prerogative to shape its own policy. But what about the question whether a promise must be "clear and unambiguous" in order to support a claim for promissory estoppel?<sup>89</sup> Candidates do not run on that issue, and it never makes the daily news. Although, upon inspection, the issue may be said to have political aspects, one cannot maintain that addressing the question is political in the same sense that the issue in *Bulloch* was.

Indeed, no citation to authority should be necessary for the proposition that the percentage of cases in which a federal court is called upon to decide an unsettled matter of state law involving a political hot-button issue constitutes a tiny fraction of all the times that the federal court is confronted with a question of unsettled state law.<sup>90</sup> Perhaps certification is appropriate in that small number of cases. But that does not suggest the appropriateness of certification otherwise.

In sum, routine certification is not the answer for determining unclear issues of state law.<sup>91</sup> Federal courts, at least most of the time, must do the work themselves. Let us therefore consider how they should go about doing so.

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89. Compare *Hale v. Volunteers of Am.*, 816 N.E.2d 259, 270 (Ohio Ct. App. 2004) (requiring a promise to be "clear and unambiguous in its terms" in order to state a claim for promissory estoppel), with *Chrysalis Health Care, Inc. v. Brooks*, 640 N.E.2d 915, 921 (Ohio Mun. Ct. 1994) (omitting this requirement). Both courts cited *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150, 154 (Ohio 1985), as authority in support of their respective formulations of the standard.

90. But see Nash, *supra* note 72, at 1739 (asserting, also without citation, that "[t]he class of cases in which questions require 'significant policymaking discretion' that might be 'more appropriately left to the states' is not small"). I do not know whether Professor Nash includes in the category of questions that "require significant policymaking discretion" those issues—such as the paradigm cases described in Part I.C. above—that are not facially "political," as that term is commonly understood.

91. In addition, one commentator has agreed that "the certification procedure raises serious questions involving the scope of federal jurisdiction and judicial power. . . . In fact, it is somewhat difficult to make the case that certification does not exceed the constitutional and statutory limits on federal jurisdiction." Nash, *supra* note 72, at 1675. To reach this conclusion, Professor Nash begins by asking whether certification is properly understood to involve one case (proceeding in the federal court) or two (conceptualizing the proceedings in the responding state court as a separate case). *Id.* at 1672, 1675. He terms these two possibilities as the unitary and binary conceptions of jurisdiction. *Id.* at 1672. Although other legal postures are easily placed in one of these two categories, Nash argues that certain aspects of certification support a unitary conception, while others support a binary conception. *Id.* at 1676. The problem with thinking of certification under the unitary conception, according to Nash, is that it requires the responding state court to exercise the federal judicial power, which, he believes, would be unconstitutional. *Id.* at 1676-77. The binary conception, on the other hand, seems to be strongly in tension with the statutory grant of diversity jurisdiction. *Id.* at 1677.

I do not share Professor Nash's concern about the jurisdictional validity of certification. Judge Selya's analysis is entirely accurate, in my view:

When a question is certified, the responding court does not assume jurisdiction over the

## II. THE STATE OF THE LAW REGARDING STATE LAW IN FEDERAL COURT

### A. *Instructions from the United States Supreme Court*

*Erie* provided the first instruction: "And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."<sup>92</sup> One year after *Erie*, in a diversity case that could have been decided on the basis of res judicata or the law-of-the-case doctrine, the Court reiterated that, where Texas law provided the rule of decision, "[i]t was the duty of the federal court to apply the law of Texas as declared by its highest court."<sup>93</sup> Subsequently, the Court cited this later case, *Wichita Royalty Co.*, for the following proposition:

[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted.<sup>94</sup>

That is easy enough. As one very cautious commentator has summarized, where "the highest court of the state whose substantive law is applicable has previously (and relatively recently) determined the issue posed" in the federal action, then "it is generally agreed that the federal judge who, under the *Erie* mandate, must apply state law, applies that law which has been enunciated by the highest court of the state."<sup>95</sup> Neither *Erie* nor *Wichita Royalty Co.* delineates, however, what the federal court is to do if the state supreme court has not spoken to the question of state law at issue in the federal case.

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parties or over the subject matter. It does not assume the power to adjudicate a dispute between the parties or to enforce any judgment. Only the certifying court asserts real judicial power—"the right to determine actual controversies arising between adverse litigants"—over the parties.

Selya, *supra* note 67, at 685 (footnotes omitted). I therefore believe that a case in federal court in which a question is certified is just that—a single case. Nor is there any reason to suppose that the state court is exercising the federal judicial power when it responds to the question, because it has not assumed jurisdiction over the parties or the subject matter. Under what authority the state court is proceeding is a matter of state concern. A state's decision to authorize its courts to issue advisory opinions is of no moment to the Constitution.

92. 304 U.S. at 78.

93. *Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls*, 306 U.S. 103, 107 (1939).

94. *West v. AT&T Co.*, 311 U.S. 223, 236 (1940).

95. Geri J. Yonover, *Ascertaining State Law: The Continuing Erie Dilemma*, 38 DEPAUL L. REV. 1, 3-4 (1988).

In a series of cases from 1940-1941, all of which appear in volume 311 of the United States Reports, and have sometimes been referred to as “excesses of 311,”<sup>96</sup> the Court addressed this issue by negative implication in the course of reversing five decisions of the courts of appeals. Two of the cases, *West v. American Telephone & Telegraph Co.*<sup>97</sup> and *Stoner v. New York Life Insurance Co.*,<sup>98</sup> did not squarely present problems of finding state law in the absence of a state supreme court decision because, in both cases, the legal question at issue had been litigated by the same parties in state court before federal litigation began.<sup>99</sup> Doctrines of issue or claim preclusion were therefore the appropriate vehicles for resolving the state-law issues in the federal litigation. Nevertheless, the Supreme Court took both opportunities to opine how, if preclusion doctrines were not applicable, the lower courts had erred in determining state law.<sup>100</sup>

In *West*, a decedent had willed his shares of AT&T stock to his widow for life, with the remainder to his two sons from a previous marriage.<sup>101</sup> The widow then presented the shares to AT&T for transfer to her name only, and the company obliged.<sup>102</sup> When the sons discovered this transaction, they sued AT&T for damages in Ohio state court.<sup>103</sup> The appellate court was the last court to rule on the case in the state courts, and it decided, as a matter of statutory construction, “that as a prerequisite to recovery for conversion of petitioners’ interest in the stock it was necessary that respondent repudiate petitioners’ title and that the petitioners should allege and prove that respondent had refused to recognize petitioners’ right in the stock.”<sup>104</sup> Since no demand or refusal had been proved, AT&T received judgment as a matter of law.<sup>105</sup>

The sons then made a demand on AT&T and brought suit again in federal district court.<sup>106</sup> Judgment for the sons was reversed by the Sixth Circuit, which ruled that demand was *not* a necessary prerequisite for the cause of action, which had thus accrued years earlier, so that limitations and laches barred the sons’ recovery.<sup>107</sup> Whether demand was a necessary prerequisite to suit had actually been litigated and decided in the earlier state court action between the same parties.<sup>108</sup> Issue preclusion,

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96. See Yonover, *supra* note 66, at 308 n.13.

97. 311 U.S. 223 (1940).

98. 311 U.S. 464 (1940).

99. *West*, 311 U.S. at 237; *Stoner*, 311 U.S. at 467.

100. *West*, 311 U.S. at 237; *Stoner*, 311 U.S. at 467.

101. *West*, 311 U.S. at 231.

102. *Id.* at 231-32.

103. *Id.* at 232.

104. *Id.* at 233.

105. *Id.*

106. *West*, 311 U.S. at 234.

107. *Id.* at 234-35.

108. *Id.* at 237.

therefore, mandated reversal of the Sixth Circuit. But the Supreme Court took the opportunity to set forth principles under *Erie*:

A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts.

Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.<sup>109</sup>

Accordingly, certain rules of decision may be said to constitute "state law," even though they have not been articulated by the state supreme court. "All available data" should be used to decide what the state law is. And the statement of an intermediate appellate court serves as a particularly strong datum.

The Court repeated this last point in *Stoner*, the second of the 311 cases in which a discussion of *Erie* principles was edifying but unnecessary. In *Stoner*, a man had brought suit against his insurance company in state court to collect disability benefits.<sup>110</sup> In the course of the state court litigation, the Kansas City Court of Appeals twice construed the meaning of "total disability" in an insurance contract under Missouri law.<sup>111</sup> After those rulings, the insurance company brought suit in the district court, seeking declaratory relief that the claimant was not entitled to benefits for any time after the state-court litigation had been initiated.<sup>112</sup> The Eighth Circuit construed the "total disability" clause differently than the state court and held that the insurance company was entitled to judgment as a matter of law.<sup>113</sup> As in *West*, the federal case followed state court "suits between the same parties involving the same issues of law and fact."<sup>114</sup> Accordingly, preclusion doctrines required reversal of the

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109. *Id.* at 236-37.

110. *Stoner*, 311 U.S. 466.

111. *Id.* at 467-68.

112. *Id.* at 466.

113. *Id.* at 467.

114. *Id.* at 467.

court of appeals.<sup>115</sup> But the Supreme Court seized the opportunity to reiterate that federal courts sitting in diversity “must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently.”<sup>116</sup>

This presumption in favor following the decisions of inferior state courts drove the Supreme Court’s reasoning in two other 311 cases that posed genuine *Erie* issues. In *Six Companies of California v. Joint Highway District Number 13*,<sup>117</sup> the question was whether a clause in a construction contract that provided for liquidated damages for a delay in project completion was applicable to a situation where the “delay” was caused by the contractor’s intentional abandonment of the project.<sup>118</sup> The Ninth Circuit decided that the clause was not applicable under California law, even though the only California appellate decision on the matter had reached the opposite conclusion.<sup>119</sup>

The Supreme Court reasoned that, so far as the relevant data disclosed, the single state appellate decision constituted the law of California:

The decision in the [state appellate court] case was made in 1919. We have not been referred to any decision of the Supreme Court of California to the contrary. We thus have an announcement of the state law by an intermediate appellate court in California in a ruling which apparently has not been disapproved, and there is no convincing evidence that the law of the State is otherwise.<sup>120</sup>

The Court therefore reversed.<sup>121</sup>

A similar result obtained in *Fidelity Union Trust Co. v. Field*.<sup>122</sup> There, the issue was whether a Totten trust was valid under New Jersey law.<sup>123</sup> Such trusts had not been recognized under the common law of the state, but in 1932, the state legislature passed four statutes authorizing them.<sup>124</sup> Twice after 1932, however, the Chancery Court of New Jersey had revisited the issue, and in both cases, the Vice-Chancellor had decided that the statutes were ineffective to change the common-law rule.<sup>125</sup> The

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115. Indeed, Judge Thomas had dissented from the panel majority below, but on the ground that “the finding and decision of the majority is contrary to the law of the case.” *N.Y. Life Ins. Co. v. Stoner*, 109 F.2d 874, 879 (8th Cir. 1940) (Thomas, J., dissenting).

116. *Stoner*, 311 U.S. at 467.

117. 311 U.S. 180 (1940).

118. *Id.* at 185.

119. *Id.*

120. *Id.* at 188.

121. *Id.*

122. 311 U.S. 169 (1940).

123. *Id.* at 178.

124. *Id.* at 175.

125. *Id.* at 175-76.

Third Circuit, however, considered the statute unambiguous and therefore applied it.<sup>126</sup>

But the Supreme Court reversed.<sup>127</sup> It emphasized that “[a]n intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.”<sup>128</sup> The Court then emphasized the importance of the Court of Chancery in New Jersey’s court system, noting that the Court of Chancery has statewide jurisdiction, and its decisions can be reviewed only by the highest court in the state.<sup>129</sup> The Court concluded that “the decisions of the Court of Chancery are entitled to like respect as announcing the law of the State.”<sup>130</sup>

The last of the 311 cases, *Vandenbark v. Owens-Illinois Glass Co.*,<sup>131</sup> addressed the altogether different question whether a change in state law during the pendency of a federal appeal mandated reversal.<sup>132</sup> *Vandenbark* was an occupational injury case in which Ohio law provided the rule of decision.<sup>133</sup> When the case was filed in federal district court, the plaintiff failed to state a cause of action upon which relief could be granted under Ohio common law.<sup>134</sup> But “[a]fter the action of the trial court in dismissing the petition, the Ohio supreme court reversed its former decisions and, in an opinion expressly overruling them, declared occupational diseases such as complained of by petitioner compensable under Ohio common law.”<sup>135</sup> The *Vandenbark* Court held that the federal appellate court was bound to apply the later state law decision: “[T]he dominant principle is that nisi prius and appellate tribunals alike should conform their orders to state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered.”<sup>136</sup>

The Court did not revisit the proper method of determining state law in federal court until 1948 in *King v. Order of United Commercial Travelers of America*.<sup>137</sup> In that diversity case, the district court had construed a particular insurance-liability clause under South Carolina law, in the absence of any state court precedent on the

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126. *Id.* at 177.

127. *Fid. Union Trust Co.*, 311 U.S. at 180.

128. *Id.* at 177-78.

129. *Id.* at 178.

130. *Id.* at 179.

131. 311 U.S. 538 (1941).

132. *Id.* at 540-41.

133. *Id.* at 539-40.

134. *Id.* at 539.

135. *Id.* at 540.

136. *Id.* at 543.

137. 333 U.S. 153 (1948).



subject.<sup>138</sup> During the pendency of the appeal, a South Carolina court of common pleas decided the identical legal issue in the same manner as the district court.<sup>139</sup> The Fourth Circuit, however, decided that it was not bound by the state court decision and reversed the district court.<sup>140</sup> After the Supreme Court accepted certiorari, another South Carolina court of common pleas decided a case presenting the same legal issue, and this case was contrary to the first state court decision.<sup>141</sup> Given that, under *Vandenbark*, the second state court decision could properly be considered,<sup>142</sup> *King* presented the Court with an opportunity to provide guidance for lower courts faced with a split of state court authority.

The Court, however, declined to take the opportunity. Instead, it decided that the Fourth Circuit had not erred in refusing to follow the first state court decision (the only one outstanding at the time of its decision).<sup>143</sup> *King* self-consciously withdrew from a broad reading of *Fidelity Union Trust Co.*, which, the Court explained, did not “lay down any general rule as to the respect to be accorded state trial court decisions.”<sup>144</sup> The Court distinguished *Fidelity Union Trust Co.* by comparing the general importance of the Court of Chancery to the New Jersey court system with the relative unimportance of the courts of common pleas in establishing South Carolina law.<sup>145</sup>

Because “a Common Pleas decision does not exact conformity from either the same court or lesser courts” and “may apparently be ignored by other Courts of Common Pleas without the compunctions which courts often experience in reaching results divergent from those reached by another court of coordinate jurisdiction,” the Court concluded that a single decision by one such court does not “of itself evidence” the law of the state.<sup>146</sup> Remarking that “a federal court adjudicating a matter of state law in a diversity suit is, ‘in effect, only another court of the State,’” the Court reasoned that “it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court.”<sup>147</sup> Yet the Court was careful not to say that the court of appeals could entirely disregard a common pleas decision. Rather, “[w]hile that court properly attributed some weight to the Spartanburg Common Pleas decision, we believe it was justified in holding the

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138. *Id.* at 155.

139. *Id.* at 156.

140. *Id.* at 156-57.

141. *Id.* at 157.

142. *Vandenbark*, 311 U.S. at 541.

143. *King*, 333 U.S. at 162.

144. *Id.* at 159.

145. *Id.* at 159-60.

146. *Id.* at 161.

147. *Id.* (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945)).

decision not controlling and in proceeding to make its own determination of what the Supreme Court of South Carolina would probably rule in a similar case.”<sup>148</sup>

Eight years later, in *Bernhardt v. Polygraphic Co. of America*,<sup>149</sup> the Court elucidated some of the other “data” that federal courts might consider as “evidence” of state law. The district court in *Bernhardt* had decided that, under Vermont law, an agreement to arbitrate was revocable until the arbitral award had actually been made.<sup>150</sup> In reaching this decision, the court relied on a 1910 opinion by the Vermont Supreme Court, and the United States Supreme Court saw no reason to second-guess the district court:

Were the question in doubt or deserving further canvass, we would of course remand the case to the Court of Appeals to pass on this question of Vermont law. But, as we have indicated, there appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule. We see no reason, therefore, to remand the case to the Court of Appeals to pass on this question of local law.<sup>151</sup>

Accordingly, under *Bernhardt*, recent opinions by state court judges may “cast[] a shadow” over older state supreme court decisions, and “dicta, doubts and ambiguities” in state court decisions are also indicia state law. Presumably, therefore, conflicting state intermediate appellate decisions can indicate the law of the state, even when an older state supreme court decision runs contrary.

One can view *Bernhardt* as not only providing further guidance for federal courts on the sources of state law, but also harmonizing the initial announcement that a federal court decide state-law issues in accord with the pronouncements of the state supreme court with subsequent cases that concerned the proper weight to be given to intermediate appellate decisions. Recall that in *West*, the Court had stated that a federal court sitting in diversity must follow the rule announced by the state supreme court—unless *the state supreme court* “has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted.”<sup>152</sup> But cases after *West* had chastised federal courts for giving insufficient consideration to intermediate state appellate decisions. *Bernhardt* confirmed that intermediate state appellate decisions could be sufficient to give a federal court clear and persuasive indication that an older pronouncement of the state supreme court was no longer the law of the state.

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148. *King*, 333 U.S. at 160-61.

149. 350 U.S. 198 (1956).

150. *Id.* at 204.

151. *Id.* at 205.

152. 311 U.S. at 236.

Finally, in its last pronouncement on the subject, the Court in *Commissioner v. Estate of Bosch*,<sup>153</sup> instructed federal courts applying state law that, in the absence of a decision by the state supreme court, they should “apply what they find to be the state law after giving ‘proper regard’ to relevant rulings of other courts of the State.”<sup>154</sup> Although this general, almost off-hand instruction about ascertaining state law is quite helpful for understanding the principle involved, it provides no explicit guidance on what the sources of state law might be, or how they might interrelate.

### B. *The State of State Law in the Courts of Appeals*

Despite the long amount of time since the Supreme Court last spoke on ascertaining state law, the federal circuit courts of appeals have not developed a consensus approach to the sources of state law, nor have they truly demonstrated consistent command of the principles involved. In one recent Ninth Circuit opinion, for example, the court stated: “When interpreting state law, we are bound to follow the decisions of the state’s highest court. When the state supreme court has not spoken on an issue, we must determine what result the court would reach based on state appellate court opinions, statutes and treatises.”<sup>155</sup> Another decision by the same court, the following year, differed both with respect to the putative sources of state law, and in the subtlety with which the task of ascertaining state law was described:

A federal court applying California law must apply the law as it believes the California Supreme Court would apply it. In the absence of a controlling California Supreme Court decision, the panel must predict how the California Supreme Court would decide the issue, using intermediate appellate court decisions, statutes, and decisions from other jurisdictions as interpretive aids.<sup>156</sup>

The second decision substitutes “decisions from other jurisdictions” for “treatises” as a source of state law. It also replaces the statement that state supreme court decisions are binding with a description of the court’s task as applying state law the way that the state supreme court would apply it.

The Ninth Circuit is far from alone in its imprecision. One Sixth Circuit opinion stated:

State supreme court decisions are controlling authority for such determinations [of state law], but if the state supreme court has not ruled on the precise issue in

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153. 387 U.S. 456 (1967).

154. *Id.* at 465.

155. *Vasquez v. North County Transit Dist.*, 292 F.3d 1049, 1054 (9th Cir. 2002) (citation and internal quotation marks omitted).

156. *Gravquick A/S v. Trimble Navigation Int’l Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003) (citations omitted).

question, this court must look at other indicia of state law, including state appellate decisions. This court may rely on those other indicia of state law unless there is persuasive data that the state supreme court would decide the issue otherwise.<sup>157</sup>

This passage identifies state supreme court decisions and state appellate decisions as sources of state law, but it also suggests—by using the word “including”—that other sources exist. In the very next sentence, however, the court states that it “may rely” on these other indicia of state law “unless there is persuasive data” that the state supreme court would decide the issue otherwise. This sentence indicates that “persuasive data” *other than* “indicia of state law” might determine what state law is, but the court neither explains how this is so nor provides examples.

As for sources of state law other than decisions by the state courts, the Second Circuit has mentioned “decisions in other jurisdictions on the same or analogous issues.”<sup>158</sup> A modified version of this option was announced by the Fifth Circuit; in seeking to apply Texas law, the court stated that “[w]e may also refer to rules in other states that Texas courts might look to.”<sup>159</sup> The Fourth Circuit has opined that it “may also consider, *inter alia*: restatements of the law, treatises, and well considered *dicta*.”<sup>160</sup> An Eighth Circuit decision also mentions “considered dicta” as well as “analogous decisions,” but hedges its bets by also including as a source of state law “any other reliable data.”<sup>161</sup> Judge Posner has written that “[w]hen state law on a question is unclear . . . the best guess is that the state’s highest court, should it ever be presented with the issues, will line up with a majority of the states.”<sup>162</sup> Even more pragmatically, another panel of the Seventh Circuit remarked that “[w]hen there is a dearth of case law on a point, we will often turn to notions of common sense.”<sup>163</sup>

Rarely do the sources of state law receive careful attention from the federal courts of appeals. Many of the statements regarding sources of state law in the foregoing paragraphs seem to be little more considered than the selection of boilerplate language from circuit precedent. One exception is *McKenna v. Ortho Pharmaceutical Corp.*,<sup>164</sup> an oft-cited Third Circuit opinion that has received the

157. *Arnett v. Myers*, 281 F.3d 552, 565 (6th Cir. 2002) (citation omitted).

158. *Gibbs-Alfano v. Burton*, 281 F.3d 12, 19 (2d Cir. 2002).

159. *Hermann Holdings Ltd. v. Lucent Technologies, Inc.*, 302 F.3d 552, 558 (5th Cir. 2002). The court did not list which other states Texas courts might look to, although the implication of this statement is that Texas courts would not consider all states.

160. *Private Mortgage Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, 296 F.3d 308, 312 (4th Cir. 2002).

161. *Western Forms, Inc. v. Pickell*, 308 F.3d 930, 933 (8th Cir. 2002).

162. *Vigortone AG Prods., Inc. v. PM AG Prods., Inc.*, 316 F.3d 641, 644 (7th Cir. 2002).

163. *Indiana Ins. Co. v. Pana Cmty. Unit Sch. Dist. No. 8*, 314 F.3d 895, 903 (7th Cir. 2002).

164. 622 F.2d 657 (3d Cir. 1980).

endorsement of Professors Wright and Miller in their treatise.<sup>165</sup> According to the *McKenna* court, federal courts seeking to apply state law should look to the “broad policies” and “doctrinal trends” that are “evinced” by the relevant state precedents.<sup>166</sup> These relevant precedents, the court continued, are state supreme court holdings, followed by that court’s dicta, then the decisions of lower state courts, scholarly treatises, Restatements of the Law, and, finally, germane law review articles—with a particular emphasis on in-state schools.<sup>167</sup>

Part of the popularity of *McKenna*, one suspects, is that it provides one of the more extensive decisional trees for approaching sources of state law. What may be surprising, however, is that even after setting forth this decisional tree in the course of an unusually involved discussion of the sources for and practice of applying state law in federal courts, the three judges of the *McKenna* panel could not agree on the proper determination of state law in the case at hand—whether Ohio would employ a “discovery rule” to toll the statute of limitations.<sup>168</sup> Judge Higginbotham stated in his dissent that the “distinguished trial judge who tried this case so patiently, was not unsympathetic to the plight of Mrs. McKenna; yet from my view he is being reversed—not because he was wrong—but because the relevant Ohio law is unenlightened.”<sup>169</sup> In other words, the majority had only paid lip service—albeit extensive lip service—to the application of state law; they had, in fact, replaced Ohio law with their own notions about what the correct rule should be. Professors Wright and Miller do not discuss this aspect of the case in their praise of *McKenna*.

What none of these federal appellate exhortations makes clear, however, is how a district court ought to go about ascertaining and applying state law where the identified state authority is split. It is well and good to say that in the absence of a decision by the state supreme court, a federal court is bound by the decisions of the state intermediate appellate courts, but that statement provides no guidance for the situation where a few state appellate courts say that the law is X, and a few other state appellate courts say the law is not-X. Indeed, as the Seventh Circuit discovered in *Rekhi v. Wildwood Industries, Inc.*, a federal court could encounter “two lines of cases [that] exist side by side; neither cites, or indicates any awareness of, the other.”<sup>170</sup> In such a situation, although “federal courts treat decisions by its intermediate appellate courts as authoritative . . . a split among those courts makes such treatment impossible.”<sup>171</sup>

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165. 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, § 4507 (2d ed. 1996).

166. 622 F.2d at 662.

167. *Id.* at 662-63.

168. *Id.* at 658.

169. *Id.* at 669 (Higginbotham, J., dissenting).

170. 61 F.3d 1313, 1317 (7th Cir. 1995).

171. *Id.* at 1319.

Certain of the federal appellate instructions discussed above are capable, as an analytic matter, of addressing this situation. “Majority rule,” for example, provides an easy out, one which the Seventh Circuit took in *Rekhi*.<sup>172</sup> Turning to “notions of common sense” offers another route, but it is less an instruction for how to deal with a split of state-court authority than it is a blank check for the federal court to proceed however it pleases.

Locating a state’s “broad policies” and “doctrinal trends” is a third possibility, but it suffers from serious difficulties. First, where intermediate authority is split, ascertaining those policies may be difficult. As applied to the particular question at hand, after all, the split of authority likely indicates that one could draw different conclusions about how to apply broad policies (unless, of course, the various state-court decisions accord on their expressions of policy, and the split has resulted from certain courts’ demonstrable error in implementing the policy doctrinally).<sup>173</sup> This was certainly the case in *McKenna*, the very opinion that announced an instruction to look to broad policies.

Other federal courts, in contrast, have suggested almost the opposite instruction with respect to “doctrinal trends.” The Seventh Circuit has decided to “avoid speculation about trends in diversity cases: ‘our policy will continue to be one that requires plaintiffs desirous of succeeding on novel state law claims to present those claims initially in state court.’”<sup>174</sup> This view may be shared by the Ninth Circuit, although its formulation of the relevant admonition is more ambiguous: “[F]ederal courts look to existing state law without predicting potential changes in that law.”<sup>175</sup>

Finally, at least three federal courts of appeals (the Third, Sixth, and Seventh) have endorsed some version of the proposition that when faced “with two opposing, yet equally plausible interpretations of state law, . . . for reasons of federalism and comity, ‘we generally choose the interpretation which restricts liability, rather than the more expansive interpretation which creates substantially more liability.’”<sup>176</sup>

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172. *Id.* at 1317 (“If we had to guess, we would guess that the Supreme Court of Illinois would follow the general rule.”).

173. *See infra* Part III.A. (setting forth an argument that state law might be unsettled because state courts, overburdened and understaffed, have demonstrably erred in elaborating their doctrine, and that comparatively institutionally advantaged federal courts can aid them in correcting these errors).

174. *Birchler v. Gehl Co.*, 88 F.3d 518, 521 (7th Cir. 1996) (quoting *Shaw v. Republic Drill Corp.*, 810 F.2d 149, 150 (7th Cir. 1987)).

175. *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1203 (9th Cir. 2002).

176. *S. Illinois Riverboat Casino Cruises, Inc. v. Triangle Insulation & Sheet Metal Co.*, 302 F.3d 667, 676 (7th Cir. 2002) (quoting *Home Valu, Inc. v. PepBoys, Inc.*, 213 F.3d 960, 963 (7th Cir. 2000) (citation and internal quotation omitted); *see also Combs v. Int’l Ins. Co.*, 354 F.3d 568, 577 (6th Cir. 2004) (“[W]hen given a choice between an interpretation of state law which reasonably restricts liability and one which greatly expands liability, we should choose the narrower and more reasonable path.”) (brackets omitted); *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 680 (3d Cir. 2002) (“[I]f we were torn between two competing yet sensible interpretations of Pennsylvania

Whether federalism and comity, or any other reason, actually justify this rule is a matter to which I return in Part III.B. below.

For the present purpose of grasping the relevant doctrine, however, two points should be recognized. First, the federal courts of appeals have not demonstrated a consistent command of the meaning and import of the Supreme Court decisions that directly address sources for and application of state law in federal courts. The second point is that although the federal appellate courts have provided a handful of tools for choosing among conflicting state authorities, these tools (1) do not follow ineluctably from the Supreme Court case law discussed above and (2) sometimes contradict each other. Whatever theoretical basis supports these tests has not been thoroughly explained.

### C. *Insight from the Standard of Review*

In attempting to make sense of these various instructions, a more recent Supreme Court decision is helpful. Before *Salve Regina College v. Russell*,<sup>177</sup> federal circuit courts were divided as to the appropriate standard of review for district court interpretations and applications of state law. Most employed some kind of deferential standard.<sup>178</sup> The rationale behind a deferential standard of review was that district court judges were more likely to be intimately familiar with the law of the state in which they sat than were the reviewing circuit judges, who hailed from different states and who had less frequent exposure to the law of any particular state.<sup>179</sup>

The Court rejected this position in *Salve Regina*, in part because it decided that deferential review was inconsistent with *Erie*.<sup>180</sup> What the Court found particularly unpalatable in light of *Erie* was that “deferential appellate review invites divergent development of state law among the federal trial courts even within a single State,”<sup>181</sup> and that “appellate courts that defer to the district courts’ state-law determinations

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law...we should opt for the interpretation that restricts liability, rather than expands it, until the Supreme Court of Pennsylvania decides differently.”)

177. 499 U.S. 225 (1991).

178. *E.g.*, *Hauser v. Public Serv. Co.*, 797 F.2d 876, 878 (10th Cir. 1986) (“In reviewing the interpretation and application of state law by a resident federal district court judge in a diversity action, we are governed by the clearly erroneous standard.”); *see also* Dan T. Coenen, *To Defer or Not to Defer*, 73 MINN. L. REV. 899, 905-906 (1989).

179. Coenen, *supra* note 178, at 905-06.

180. 499 U.S. at 234.

181. *Id.* Although this proposition could have been true in theory and was apparently conceded at oral argument, federal appellate courts in fact had recognized this problem and avoided it by declining to defer to a district court’s interpretation of state law on a point where the federal district courts of the state were in disagreement. *E.g.*, *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1384 n.2 (10th Cir. 1985) (“[A]nother resident district judge has expressed views contrary to those expressed by the trial court in this case. Under these circumstances, it is inappropriate to defer to the district court’s views.” (citation omitted)).

create a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum.<sup>182</sup>

Although these two problems might undermine the salutary policy benefits of *Erie*, they do not demonstrate why deferential appellate review of district-court determinations of state law is inconsistent with the constitutional rationale of *Erie*. Indeed, Professors Fallon, Meltzer, and Shapiro have suggested that *Salve Regina* was not compelled by *Erie*.<sup>183</sup> I think, however, that the holding was constitutionally compelled in light of *Erie*.

The *Salve Regina* Court confronted and rejected the principal rationale for deferential review at the end of its analysis.<sup>184</sup> Citing an article by Professor Philip B. Kurland, the Court explained:

[T]he proposition that a district judge is better able to “intuit” the answer to an unsettled question of state law is foreclosed by our holding in *Erie*. The very essence of the *Erie* doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge. . . . Similarly, the bases of state law are as equally communicable to the appellate judges as they are to the district judge. To the extent that the available state law on a controlling issue is so unsettled as to admit of no reasoned divination, we can see no sense in which a district judge’s prior exposure or nonexposure to the state judiciary can be said to facilitate the rule of reason.<sup>185</sup>

State law, in other words, is still law. If questions of law are subject to independent review by the federal appellate courts, state-law questions must also be subject to independent review; to subject them to any other standard would be to treat them as something other than questions of law. Put differently, the Constitution does not compel federal appellate courts to review questions of law de novo. But once the decision to review questions of law de novo has been made, the constitutional rationale of *Erie* requires that questions of state law be subject to the same standard of review.

The broader lesson for federal courts seeking to ascertain and apply state law that *Salve Regina* makes clear is that they should proceed in the same manner that they would in deciding federal-law questions. As the Court itself explained, “[S]tate law is to be determined in the same manner as a federal court resolves an evolving issue of federal law: ‘with the aid of such light as is afforded by the materials for the decision at hand, and in accordance with the applicable principles for determining state

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182. *Salve Regina*, 499 U.S. at 234.

183. RICHARD H. FALLON ET AL., *THE FEDERAL COURTS & THE FEDERAL SYSTEM* 694 (4th ed. 1996) (“Is the rule of *Salve Regina* required by *Erie*? If not, is it preferable. . .”).

184. 499 U.S. at 238.

185. *Id.* at 238-39.



law.”<sup>186</sup> The basic principle at issue in these cases is that federal courts should seek to apply state law as a paradigmatic state court would. But this brings us to the real nub of the problem. Opining explicitly on the task of ascertaining and applying state law requires one to say something about how it is that we suppose courts go about expounding the law. Specifically, to what extent does or should a federal court perform a state policymaking function when it ascertains and applies unsettled state law? This is the fundamental question to which I now turn.

### III. ASCERTAINING AND APPLYING STATE LAW IN FEDERAL COURT: THREE APPROACHES

#### A. *Federal Superiority: An Argument Premised on Institutional Advantage in Legal Reasoning*

If ascertaining and applying state law in federal court is simply a matter of law, no different than elaborating federal law, then perhaps federal courts should not be shy about confronting unsettled state-law issues—or even settled ones. According to the *Salve Regina* Court, federal courts are at worst equally as capable as state courts in applying state law.<sup>187</sup> More likely, however, is that federal courts are substantially more capable than their state brethren because, institutionally, they are comparatively advantaged in dealing with questions of law.

##### 1. Support for the Institutional Advantage of Federal Courts in Legal Reasoning

Academic literature from the late 1970s and early 1980s supports this view. In the *Myth of Parity*, Professor Neuborne argued that Supreme Court jurisprudence assuming that constitutional rights could be vindicated equally in state and federal courts was wrongheaded because federal courts were institutionally preferable to state courts for raising federal constitutional claims.<sup>188</sup> The first reason that he offered to support a preference for a federal trial forum was the following:

[T]he level of technical competence which the federal district court is likely to bring to the legal issues involved generally will be superior to that of a given state trial forum. Stated bluntly, in my experience, federal trial courts tend to be better equipped to analyze complex, often conflicting lines of authority and more likely to produce competently written, persuasive opinions than are state trial courts.<sup>189</sup>

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186. *Id.* at 227 (quoting *Meredith v. Winterhaven*, 320 U.S. 228 (1943)).

187. *Id.* at 238.

188. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

189. *Id.* at 1120.

Professor Neuborne identified five bases for the superior technical competence of the federal courts.<sup>190</sup> For three reasons, he contended, the federal judges are of a higher intellectual caliber than their state counterparts.<sup>191</sup> First, "Because it is relatively small, the federal trial bench maintains a level of competence in its pool of potential appointees which dwarfs the competence of the vastly larger pool from which state trial judges are selected."<sup>192</sup> The second reason followed crude market economics: federal judges are paid more.<sup>193</sup> Third, although conceding that the selection of federal judges is imperfect, Professor Neuborne contended that the selection tends to focus more on intellectual merit than does state selection processes: "Neither elections nor an appointment process based largely on political patronage is calculated to make refined judgments on technical competence."<sup>194</sup>

In addition to the reasons supporting the technical superiority of federal judges, federal courts enjoy two other institutional advantages, in Professor Neuborne's estimation.<sup>195</sup> Their caseload burden is less, for one thing.<sup>196</sup> Second, they have better judicial clerks:

Federal clerks at both the trial and appellate levels are chosen from among the most promising recent law school graduates for one- to two-year terms. State trial clerks, on the other hand, when available at all, tend to be either career bureaucrats or patronage employees and may lack both the ability and dedication of their federal counterparts.<sup>197</sup>

Professor Neuborne's purpose in pointing out these institutional advantages of federal courts was to support his argument that, contrary to then-developing Supreme Court jurisprudence, one should not expect that federal constitutional rights could be vindicated equally in state and federal courts.<sup>198</sup> Other parts of his article, accordingly, focus on other reasons to suspect that federal courts are more likely to vindicate federal constitutional rights, such as their insulation from majoritarian pressures.<sup>199</sup> But the observations noted above are restricted to relative advantages in performing legal reasoning, and no reason is immediately apparent why they would not apply equally to legal reasoning where state law provides the rule of decision,

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190. *Id.* at 1121-24.

191. *Id.* at 1121-22.

192. *Id.* at 1121.

193. Neuborne, *supra* note 188, at 1121.

194. *Id.* at 1122.

195. *Id.* at 1122-23.

196. *Id.* at 1122.

197. *Id.*

198. Neuborne, *supra* note 188, at 1106.

199. *Id.* at 1127-30.

especially if we proceed on the premise that “state law is to be determined in the same manner as a federal court resolves an evolving issue of federal law.”<sup>200</sup>

Indeed, Professor David Shapiro made this logical extension in the very next volume of the *Harvard Law Review*.<sup>201</sup> Seeking to ascertain whether federal courts were in fact contributing to the development of substantive state law, Professor Shapiro analyzed five volumes of the Federal Reporter and three sections of the Restatement (Second) of Torts.<sup>202</sup> He identified twenty-one diversity cases in the Federal Reporter that “could be said to have made . . . useful contributions to developing state law,” meaning that the opinions in those cases were “reconciling or distinguishing existing precedent, synthesizing or analyzing state law, or setting statutory or constitutional boundaries to the reach of state long-arm statutes.”<sup>203</sup>

The Restatement also reflected the influence of federal courts on state substantive law: “Thirty of the 142 cases cited in the Reporter’s Notes in support of the new rules were federal diversity cases,” a statistic that was “particularly striking in light of the fact that the sum of diversity litigation equals only about two percent of the total litigation in state courts of general jurisdiction.”<sup>204</sup> This disproportionate contribution of federal courts to the development of state law, Professor Shapiro noted, could be a result of the “more debatable . . . claim that the quality of justice available in the federal courts is superior to that provided in state courts.”<sup>205</sup> In support of this hypothesis, he echoed Professor Neuborne, noting that “federal courts may provide less crowded dockets, more efficient procedures, and, in some areas, better judges, at least at the trial level.”<sup>206</sup>

Professor William M. Landes and then-Professor Richard A. Posner attempted to generalize and systematize Professor Shapiro’s rather subjective analysis in their article *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*.<sup>207</sup> They

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200. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 227 (1991). For an example noting this point in the commentary, see MICHAEL E. SOLIMINE & JAMES L. WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM* 8–9 (1999).

Although the arguments against parity are of greater moment in those cases where a potential loss of liberty is involved, there is little distinction made, in the qualitative perspective, between criminal and civil litigation. The rather disturbing conclusion reached from this premise is that litigants should always prefer a federal to a state forum and that federal courts should never shrink from policies that result in maximum review of state action through appeal, habeas corpus, diversity jurisdiction, etc.

*Id.*

201. Shapiro, *supra* note 65.

202. *Id.* at 325–26.

203. *Id.*

204. *Id.* at 326.

205. *Id.* at 328–29.

206. Shapiro, *supra* note 65, at 329 (footnotes omitted).

207. William M. Landes & Richard A. Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. LEGAL STUD. 367 (1980).

constructed two samples of common-law decisions, one by federal courts and one by state courts, and then employed economic analysis to determine which sample produced the most influential precedent and along which vectors.<sup>208</sup> Next, they examined the proportional representation of state and federal precedents in contracts, property, and torts casebooks.<sup>209</sup>

Although these inquiries did not produce overwhelming evidence, the authors concluded that they had uncovered "some . . . evidence that the federal courts of appeals are more productive than state supreme courts as measured by the value of their precedent output,"<sup>210</sup> and certain analyses indicated that federal-court opinions were of "higher quality" than those of the state courts—that is, other courts demonstrably found the federal-court opinions more persuasive.<sup>211</sup> The authors therefore concluded, "[c]ontrary to the conventional view," that "the federal courts in diversity cases appear to make a significant contribution to the continuing development of the common law."<sup>212</sup>

These conclusions hardly surprised Professor Neil Kent Komesar in his response to the article.<sup>213</sup> Without citing the *Myth of Parity*, Professor Komesar replicated many of Professor Neuborne's observations, although in the context of federal-court superiority to state courts in elaborating state law and without the limiting qualification of comparing only federal trial courts to state trial courts.<sup>214</sup> He noted that "a state supreme court justice may confront a larger caseload or set of tasks than a judge on the federal court of appeals."<sup>215</sup> Moreover, he recognized that "[f]ederal district court judges write extensive and well-researched opinions in many cases. They are likely to have as much, if not more, research support staff—judicial clerks—than state *supreme* court judges, let alone state trial court judges."<sup>216</sup> Finally, he cited the fact that "[f]ederal judgeships are on the whole more attractive to those interested in the judiciary" because of higher pay and life tenure.<sup>217</sup>

No developments in the twenty-five years since this scholarship was produced provide a reason to question the continued vitality of these observations. To the contrary, recent evidence indicates that state court dockets, including state intermediate appellate courts as compared with federal district courts, remain

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208. *Id.* at 372-80.

209. *Id.* at 383-85.

210. *Id.* at 383.

211. *Id.* at 381.

212. Landes & Posner, *supra* note 207, at 386.

213. Neil Kent Komesar, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction: A Comment*, 9 J. LEGAL STUD. 387 (1980).

214. *See id.* at 392-95.

215. *Id.* at 392.

216. *Id.* at 393-94.

217. *Id.* at 394.

comparatively overburdened.<sup>218</sup> Second, those law clerks who achieved the highest marks at the most prestigious schools continue to work primarily for the federal courts of appeals, secondarily for federal district courts, then for state supreme courts, and only occasionally for state intermediate appellate courts.<sup>219</sup> Third, some have intimated that the increasing prominence in recent years of “special interest” groups in the funding and conduct of judicial elections may be resulting in the election of less qualified state-court judges.<sup>220</sup> Although several commentators have noted that the likelihood of federal courts more routinely vindicating federal rights may change along with the changing composition of the federal and state bench,<sup>221</sup> none has undermined the continued comparative advantage of federal courts in terms of technical legal competence. Indeed, in a 1999 work promoting judicial federalism, Professors Michael Solimine and James Walker conceded that “even if state trial judges have fewer shortcomings than asserted by critics of parity, the quality of federal judges (however measured) is clearly higher.”<sup>222</sup>

## 2. An Argument for Instruction

One might conclude, then, that federal courts should not shy away from resolving conflicts and tensions in state law because they are better equipped to do so than state courts themselves. Federal courts, on this rationale, should reach out to

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218. See Edward W. Najam, Jr., *Caught in the Middle: The Role of State Intermediate Appellate Courts*, 35 IND. L. REV. 329, 330 (2002) (“State trial and appellate courts handle most of the nation’s judicial business and dominate the judicial landscape with many more judges, courts and cases than their federal counterparts.”); *id.* at 332 (“[S]tate intermediate appellate judges preside over growing caseloads with finite resources.”).

219. Cf. Christopher Avery et al., *The Market for Federal Judicial Law Clerks*, 68 U. CHI. L. REV. 793, 808 (2001) (describing the market for judicial clerkships).

220. See, e.g., Richard William Riggs, *A Proposal for Change*, 39 WILLAMETTE L. REV. 1439, 1441 (2003) (warning, as a sitting Oregon Supreme Court justice, of the impending danger to the “quality” of judicial appointments as a result of “special interest groups that can afford to ‘pay’ for costly judicial elections”).

221. E.g., Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1222 (2004) (“Because the composition of the state and federal benches changes, as do the issues coming before them, parity inevitably is a dynamic rather than a static concept.”); *id.* at n.27 (surveying the literature). The point may be rephrased in terms of the relative likelihood that state versus federal courts will vindicate the rights (established as federal or otherwise) of minority plaintiffs. E.g., William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 625 (1999) (noting that gay rights advocates have generally met with better success in state court than in federal court, and offering that although “[t]he superficial explanation for this disparity lies in the character of the judges appointed by Ronald Reagan and George Bush,” nevertheless “state courts might enjoy some institutional advantages in the resolution of civil rights claims,” such as greater day-to-day interaction with constituents and pressure from the electorate).

222. SOLIMINE & WALKER, *supra* note 200.

assess and pronounce upon unsettled state law. They should identify state-court opinions that are incorrect or are the product of poor legal reasoning and should explain why this is so, and they should publish their opinions.

Weaker forms of this position have sometimes been championed under the banner of “cross-fertilization” or “cross-pollenization.”<sup>223</sup> In other words, as Professor Geri Yonover has put it, “[g]enetic diversity by hybridization, cross-pollination, and cross-breeding increases the health of flora and fauna. . . . A like result of the interplay between the dual state and federal judicial systems produces, I believe, a healthier specimen.”<sup>224</sup> But this banner is too coy.

Federal judges do not employ a brand of legal reasoning that is distinctly “federal.” Indeed, a certain difficulty attends even to deciphering what would constitute a distinctly “federal” or “state” way of thinking. The analogy to cross-fertilization is therefore inapt. It is not so much that federal courts’ opinions on state law contribute something different in kind to the development of state law. Rather, the idea here is that federal courts are simply *better* at doing the same legal reasoning that state courts should be undertaking.

State law may be unsettled because the state courts are confused about certain matters of doctrine. Or a split of intermediate state authority could exist because certain courts in the state have taken a position that is demonstrably erroneous. Where either of these situations exists, the federal court that opines on state law is effectively doing a favor to the state judicial system—helping it along, using its institutional advantages to show the way out of the thicket. This is not cross-fertilization. It is instruction.

One example of such instruction is the opinion in *Allstate Insurance Co. v. Westinghouse Electric Corp.*<sup>225</sup> This diversity case required the Northern District of Illinois to determine which statute of limitations was appropriate under Illinois law for product-liability claims involving damage to property.<sup>226</sup> Although the general statute of limitations for such actions was five years, another section of the Illinois Code provided for a much longer statute of repose, as well as a subsection that provided for a two-year-from-discovery exception to the statute of repose.<sup>227</sup>

The defendant pointed out that two Illinois appellate decisions had held that this two-year subsection actually provided the applicable statute of limitations.<sup>228</sup> But the district court identified a third Illinois appellate decision that, although cited by neither party, was directly contrary to the two cases cited by the defendant.<sup>229</sup> The court then reasoned that the dicta of the Illinois Supreme Court was consistent with

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223. Friedman, *supra* note 221, at 1239.

224. Yonover, *supra* note 66, at 334.

225. 68 F. Supp. 2d 983 (N.D. Ill. 1999).

226. *Id.* at 986.

227. *Id.* at 984–85.

228. *Id.*

229. *Id.*

the rationale of the minority position and inconsistent with that of the majority position because it described the subsection as an exception to the statute of repose, not as setting forth an independent limitations period, and that the majority position was “fundamentally inconsistent with the well known principle, applied in Illinois as elsewhere, that a statute must be read, where possible, to give meaning to all of its terms.”<sup>230</sup>

The majority approach to the subsection read out of the statute its reference to the general statute of limitations.<sup>231</sup> In other words, the law in Illinois was unsettled on this point because two courts had misread the relevant statutes, while a third had read them correctly.<sup>232</sup> The district court decided that the Illinois Supreme Court would adopt the correct position and denied the defendant’s motion to dismiss.<sup>233</sup> When the issue finally came before the Illinois Supreme Court a couple years later, the court did, in fact, adopt the Northern District of Illinois’s position.<sup>234</sup>

Such instruction is a good thing because it furthers the core rule-of-law values of coherence and predictability. Where the law is unsettled, citizens (including individuals and entities) are unable to conform their behavior to its dictates because they cannot ascertain what those dictates require. They cannot assess the likely costs of anticipated actions because the law does not provide them with clear guidance as to how those actions would be evaluated in the courts.

Doctrinal incoherence, moreover, exacerbates this problem. Rather than simply not knowing how the law would treat certain actions, citizens face the disconcerting situation of one court saying that X action yields liability and another court simultaneously saying that X yields no liability, even though both courts are charged with expounding the same law. The reasoning that the conflicting state courts offer to support these divergent results is likely to be quite different, thus extending the uncertainty far beyond the particular situation about which the courts disagree. Moreover, potential litigants cannot count on any particular rationale being applied to new fact patterns.

By resolving doctrinal incoherence in state law or otherwise indicating the best application of existing law to new facts, federal courts do more than simply satisfy an intellectual, aesthetic preference for uniform doctrine. They further the rule of law within the state. Federal courts should therefore be encouraged to bring their considerable legal-reasoning powers to bear on unsettled issues of state law.

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230. *Allstate Ins. Co. v. Westinghouse Elec. Corp.*, 68 F. Supp. 2d 983, 987 (N.D. Ill. 1999).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Allstate Ins. Co. v. Menards*, 782 N.E.2d 258, 203 (Ill. 2002).

### 3. Does the Instruction Approach Violate *Erie*?

One possible objection to this approach is that it is inconsistent with the rationale of *Erie*. The point of *Erie*, after all, is that federal courts, in the category of cases of interest here, are supposed to be applying state law rather than expounding federal law.<sup>235</sup> If federal courts' superior legal reasoning capabilities justify their putting forth "correct" interpretations of state law, then what was the necessity of *Erie*? Why, that is, can state substantive common law diverge from federal expositions of general law? Perhaps the very fact of divergence, coupled with the *Erie* command that state substantive law controls, indicates that federal courts are not actually capable of legally reasoning about state law.

As I will explain momentarily, I think this objection is largely correct, but the rule of *Erie* alone is not sufficient to justify it. In *Erie*, "general law" suggested one outcome, and state law arguably suggested a different outcome; although the Supreme Court held that state law must control and explained that general federal common law does not exist,<sup>236</sup> it did not explain why state law in this instance differed from the common law generally understood. What the *Erie* Court did recognize was that a state supreme court, just like a state legislature, could choose to deviate from general common-law rules.<sup>237</sup> Subsequent decisions, as we have seen, indicated that inferior state courts were equally capable of departing from particular common-law principles.<sup>238</sup>

At any one time, however, the federal court still has only one set of state-law decisions to apply. Thus, for example, California and Virginia presently adhere to very different versions of the parol evidence rule. The California Supreme Court has held that parol evidence may be introduced not only to resolve ambiguous terms in written contracts, but also to demonstrate that terms are susceptible to varying interpretations in the first place.<sup>239</sup> On the other hand, the rule in Virginia is that parol evidence is admissible only in the former circumstance.<sup>240</sup>

All *Erie* says is that the federal court must reason using the relevant state-law materials.<sup>241</sup> Where Virginia law applies, a federal court is obligated to adhere to discernable Virginia law, rather than California precedent, even if, in the federal

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235. *Erie*, 304 U.S. at 71-73.

236. *Id.* at 78.

237. *Erie*, 304 U.S. at 78.

238. See *Six Companies of California v. Joint Highway Dist. No. 13*, 311 U.S. 180, 188 (1940); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-79 (1940).

239. *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 645-46 (Cal. 1968).

240. *Amos v. Coffey*, 320 S.E.2d 335, 338 (Va. 1984).

241. *Erie*, 304 U.S. at 72-73.



court's opinion, California has articulated the parol evidence rule more soundly, in the scheme of general principles of contract law, than has Virginia.<sup>242</sup>

This proposition may be viewed more abstractly. Recall that classical legal thought viewed the common law as an inexorable logic expanding from core conceptions.<sup>243</sup> It is entirely possible to read *Erie* as rejecting the naturalness of only the second proposition. That is, state courts may substitute the core conceptions, but the authority to substitute does not necessarily mean that the common law within a state is not a system of logic expanding from those substituted conceptions.

Thus, although a state remains free to deviate from the generalized concepts of private law, such deviation is essentially a conscious decision that does not undermine the operation of legal reasoning in relation to the altered signposts in the precedential landscape. One scholar, Professor Michael C. Dorf, has argued that this ought to be the end of the discussion of federal court application of state law: "A federal judge sitting in diversity should not attempt to view herself inside the head of a state high court judge; instead, she should try to view the state law—in all its subtlety—inside her own head, as she resolves legal disputes in accordance with state law."<sup>244</sup> Indeed, he maintains that this is a "remarkably simple proposition."<sup>245</sup> The rule of *Erie* and its progeny alone, therefore, do not necessarily undermine the contention that where state precedent is conflicting, federal courts may be institutionally advantaged to identify the correct resolution of the conflict in light of other state law precedent.

#### 4. Why the Instruction Approach Is Flawed

To understand how this position would work, and also why it is wrong, one need only examine a concrete example. Recall the situation that I provided in Part I.C. of the state-law contract issue that worked its way into the federal court for the Southern District of Ohio through a combination of federal civil rights laws and the Federal Arbitration Act. The situation involved a plaintiff who sued her former, at-will employer for sex discrimination, and the employer responded that she agreed to arbitrate the claim when she signed an employee handbook halfway through her period of employment, which contained a provision that any claim she had against the company must be arbitrated.<sup>246</sup>

Because the Federal Arbitration Act directs district courts to enforce valid agreements to arbitrate, one central question is whether a valid arbitration agreement

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242. *E.g.*, *Wilson Arlington Co. v. Prudential Ins. Co.*, 912 F.2d 366, 370 (9th Cir. 1990) ("Were we to apply California law to this case, we would no doubt be required to affirm the denial of Wilson Arlington's motion for summary judgment. But this isn't California; it's Virginia.").

243. *See supra* Part I.A.

244. Dorf, *supra* note 28, at 714-15.

245. *Id.* at 715.

246. *See, e.g.*, *Raasch v. NCR Corp.*, 254 F. Supp. 2d 847, 853 (S.D. Ohio 2003).

existed between the parties.<sup>247</sup> The state law that ordinarily governs the formation of contracts must be used to answer that question,<sup>248</sup> arbitration is conditioned on the existence of a contract that contains an arbitration clause.<sup>249</sup> Under Ohio law, the required elements of a valid contract are “offer and acceptance, supported with valid consideration.”<sup>250</sup>

Ohio comprehends “consideration” as case books and contract treatises set it forth:

Under Ohio law, consideration consists of either a benefit to the promisor or a detriment to the promisee. To constitute consideration, the benefit or detriment must be “bargained for.” Something is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.<sup>251</sup>

Certainly, the former employer’s unilateral, mid-employment imposition of a requirement that the at-will employee arbitrate any claim that she has against the company constitutes a detriment to the employee. But how is it bargained for? What has the company exchanged for the employee’s promise to arbitrate? According to the company, it continued to employ the employee, and that was sufficient.

In 2001, intermediate Ohio appellate courts were divided as to whether “continued employment” of at-will employees constituted consideration sufficient to make enforceable employees’ mid-employment agreements to new terms imposed by employers.<sup>252</sup> Several Ohio appellate courts had held that continued employment was not adequate consideration.<sup>253</sup> More, however, had reached the opposite conclusion.<sup>254</sup> The reasoning of the majority approach was as follows: “[A]s a result of the at-will nature of the employment, neither employer nor employee is obligated

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247. 9 U.S.C. § 2 (2000).

248. *Id.*; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

249. Federal and state courts have expressed some confusion concerning the enforceability of an arbitration clause that is contained within a contract that one party later claims to be void as a matter of state law (as, for example, because the subject matter of the contract is illegal), although the Supreme Court may have ended that confusion with its recent decision in *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204 (2006).

250. *Gruenspan v. Seitz*, 705 N.E.2d 1255, 1264 (Ohio Ct. App. 1997).

251. *Carlisle v. T & R Excavating, Inc.*, 704 N.E.2d 39, 43 (Ohio Ct. App. 1997) (citations omitted).

252. *Raasch*, 254 F. Supp.2d at 863.

253. *E.g.*, *Prinz Office Equipment Co. v. Pesko*, 1990 WL 7996 at 5 (Ohio App. 9 Dist. 1990) (“Ohio does not recognize continued employment as valid consideration.”); *Thompson v. Clough*, 2001 WL 328561 at 3 (Ohio App. 4 Dist. 2001).

254. *E.g.*, *Canter v. Tucker*, 674 N.E.2d 727, 730 (1996); *Copeco, Inc. v. Caley*, 632 N.E.2d 1299, 1301 (Ohio App. 5 Dist. 1992) (holding that continued employment constituted sufficient consideration for a new agreement imposed during employment).

to continue the relationship for any period of time. Continued employment, therefore goes beyond what the employer and employee are already obligated to do and constitutes sufficient consideration.<sup>255</sup>

Under conventional legal reasoning, this majority approach was clearly wrong. Although the employer was not obligated to continue employing the employee before she agreed to the new term that the employer sought to impose, the employer was also not obligated to continue employing the employee after she agreed to the new term, as long as employment remained at will. One moment after the employee signs a handbook containing an agreement that she will arbitrate her disputes, the company may terminate her employment. Unless the company has agreed to continue to employ the employee in exchange for an agreement to the term of the new handbook, thereby removing the relationship from the realm of at-will employment, “continued employment” is not consideration sufficient to support the imposition by the employer of the new term in the middle of a period of employment. This substantive position accords with that set forth in treatises on contract law and in several opinions by federal appellate courts.<sup>256</sup>

In 2001, then, the Ohio appellate courts were split over an issue that, in light of the doctrine upon which all Ohio courts agreed, had one formally correct resolution—albeit not the resolution adopted by a majority of Ohio appellate courts. The federal district court, pursuant to theory outlined in this section, should therefore have applied Ohio law by identifying the split of authority, explaining why the majority approach was doctrinally incorrect, and ruling in favor of the plaintiff on this issue. By bringing its superior legal reasoning capabilities to bear on the unsettled issue of state law, the district court could have provided guidance to the Ohio courts struggling with the issue.

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255. *Fin. Dimensions, Inc. v. Zifer*, 1999 WL 1127292 at 3 (Ohio App. 1 Dist. 1999).

256. *See, e.g., Gibson v. Neighborhood Health Clinics*, 121 F.3d 1126, 1132 (7th Cir. 1997) (applying Indiana law and explaining that “NHC’s offer of employment to Gibson was not made in exchange for her promise to arbitrate, for she had already been hired at the time she made the promise. Once again, the element of bargained for exchange is lacking.... [W]hen an employer has made no specific promise, the mere fact of continued employment does not constitute consideration for the employee’s promise.”); *McMullen v. Meijer, Inc.*, 355 F.3d 485, 490 (6th Cir. 2004) (“It is an elemental tenet of Michigan contract law, which applies here, that past consideration cannot serve as legal consideration for a subsequent promise. . . . Meijer did not offer McMullen any new consideration in return for signing the form, which Meijer did not sign.”); E. ALLAN FARNSWORTH, *CONTRACTS* § 2.9, at 63 (2d ed. 1990) (“Usually the promise is made as part of the employment agreement, and no problem of consideration arises. Occasionally, however, the employee makes the promise after the employment has begun. The employer then argues that it could have terminated the employment and that it was the employer’s forbearance from doing so for which the employee bargained when making the promise. Courts have reached conflicting results, with some struggling to find a bargain where there is none.”).

But a strange thing happened in 2004. The Ohio Supreme Court adopted the continued-employment-is-consideration approach.<sup>257</sup> In a case concerning the enforceability of a covenant not to compete, the court accepted a certified conflict from the court of appeals, and then reasoned (erroneously, as a matter of contract-law doctrine) that “[t]he employee’s assent to the agreement is given in exchange for forbearance on the part of the employer from terminating the employee.”<sup>258</sup>

Justice Alice Robie Resnick pointed out in dissent that the majority opinion transformed a “mutual exchange of nothing into consideration,” even though “the employer simply winds up with both the noncompetition agreement and the continued right to discharge the employee at will, while the employee is left with the same preexisting ‘nonright’ to be employed for so long as the employer decides not to fire him.”<sup>259</sup> The majority failed to address this criticism, instead holding that “consideration exists to support a noncompetition agreement when, in exchange for the assent of an at-will employee to a proffered noncompetition agreement, the employer continues an at-will employment relationship that could be legally terminated without cause.”<sup>260</sup>

In what sense, then, was the split of intermediate state appellate authority before this decision capable of a “correct” resolution? The resolution that seemed to accord best with the other state-law concepts of contractual consideration and at-will employment was not, in fact, the resolution selected by the state supreme court. And yet, under *Erie*, it is fundamental that once the state supreme court opines on an issue, it is the opinion of the state supreme court that determines state law, even if that opinion seems poorly reasoned or illogical in light of other state-law doctrines that were not unsettled and that should have, by their terms, decided the issue under consideration.<sup>261</sup>

The answer is that the split of authority was capable of “correct” resolution only formalistically, and that such formalism does not necessarily capture how state courts decide issues. This puts a finer point on the legal realist insight that the law is ultimately what courts do in fact. Not only are states capable of deviating from general principles of common law, which is, as discussed above, a necessary aspect of *Erie*, but they also do not necessarily decide cases in accordance with the legal principles set forth in their own case law as it exists at any one time. Where state law is conflicted on a particular point, one position may be termed mistaken with reference to the body of state law as a whole. But once state cases settle on that position, the fact of settlement transmogrifies the mistake into the law. Precedent and principle, in other words, operate dialectically.

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257. *Lake Land Employment Group of Akron, LLC v. Columber*, 804 N.E.2d 27, 32 (Ohio 2004).

258. *Id.*

259. *Id.* at 34 (Resnick, J., dissenting).

260. *Id.* at 32.

261. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72 (1938).

Something other than pure legal reasoning—by which I mean reasoning to a result using only “the three dimensions of authoritative premises, facts and analysis,” as in Professor Duncan Kennedy’s helpful formulation<sup>262</sup>—is involved in the development of state law. Whether this other is denominated politics, judgment, or perhaps simply imperfection is immaterial to the immediate point that it does exist and that the concept of law incorporates it.<sup>263</sup>

This brute fact requires the conclusion that although federal courts may offer opinions on unsettled state law that seem to accord better with principles of settled state law than other opinions, they can never offer “correct” resolutions of conflicting state-law authority. The state supreme court could always resolve the conflict differently. For this reason, describing a particular position as “correct” or “incorrect” is incomplete. Whatever institutional advantages in legal-reasoning capabilities federal courts may enjoy over their state counterparts does not justify the claim that federal courts are better situated to resolve unsettled issues of state law. Despite the *Salve Regina* Court’s instruction that state law is subject to elaboration by federal courts in the same manner as is federal law<sup>264</sup>—or, perhaps, because of it—federal courts cannot necessarily resolve unsettled or conflicting state law through conventional legal reasoning.

*B. Federal Incompetence: An Argument Premised on Notions  
of Federalism and Comity*

If the idea that federal courts should tell their state counterparts the “right” answers to unsettled state-law issues is untenable, then perhaps the opposite position is meritorious. This view maintains that federal courts are generally incapable of applying state law under any circumstances, or at least where it is arguably unsettled. Moreover, to the extent that federal courts attempt to ascertain and apply unsettled state law, their efforts are inimical to state sovereignty and even to *Erie* itself. Adherence to this theory counsels a strong policy of avoidance and the idea that federal courts should treat state law as “static.” In recent years, several scholars have put it forward with varying degrees of forcefulness. This section examines the “federal incompetence” argument.

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262. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1724 (1976).

263. *See id.* (“Yet most contemporary students of legal thought seem to agree that an account of adjudication limited to the three dimensions of authoritative premises, facts and analysis is incomplete. One way to express this is to say that ‘policy’ plays a large though generally unacknowledged part in decision making. The problem is to find a way to describe this part.”).

264. *Salve Regina College v. Russell*, 499 U.S. 225, 234 (1991).

## 1. The Problem of "Making" State Law

Judge Dolores Sloviter of the Third Circuit Court of Appeals announced something similar to this thesis in a relatively strong form in a 1992 article.<sup>265</sup> Like Professor Shapiro, whose work reaching the opposite conclusion was discussed in Part III.A.1., the purpose of Judge Sloviter's article was to address the propriety of the existence of diversity jurisdiction as a policy matter.<sup>266</sup> Evaluation of diversity jurisdiction, she contended, has largely "overlooked that the filing of approximately 60,000 diversity cases in the federal courts each year results in the inevitable erosion of the state courts' sovereign right and duty to develop state law as they deem appropriate."<sup>267</sup>

The root of the problem, she argued, is that "[f]inding the applicable state law . . . is a search that often proves elusive."<sup>268</sup> That is, federal judges who understand *Erie* should be capable of applying state law where it is clearly established, but how should the federal court predict what the state's highest court would decide where the state supreme court precedent is old and intervening doctrinal trends cast doubt on it?<sup>269</sup> What weight ought to be given to state intermediate appellate decisions, especially where they are inconsistent?<sup>270</sup> And what if there are no state-court decisions on an issue?<sup>271</sup> Judge Sloviter noted that "[d]espite our best efforts to predict the future thinking of the state supreme courts within our jurisdiction on the basis of all of the available data," the Third Circuit and its district courts "have guessed wrong" on several issues of state law.<sup>272</sup>

These "wrong guesses" cause at least four problems. First, "such incorrect predictions inevitably skew the decisions of persons and businesses who rely on them."<sup>273</sup> Second, they "inequitably affect the losing federal litigant who cannot appeal the decision to the state supreme court."<sup>274</sup> Third, they might confuse lower state courts into erroneously "accept[ing] federal predictions as applicable precedent."<sup>275</sup>

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

266. See *id.* at 1671; Shapiro *supra* note 65, at 317.

267. See Sloviter, *supra* note 265, at 1671.

268. *Id.* at 1675.

269. *Id.* at 1676.

270. *Id.*

271. *Id.* at 1676-77.

272. Sloviter, *supra* note 265, at 1679.

273. *Id.* at 1681.

274. *Id.*

275. *Id.*

But the worst effect of federal-court opining on state law is that it “verges on the lawmaking function of that state court.”<sup>276</sup> Even where federal courts do no more than fill in the interstices of state law, that is they are effectively “making” state law, despite the fact that the federal judge “is certainly not as likely to be as attuned as a state judge is to the nuances of that state’s history, policies, and local issues.”<sup>277</sup> In sum, “When federal judges make state law—and we do, by whatever euphemism one chooses to call it—judges who are not selected under the state’s system and who are not answerable to its constituency are undertaking an inherent state court function.”<sup>278</sup>

Judge Sloviter’s prescription for these problems was simply to minimize state law in federal court.<sup>279</sup> She recognized the many difficulties associated with certification, such that it could not be the answer to the problem she identified.<sup>280</sup> And she conceded that, as a practical matter, federal courts could not get entirely out of the application of state law.<sup>281</sup> Given the thesis that any elaboration of state law was an infringement of state sovereignty, however, Judge Sloviter could offer no method for reducing this harm, suggesting instead that the best strategy was for Congress to constrict diversity jurisdiction.<sup>282</sup>

## 2. Prediction, the Static Approach, and Liability Constriction

Professor Bradford R. Clark substantially elaborated upon this basic argument several years later.<sup>283</sup> Like Judge Sloviter, Professor Clark posited that “where existing law fails to provide determinate answers to particular questions[,] common-law courts frequently exercise policymaking discretion, either explicitly or implicitly, in order to supply a rule of decision that will resolve the case at hand.”<sup>284</sup> But unlike Judge Sloviter, whose objection to federal-court application of state law was based on a general notion of state sovereignty and who conceded that “there is no evidence that the founders were concerned, as I am, about the impact of diversity jurisdiction on federalism principles,”<sup>285</sup> Professor Clark found support for the objection in *Erie*.<sup>286</sup>

Recall that the *Erie* Court held both that the law does not exist apart from the authority that announces it and that federal courts have no general authority to

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276. *Id.* at 1682.

277. Sloviter, *supra* note 265, at 1682.

278. *Id.* at 1687.

279. *Id.*

280. *Id.* at 1684-86.

281. *Id.* at 1687.

282. Sloviter, *supra* note 265, at 1687.

283. *See* Clark, *supra* note 1.

284. *Id.* at 1469.

285. Sloviter, *supra* note 265, at 1687.

286. *See* Clark, *supra* note 1, at 1461-62.

generate substantive rules of decision applicable in states.<sup>287</sup> This latter aspect of the holding, Professor Clark contended, should be understood as a rule of judicial federalism.<sup>288</sup> That is, the Constitution sets forth particular requirements for federal lawmaking, such as bicameralism and presentment, that are designed to safeguard state sovereignty, but that would be avoided if judges made law.<sup>289</sup> Professor Clark concluded: "Strict adherence to the principles of judicial federalism recognized in *Erie* is necessary to ensure that the political safeguards of federalism serve their intended function."<sup>290</sup>

Professor Clark canvassed several methods according to which federal courts might ascertain and apply unsettled state law to determine how these accord with judicial federalism.<sup>291</sup> His ultimate conclusion was that federal courts should not decide if at all possible; they should use certification.<sup>292</sup> For the reasons discussed in Part I.D., however, this approach is unworkable in practice, and I will therefore devote no further attention to it here. Nor will I address the possibility of abstention—another way not to decide—that Professor Clark considered but rejected as inconsistent with a separation of powers.<sup>293</sup> With respect to actually deciding state-law issues, Professor Clark first rejected the idea that federal courts should use their "independent judgment" to create a cause of action because such would constitute "substantial policymaking discretion on behalf of the state" and "the resulting cause of action [is not] state law because, under *Erie*, only agents of the state have authority to adopt such law."<sup>294</sup>

"Prediction," which Professor Clark characterized as the dominant method in federal courts, is subject to an almost-identical critique: "[W]hen federal courts fashion substantive rules of common law applicable in a state using the predictive approach, both the procedural and political mechanisms established by the Constitution to check the exercise of federal power are absent."<sup>295</sup> This is true whether the federal court is predicting a novel cause of action or a novel defense or that state precedent will be overruled.<sup>296</sup> Where a federal court's prediction is later proved "incorrect" by a subsequent state supreme court decision, "it becomes clear that the rights and obligations of the parties were determined, not according to the 'law of the State,' but according to 'law' adopted by a federal court."<sup>297</sup> Somewhat

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287. *Erie*, 304 U.S. at 78-80.

288. See Clark, *supra* note 1, at 1482.

289. See Clark, *supra* note 1, at 1482-93.

290. *Id.* at 1489.

291. See *id.* at 1495-1564.

292. *Id.* at 1544.

293. *Id.* at 1524.

294. Clark, *supra* note 1, at 1494.

295. *Id.* at 1501.

296. *Id.*

297. *Id.* at 1504.



less obvious, however, is that “even if the rule in question is embraced by the state’s highest court at a later date, it remains true that the rule applied in federal court did not in fact constitute a sovereign command of the state at the time the federal court rendered its decision.”<sup>298</sup>

A more attractive option from the perspective of judicial-federalism concerns is the “static” approach, according to which a federal court refuses to entertain the argument that a particular proposition is state law until that proposition is firmly established in state jurisprudence.<sup>299</sup> This tack appears to solve the problem of federal courts surreptitiously making state law (and thereby policy):

Under the static approach, federal courts apply substantive rules of decision only to the extent that they constitute sovereign commands of the state—that is, only after they have been adopted or declared by an appropriate agent of the state, such as its legislature or judiciary. The requirement of adoption by an appropriate organ of the state eliminates the possibility that federal courts will usurp state lawmaking power by erroneously or prematurely making the fundamental policy choices that are necessary to recognize (and apply) novel rules of decision on behalf of a state.<sup>300</sup>

Such reserve makes sense in light of the “background presumption” of “the Anglo-American system” that all human activities are outside the scope of the law absent a positive action to the contrary by sovereign authority.<sup>301</sup>

Although no court has explained its supporting reasoning in the detail of Professor Clark, several federal courts have embraced the static approach. Requiring “plaintiffs desirous of succeeding on novel state law claims to present those claims initially in state court,”<sup>302</sup> stating that “federal courts look to existing state law without predicting potential changes in that law,”<sup>303</sup> or applying “the law of the forum as we infer it presently to be, not as it might come to be,”<sup>304</sup> all sound in terms of state-law stasis.

This reasoning also might explain why certain courts have stated that where they are confronted “with two opposing, yet equally plausible interpretations of state law, . . . for reasons of federalism and comity, [they] generally choose the interpretation which restricts liability, rather than the more expansive interpretation which creates substantially more liability.”<sup>305</sup> I am unaware of any opinion explaining the basis for

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298. *Id.* at 1505.

299. Clark, *supra* note 1, at 1535.

300. *Id.* at 1540.

301. *Id.* at 1504.

302. *Birchler v. Gehl Co.*, 88 F.3d 518, 521 (7th Cir. 1996).

303. *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1203 (9th Cir. 2002).

304. *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 694 (1st Cir. 1984).

305. *S. Illinois Riverboat Casino Cruises, Inc. v. Triangle Insulation & Sheet Metal Co.*, 302

this position. Several courts have simply stated it as a rule and cited to previous federal authority, without even offering “federalism and comity” as general justifications.<sup>306</sup> Nevertheless, this liability-restricting position accords with the background presumption of legality that undergirds the static approach. Applying a rule that results in liability where state law might be understood to result in no liability, on this view, purports to set forth the command of a sovereign state at a time when it has not spoken definitively. Restricting liability, on the other hand, is not problematic because of the background presumption that all actions are permissible until the government declares otherwise.

### 3. Flaws in “Federal Incompetence” Approaches

The static approach and its underlying rationale, however, are fundamentally flawed for two overlapping reasons. First, their objections to judicial lawmaking often fail to have any distinct federalism dimension. These objections, in other words, do not lose their sting when reformulated as between state courts or as between federal courts. Second, they embrace a view of law that, although perhaps meritorious in theory, is beyond the mainstream legal conception assumed by Supreme Court decisions.

The first problem is something like a conflation of indeterminacy in state law with federalism concerns. According to Judge Sloviter, when a federal court makes a prediction of state law that ultimately proves inaccurate, the litigant on the wrong side of the federal prediction has been treated inequitably.<sup>307</sup> Professor Clark similarly argued that in such a situation “it becomes clear that the rights and obligations of the parties were determined, not according to the ‘law of the State,’ but according to ‘law’ adopted by a federal court.”<sup>308</sup> This is because the opposite result would have obtained had state law (as made clear by subsequent decisions of the state supreme court) been applied, rather than the federal court’s ultimately inaccurate understanding of state law (before the state supreme court had made it clear).

But what is the relevance to this analysis that it was a federal court that had taken the position ultimately spurned by the state supreme court? The same arguments could be leveled where state law is unclear, and a state court applies a rule of decision that is rejected in a subsequent case by the state supreme court. By hypothesis, the state law was unclear. Perhaps, as in the example of whether continued employment constituted consideration under Ohio law in 2001, state appellate decisions directly conflicted.<sup>309</sup> To say that the matter would have been decided differently in state

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F.3d 667, 676 (7th Cir. 2002) (internal quotation marks omitted).

306. See, e.g., *Home Valu, Inc. v. Pep Boys*, 213 F.3d 960, 963 (7th Cir. 2000); *Birchler*, 88 F.3d at 521.

307. Sloviter, *supra* note 265, at 1681.

308. Clark, *supra* note 1, at 1504.

309. *Lakeland Emp. Group of Akron v. Columber*, 101 Ohio St. 3d 242 (2004) (opting for

court, as Professor Clark opines,<sup>310</sup> is not necessarily true; it is, rather, an unverifiable guess.

Judge Bruce M. Selya thus has persuasively reasoned that the litigant who loses on a state law issue in federal court “is no more greatly disadvantaged than a litigant who loses in a lower state court and is thereafter denied discretionary review, only to have the state’s high court decide the issue favorably in some other case at a later date.”<sup>311</sup> If one concludes that (1) the rights and obligations of the parties to such a state-court suit were determined according to the law of the state, but that (2) the rights and obligations of the parties to an equivalent diversity suit in federal court were not determined according to the law of the state, and (3) both the state court and the federal court applied the identical substantive rule, then the objection to the federal court’s application of a rule of decision ultimately rejected by the relevant state supreme court has nothing to do with the rule of decision actually employed.<sup>312</sup>

To the extent that losing litigants are treated unfairly, they suffer the same injury in state or federal court.<sup>313</sup> No aspect of this unfairness results from the fact that it was a federal court, rather than a state court, that applied a rule that was later rejected.<sup>314</sup> Recognition of this proposition supports the majority rule in the federal courts that a subsequent state-court decision, even one by the state court of last resort, that is contrary to the federal court’s prior prediction of state law is not a ground for relief from the earlier federal judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure.<sup>315</sup>

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one of two strands of opposing state law).

310. Clark, *supra* note 1, at 1513 (“Had DeWeerth’s claim been litigated in state court, she presumably would have regained possession of the Monet.”).

311. Selya, *supra* note 67, at 690.

312. *Id.* at 690-91.

313. *Id.* at 690.

314. *See id.* at 690-91.

315. *Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 194 F.3d 922, 925 (8th Cir. 1999) (“[T]here is nothing in the *Erie* doctrine that requires federal courts to sacrifice the finality of their judgments because state courts subsequently interpret state law differently than the federal courts have done.”); *Cincinnati Ins. Co. v. Flanders Elec. Moror Serv., Inc.*, 131 F.3d 625, 629 (7th Cir. 1997) (“We believe that the decision of this Court in *Cincinnati I* was a valid and well-reasoned effort to carry out our duty under *Erie*. Moreover, the fact that our prediction—and the prediction of the district court—was contrary to the conclusion later reached by the Indiana Supreme Court does not constitute an extraordinary circumstance warranting the reopening of this case to achieve a similar result.”); *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748 (5th Cir. 1995) (“We think a proper understanding of the limited circumstances in which post-judgment relief is available when decisional law changes, and of our role as an *Erie* court attempting to determine and apply state law, supports the conclusion that a change in state decisional law, rendered after this court makes an *Erie* prediction, will not normally constitute an extraordinary circumstance, and cannot alone be grounds for relief from a final judgment pursuant to Rule 60(b)(6).”); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1273-74 (2d Cir. 1994) (“The subsequent outcome of the *Guggenheim* decision does not impugn the integrity of the *DeWeerth* decision or the fairness of the process that was accorded

This argument applies equally to two other problems identified by Judge Sloviter that result from “wrong” *Erie* guesses: that individuals will skew their conduct accordingly and that lower state courts might be confused into accepting the federal decision as precedent.<sup>316</sup> With respect to individuals using the federal decision to gauge their conduct, a wrong *Erie* guess by a federal court should do no more to skew conduct than would a state-court decision using the same rule.

The idea that lower state courts might be confused into accepting federal decisions as precedent seems odd. If the lower state court finds the federal opinion to be a persuasive explication of state law, using the decision as a guide would not be the result of confusion. If, on the other hand, the lower state court somehow thought that it was bound by the federal-court precedent, there is nothing about this problem that turns on the identity of the court as federal.<sup>317</sup> A court in State B might use the substantive law of State A because of its own choice-of-law rules, and then opine identically to the hypothetical federal court.<sup>318</sup> Lower courts in State A would presumably be equally susceptible to adopt the misconception that they were bound by the decision in State B as that they were bound by the decision in federal court.<sup>319</sup> In any event, there is neither evidence to suggest nor reason to suppose that lower state courts are, in fact, confused as to whether they are bound by federal court decisions on state law.<sup>320</sup>

Chief Justice Rehnquist made these same points in another context. In *Thomas v. American Home Products, Inc.*, the Eleventh Circuit had ruled on a matter of Georgia law, and shortly after the court’s decision, the Georgia Supreme Court addressed the issue in another case.<sup>321</sup> The Supreme Court granted a petition for certiorari, vacated the Eleventh Circuit’s decision, and remanded the case for reconsideration in light of

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DeWeerth. . . . The very nature of diversity jurisdiction leaves open the possibility that a state court will subsequently disagree with a federal court’s interpretation of state law. However, this aspect of our dual justice system does not mean that all diversity judgments are subject to revision once a state court later addresses the litigated issues.”). *But see* *Pierce v. Cook & Co., Inc.*, 518 F.2d 720, 722-23 (10th Cir. 1975) (en banc) (permitting relief from judgment where subsequent state decision arose out of same factual transaction). The same rule, of course, applies in cases decided pursuant to a federal rule of decision. *E.g.*, *Carter v. Romines*, 593 F.2d 823, 824 (8th Cir. 1979) (reasoning that a change in federal decisional law does not justify the grant of a Rule 60(b) motion).

316. See Sloviter, *supra* note 265, at 1681.

317. See Selya, *supra* note 67, at 682-83.

318. *Id.*

319. *Id.*

320. Certainly, the converse proposition—that state-court opinions on matters of unsettled federal law might confuse litigants or federal courts as to what federal law is—has not gained any currency in the case law. To the contrary, the United States Supreme Court will not review a state-court decision that rests on an adequate and independent state-law ground, even if it also contains an exposition of federal law that is directly at odds with federal precedent on the issue. See *Michigan v. Long*, 463 U.S. 1032 (1983).

321. *Thomas v. Am. Home Products, Inc.*, 519 U.S. 913 (1996).

the new Georgia Supreme Court decision.<sup>322</sup> Dissenting, Chief Justice Rehnquist explained, correctly in my view, that there was no need for these further procedural machinations:

[B]y failing to predict the Georgia Supreme Court's *Banks* decision the Eleventh Circuit has in no way slighted the State of Georgia or upset the balance of our federalism. I do not believe that this Court has a stake in the correctness of discrete state-law decisions by federal courts, nor, in such cases, any obligation to weigh justice among contesting parties.<sup>323</sup>

Neither parties nor states are harmed by “wrong” *Erie* guesses.

Closer examination reveals a similar problem with Professor Clark's contention that federal courts deciding state law where that law is unsettled has an unconstitutional dimension.<sup>324</sup> On his reading of *Erie*, federal courts have no power to “make” law even interstitially, but there is no equivalent difficulty, as a matter of federal constitutional law, when state courts do so because the Constitution imposes no procedural requirements for state lawmaking.<sup>325</sup> The federalism aspect of this argument, however, is unclear. If the constitutional contention is correct, then a federal court that applies unsettled *federal* law is also “making” law applicable in a state without following the political safeguards of federalism. The objection put forward to federal courts applying unsettled state law thus does not have any distinct federalism dimension. It is, rather, a far-reaching constitutional claim that federal courts should not apply law where that law is unsettled, or at least that federal courts should employ a static approach to all unsettled law—federal or state.

One can, however, refashion the constitutional argument into one about political legitimacy that is not subject to the same rejoinder. That is, citizens who disagree with how state judges develop state law may vote those judges out of office, but they cannot do the same to federal judges; therefore, the development of state law by state judges is more legitimate politically.<sup>326</sup> But this argument also sweeps too broadly. First, it counsels in favor of the election of judges and, consequently, has much less force for states that appoint their judges. Similarly, it fails to explain why such political illegitimacy is acceptable when federal judges develop federal law but not when they develop state law.

More fundamentally, whether articulated in terms of political legitimacy or constitutionality, such an argument identifies a certain component of judging as policymaking and seeks to minimize or eliminate it, but this is a task that cannot be

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322. *Id.* at 913. For an analysis of the use of this procedure—often referred to as GVRing a case—see Shaun P. Martin, *Gaming the GVR*, 36 ARIZ. ST. L.J. 551 (2004).

323. *Thomas*, 519 U.S. at 917 (Rehnquist, C.J., dissenting from the grant of certiorari).

324. Clark, *supra* note 1, at 1484.

325. *Id.*

326. *Cf. Sloviter, supra* note 265, at 1687.

accomplished. The methods proposed to end judicial policymaking not only fail, they replicate the supposed evil that they are designed to cure.

Even on its own terms, the idea that determining unsettled law involves substantial policymaking, but applying settled law does not, is difficult to maintain because of the assumed distinction between settled and unsettled law. Both Judge Sloviter and Professor Clark agreed that where state law is clearly settled, a federal court may properly decide state-law issues because, under such circumstances, it is merely applying state law, not making it.<sup>327</sup> But how does one determine when state law is unsettled?

One answer to this question is that state law is unsettled where it will admit of more than one reasonable result. But if this is the case, how is the judge to decide whether one reading is unreasonable where the parties disagree on the best reading of state law? The legal realist Felix Cohen identified one aspect of this problem in his 1931 article the *Ethical Basis of Legal Criticism*.<sup>328</sup> As Cohen put it, whether a difference between two cases is important is itself an ethical choice.<sup>329</sup> Professor Scott Brewer systematically confirmed this insight more recently.<sup>330</sup> Analogical legal reasoning prevents one or more cases from ever completely determining the next case.<sup>331</sup> Although certain arguments may not work given a certain set of precedents, the precedents themselves cannot fully constrain how they will be understood and applied in future cases.<sup>332</sup> For these reasons, the “federal incompetence” position suffers from the same policymaking problem that it seeks to avoid because a policy choice is inherent in the anterior question of whether state law is settled.

The inability to escape policy choices in adjudication is evident along another dimension. Application of the static or liability-restricting approach in any particular case effects a clear policy choice of which a state may not approve. Where a plaintiff has been injured by a defendant’s conduct, for example, and state law is unclear as to whether the facts state a cause of action, employing a static or liability-restricting approach is in fact a cost-allocation mechanism between the plaintiff and defendant. To say that the case should be decided on the basis of the background presumption of Anglo-American jurisprudence that all things are permitted until clearly prohibited is also to say that an injured party, and not the injurer, must bear the costs of its own injury.

Further, absent state case law so stating, there would seem to be no reason to assume that any particular state would favor such a default cost-allocation system.

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327. See Sloviter, *supra* note 265, at 1674-1678; see Clark, *supra* note 1, at 1465-71.

328. Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1931).

329. *Id.* at 215.

330. Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 1006-1012 (1996) (systematizing the function of disanalogy-warranting rules).

331. *Id.*

332. *Id.*

Many states, to the contrary, have expressed a background policy of fully compensating injury.<sup>333</sup> How, then, does the static or liability-restricting approach represent less of a policy choice than would the opposite decision? They do not; they simply implement a *different* policy choice.

Similarly, as one commentator has demonstrated, where state law concerning exceptions to the employment-at-will doctrine is evolving, how does a federal court better comport with state law by refusing to recognize the evolution until clearly instructed to do so by the state supreme court?<sup>334</sup> The answer, again, is that it does not.<sup>335</sup> Ruling in favor of a defendant employer in such cases represents a policy choice that is qualitatively identical to that inherent in ruling in favor of a plaintiff employee.<sup>336</sup>

Another demonstration of the policy choices inherent in such “background rules” is to show that they can yield diametrically opposed results. Despite their common origin, stasis and liability-restriction appear to be capable of dictating different answers to the same situation. Imagine that the state appellate courts had uniformly adhered to a rule that imposes liability, but their decisions are all decades old, and newer state trial court opinions suggested the development of a novel defense to one subset of the facts under which the older decisions had imposed liability. State law would now be at least somewhat unsettled as to the novel defense that creates an exception to the general rule that imposes liability. A federal court employing the static approach would presumably decline to permit a defendant to use the novel defense. At the same time, however, the novel defense would restrict liability.

In sum, static and liability-restriction fail to achieve the objective of avoiding policymaking by federal courts applying unsettled state law. They simply implement a particular policy—usually, a defendant-friendly policy. Federal courts that follow it may therefore wind up ascertaining and applying state law less faithfully than in the absence of such default rules.<sup>337</sup>

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333. *E.g.*, Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 351 (3d Cir. 2001) (“[O]ne of the most venerable principles in Pennsylvania jurisprudence, and in most common law jurisdictions for that matter, is that, where there is an injury, the law provides a remedy.”). *See also* OR. CONST. art. 1, § 10.

334. *See* Mark R. Kramer, Comment, *The Role of Federal Courts in Changing State Law: The Employment at Will Doctrine in Pennsylvania*, 133 U. PA. L. REV. 227 (1984).

335. *Id.*

336. *See, e.g., id.* at 258 (positing that a public policy and personnel policy argument can be made for an employer or employee).

337. *See id.* at 263 (reviewing state and federal opinions interpreting Pennsylvania law regarding exceptions to the employment-at-will doctrine and concluding that “[i]nterpreting change [in state law] narrowly does not diminish federal influence; on the contrary, it may lead to distortions of state law and cause forum shopping effects as severe as those forbidden by *Erie*”).

### C. Using the Federal Court's Own Judgment

#### 1. Fundamental Flaws of Proposed Approaches, Reprise

Thus far, we have identified a line of cases in which the Supreme Court recognized, first, that state courts are capable of determining state law that is different from generalized notions of the common law and, second, that state law could be difficult for federal courts to ascertain and apply.<sup>338</sup> But this line of cases—*Erie* and its progeny—provides no hierarchy of state-law sources or a decision tree for selecting among conflicting state precedents. Nor have the federal courts of appeals settled on any uniform method for doing so.<sup>339</sup> At the same time, however, we have been told that state law is law that should be elaborated by federal courts in the same manner as federal law.<sup>340</sup>

We have therefore examined how these two principles should be understood together. First, we considered the possibility that federal courts should use their superior institutional advantages in legal reasoning to resolve state-court doctrinal confusion.<sup>341</sup> But we were forced to discard this view because it fails to account for the fact that state supreme courts, as the ultimate arbiters of state law, need not adopt the position that is “correct” in light of their own precedent at any particular time, and when they fail to adopt that position, what had seemed to be merely a mistake becomes the law.<sup>342</sup>

Second, we considered one possible conclusion to be drawn from the disconnect between “correct” legal reasoning and the reality that state law might develop along a different dimension—that is, to apply unsettled state law is to “make” state law, and federal courts should avoid this because although state courts are free to make their own law, federal courts do not have the power to do so.<sup>343</sup> But this position also failed. For one thing, upon close inspection, it lacked any distinct federalism component, and was therefore a general argument about the lawmaking function of federal courts. For another, such an argument proved far too much, in part because the distinction between settled and unsettled law cannot safely be maintained and in part because the policymaking component of judging cannot be avoided.<sup>344</sup>

Another way to understand the failure of these alternatives is to think about them in terms of their conceptions of law. The position that federal courts can identify correct answers to unsettled state law issues because of superior technical abilities,

338. See *supra* Part II.A.

339. See *supra* Part II.B.

340. See *supra* Part II.C.

341. See *supra* Part III.A.1 and III.A.2.

342. See *supra* Part III.A.4.

343. See *supra* Part III.B.1.

344. See *supra* Part III.B.3.



although capable of being harmonized with *Erie*,<sup>345</sup> depends on a conception of law as an unchanging system of logic that connects existing precedents by means of principles. This is an accurate conception in some respects, namely, that federal and state courts alike attempt to reason in a principled manner from existing authority. But it is unsustainable because state courts are not bound to, and in fact often do not, resolve ambiguities in their own case law in the manner that a formalistic reading of extant precedents might suggest.

The law changes, and it does not do so in a way that is dictated by existing precedents. In part this is simply because the data set of precedents from which one seeks to deduce a rule of decision is constantly expanding. At a certain time, one rule may plausibly account for the vast bulk of past precedent, but whenever a state court issues a subsequent ruling, the proposed rule might need to be altered to account for the new ruling. Precedent and the principles that underlie it thus operate dialectically. In part, however, this also owes to the recognition that “[t]he life of the law has not been logic: it has been experience.”<sup>346</sup> Some element of choice among multiple options inheres in every judgment.

The position that federal courts are incapable of deciding unsettled issues of state law without “making” state policy, however, relies on a conception of law where the element of choice is paramount and omnipresent. On the one hand, we have just concluded that such choice *is* always present. Yet, on the other hand, this is a view of law that courts cannot embrace because it would mean that they are always, in effect, legislating. This conception of law, unsurprisingly, is inconsistent with *Erie*’s progeny. Recall that in *King*, the Court reviewed a federal court judgment where the only two state court precedents reached opposite conclusions, but the Court did not even intimate that this meant that federal courts were disabled from finding and applying state law or that, in doing so, they would actually be “making” state law.<sup>347</sup> To the contrary, the Court affirmed, thereby upholding the court of appeals’ judgment that was supported by the more recent state court precedent, in contravention of the static approach.<sup>348</sup>

Combining these observations yields the conclusion that although deciding issues of unsettled state law involves policy choices for federal courts, the conception of law that animates *Erie* and its progeny regards such choice as a component of finding and applying law generally, rather than “making” it. Another way to state this conclusion is that *Erie* and its progeny recognize implicitly that federal courts “make” state law when they ascertain and apply it, and that is simply something to be accepted.

Indeed, the *Salve Regina* Court supported its assertion that “[t]he very essence of the *Erie* doctrine is that the bases of state law are presumed to be communicable by

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345. See *supra* Part III.A.3.

346. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

347. See *supra* notes 137-148 and accompanying text.

348. See *King*, 333 U.S. at 162.

the parties to a federal judge no less than to a state judge<sup>349</sup> by citing Professor Kurland's observation that "if the law is not a brooding omnipresence over the United States, neither is it a brooding omnipresence in the sky of Vermont, or New York or California."<sup>350</sup> And in his article, Professor Kurland preceded this observation with the slightly more candid statement that "when reference is shifted to the law of the states, . . . the very essence of the *Erie* doctrine is that a federal judge can find, if not make, the law almost as well as a state judge."<sup>351</sup>

Justice Frankfurter also obliquely acknowledged this fact of interstitial policymaking as a necessary component of applying state law in federal court, I think, when, concurring in *Bernhardt*, he stated: "The essence of the doctrine of [*Erie*] is that the difficulties of ascertaining state law are fraught with less mischief than disregard of the basic nature of diversity jurisdiction, namely, the enforcement of state-created rights and state policies going to the heart of those rights."<sup>352</sup> Less mischief, not none.

This irreducible element of policymaking within the confines of settled authority explains why the Supreme Court could never purport to provide a comprehensive list of all the sources of state-law authority or a definitive decision-tree for how to evaluate them. To do so would be, in essence, to tell lower federal judges how to reason legally and to judge. Such instruction would be decidedly unbecoming. Concurring in *Lehman Brothers*, Justice Rehnquist expressed shock at the mere suggestion:

I assume it would be unthinkable to any of the Members of this Court to prescribe the process by which a district court or a court of appeals should go about researching a point of state law which arises in a diversity case. Presumably the judges of the district courts and of the courts of appeals are at least as capable as we are in determining what the Florida courts have said about a particular question of Florida law.<sup>353</sup>

## 2. Federal Judicial Brains

Rejection of these extreme positions, however, leaves us with another that does accord with the conception of law assumed by *Erie* and its progeny. Given both that formally "correct" answers to unsettled state-law questions do not exist and that an aspect of policymaking necessarily inheres in deciding an unsettled issue of state law,

349. 499 U.S. at 238.

350. *Id.* at 239 (quoting Philip B. Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 217 (1957)).

351. Philip B. Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 217 (1957).

352. *Bernhardt*, 350 U.S. at 208-09 (Frankfurter, J., concurring).

353. 416 U.S. at 394 (Rehnquist, J., concurring).

there would seem to be no reason for federal courts to do anything other than exercise their discretion in furtherance of what they think to be the best answers. I therefore think that federal courts should decide unsettled questions of state law in the best manner that they think is permitted by state-law materials.<sup>354</sup>

What makes a particular resolution “best” may vary from case to case and from court to court. Where state law may be read to admit of multiple resolutions, a federal court might select one of them because it thinks that resolution will promote substantive justice, or the court might conceive the best rule in terms of its promotion of efficiency, or views about the ease of administration could counsel in favor of one rule over another. Whatever criteria a court uses to decide which answers are better than others, there would seem to be no reason for it to select second-best solutions.

Variants of this sort of theory have sometimes been referred to as the “independent judgment” rule.<sup>355</sup> Professor Arthur L. Corbin articulated the proposition well in 1941:

When the rights of a litigant are dependent on the law of a particular state, the court of the forum must do its best (not its worst) to determine what that law is. It must use its judicial brains, not a pair of scissors and a paste pot. Our judicial process is not mere syllogistic deduction, except at its worst. At its best, it is the wise and experienced use of many sources in combination—statutes, judicial opinions, treatises, prevailing mores, custom, business practices; it is history and economics and sociology, and logic, both inductive and deductive.<sup>356</sup>

Without care, Professor Corbin’s exposition could be misread to state that federal courts should decide state-law questions according only to what the federal court thinks would be the best rule in an ideal world. Such a reading, however, would be inaccurate.

The first sentence of the above quotation stipulates that a federal court must “do its best (not its worst) to determine” state law. That is, the court cannot in good faith impose its ideal solution without regard to existing state-law precedents. It must give those precedents proper regard. At any particular time, certain arguments and rules will not be available on the basis of extant sources of state law, and the rule of *Erie* is that these constraints must be respected.<sup>357</sup> But where state law is unsettled, then by definition state law will admit of more than one answer.

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354. This approach shares some aspects of the jurisprudential theory developed by Ronald Dworkin in *Law’s Empire*, but my aim here is far more modest. See generally RONALD DWORKIN, *LAW’S EMPIRE* (Harvard University Press) (1986). I do not attempt, as does Dworkin, to set forth criteria for determining which rules are substantively best. See generally *id.* Rather, the claim of this article is that use of a federal court’s independent judgment to decide unclear state-law issues in the manner that the federal court thinks best is consistent with the principles of *Erie* and its progeny.

355. See *supra* note 294 and accompanying text.

356. Arthur L. Corbin, *The Laws of the Several States*, 50 *YALE L.J.* 762, 775 (1941).

357. See, e.g., *supra* notes 239-242 and accompanying text.

The determination that law is unsettled is not the product of any particular formula; it too is a matter of the deciding court's judgment, and federal courts are capable of sensitivity to this question.<sup>358</sup> State law, as it is applied in federal court, is thus ultimately the federal court's judgment as to how the data points of state authority should—not must—be connected.

### 3. Benefits to Independent Judgment

There are several benefits to such an approach. First, the parties before the court have their dispute adjudicated according to the rule that the court thinks wisest, rather than according to some other, second-best solution. Second, the judicial system of the state whose law is being applied gains the benefit of the federal court's analytical skills and its judgment in demonstrating the possibilities inherent in unsettled state law. A decision on state law by a federal court may ultimately be accepted or rejected by the state judicial system,<sup>359</sup> but a well-reasoned decision can serve as a guide for state courts that find it persuasive.<sup>360</sup> Where state law is unsettled, a federal court opinion that sets forth the federal court's judgment as to the best answer therefore makes it more likely that the state judicial system ultimately will adopt this "best" position.

A third, less obvious benefit attends the admonition for federal courts to exercise their independent judgment when state law is unsettled. This approach, perhaps paradoxically, operates as a constraint on federal courts because it requires them to take responsibility for their decisions. We have just noted the benefit that state legal systems may derive from federal-court opinions setting forth their views of best resolutions to unsettled matters of state law; not only do state courts have guides to use in resolving unsettled questions should they find the opinions persuasive, but because the guide exists, state systems are ultimately more likely to adopt the federal courts' opinions of state law as their own. But this second result is a benefit to states only if the federal court has set forth an opinion that is "better" than other possible resolutions according to some vector against which the merit of legal opinions may be judged. This requires the federal court to bring its skills and judgment to bear on the questions at hand, and determine what is, in its opinion, the best resolution of the

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358. See *supra* notes 328 & 328 and accompanying text. A recent opinion by Judge Wood for the Seventh Circuit provides a rare, explicit acknowledgment: "It is true that there are other decisions of the lower Indiana courts that point in the opposite direction. If the decisions of the lower courts pointed consistently toward a different resolution of the precise question before us, our task would be more difficult." *Lewis v. Methodist Hosp.*, 326 F.3d 851, 856 (7th Cir. 2003) (citations omitted). I think that under the approach set forth in this Part, the identification of a minority position in the state courts would clearly be sufficient to justify the federal court in deciding the question presented according to the minority approach if it thought that the better result.

359. See *supra* Part III.A.4.

360. See *supra* note 211 and accompanying text.

issue, rather than permitting the federal court to disown this responsibility by resorting to some default rule.

#### 4. Does Independent Judgment Comport with the 311 Cases?

One might object to my exposition of a federal court's task that it is in tension with the 311 cases.<sup>361</sup> After all, in several of those cases, only a state trial court or one state court of appeals had addressed a particular issue, yet when the federal court of appeals resolved the state-law question differently, the Supreme Court reversed and chided the federal court for failing to follow state law.<sup>362</sup> Would not the state supreme court have had the prerogative to decide that a state trial court was incorrect? How, then, did the federal court err?

Contemporary critics of the 311 cases made essentially this point. Indeed, Professor Corbin's quote above is taken from an article in which he argued that the Supreme Court was wrong in *Field* to have forced the Third Circuit to follow the New Jersey Vice-Chancellor's seemingly erroneous construction of an unambiguous state statute: "Why did it do this? Because a Vice-Chancellor, in another case could not, or would not, see what the legislature meant. A court of first instance, and a single judge!"<sup>363</sup> Thus, he complained that the Supreme Court's instructions forced a federal court seeking to ascertain state law to use "a pair of scissors and a paste pot," where it should "use its judicial brains" instead.<sup>364</sup>

There is a temptation to answer these questions by chalking the 311 cases up to a particular moment in legal history. According to such an explanation, the Supreme Court, around 1940, had to take an overly aggressive stance with regard to the respect that federal courts had to accord state-court decisions in order to accustom the federal courts to the rule of *Erie* that state law, as declared by state courts, not general common law, provided the rule of decision in diversity cases. On this theory, by 1948, *Erie*'s requirements had become firmly established, so the Court in *King* could afford to withdraw explicitly from a broad reading of the 311 cases.<sup>365</sup> To the extent that commentators have attempted to reconcile the 311 cases with later Supreme Court decisions, they have essentially adopted this position.<sup>366</sup>

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361. See *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940); *Fid. Union Trust Co. v. Field*, 311 U.S. 169 (1940); *Vandebark v. Owens Illinois Glass Co.*, 311 U.S. 538 (1941).

362. *West*, 311 U.S. at 236; *Stoner*, 311 U.S. at 467; *Six Cos.*, 311 U.S. at 188; *Fid. Union Trust*, 311 U.S. at 177-78.

363. Corbin, *supra* note 356, at 775.

364. *Id.*

365. See *King*, 333 U.S. at 159.

366. See Henry J. Friendly, *In Praise of Erie-And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 400 (1964) (describing the "excesses of 311").

Retreat from legal doctrine to legal history, however, is not necessary to harmonize the 311 cases with my discussion of how federal courts should go about applying state law. Instead, we need only take a closer look at the decisions by the federal courts of appeals that were reversed.<sup>367</sup> These cases rejected the pertinent state-court precedent on the basis of generalized notions of the common law, supported either by no authorities or by citation to the decisions of courts in other states.

In *Field*, for example, the Third Circuit first concluded that although its own precedents “come pretty close to saying that a federal court must follow the construction of a state statute made by a court not of final resort,”<sup>368</sup> the court was not truly bound absent the pronouncement of the state’s highest court.<sup>369</sup> But in then reaching a decision that was contrary to those of the New Jersey Court of Chancery, the Third Circuit stated simply that the state courts’ construction of the statute at issue “violates the plain if not artistic language of the statute, and the fundamental rule of statutory construction that a statute must be construed to give effect to its intent.”<sup>370</sup>

The court cited nothing in support of this proposition.<sup>371</sup> Yet any number of aspects of New Jersey law might have contravened it—a strong principle of legislative acquiescence<sup>372</sup> or other particular rules of statutory construction, for example.<sup>373</sup> Had the Third Circuit reviewed New Jersey principles of statutory construction, applied those principles, and on this basis disagreed with the decisions of the Court of Chancery, one could conclude that the Third Circuit was in fact applying New Jersey law, and the Court of Chancery had erred.

By failing to engage with any principles of New Jersey statutory construction, however, the Third Circuit in *Field* was doing what *Erie* prohibited—resolving an

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367. See, e.g., *Field v. Fid. Union Trust Co.*, 108 F.2d 521 (3d Cir. 1939), *rev'd*, 311 U.S. 169; *Six Cos. of Cal. v. Joint highway Dist. No. 13*, 110 F.2d 620 (9th Cir. 1940), *rev'd*, 311 U.S. 180 (1946).

368. *Field*, 108 F.2d at 525.

369. *Id.* at 526.

370. *Id.*

371. *Id.*

372. By “legislative acquiescence,” I refer to the rule that where a court arguably misinterprets a statute, but the legislature does not pass a new law to correct the error, one may infer that the judicial construction was actually correct. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 599-600 (1983). Judge Jones, dissenting from the Third Circuit majority in *Field*, raised this possibility by pointing out that “although each [chancery case] was decided early in 1936 and the New Jersey legislature has been in regular session four times since then, the effect of those decisions has not been changed by subsequent legislative action of further judicial decision.” *Field*, 108 F.2d at 527 (Jones, J., dissenting).

373. The *Field* majority itself acknowledged that the state courts might have been interpreting the statute in order to avoid a constitutional question: “Serious constitutional defects were hinted, but not specified. The court refused to enforce the Act without clearly saying that it was unconstitutional.” *Id.* at 527.

issue of substantive state law using only its own notions of general common law. The Ninth Circuit's decision in *Six Companies* was similarly flawed.<sup>374</sup> Therefore, contrary to Professor Corbin's assumption in 1941, nothing about the 311 cases is inconsistent with the view of federal judicial decision-making with respect to state law that I am advocating.

## 5. Independent Judgment in Practice

### a. The "Prediction" Metaphor Reconsidered

Even where they do not purport to employ one of the default rules debunked in Part III.B., however, federal courts have sometimes identified best answers to unsettled state-law questions and then refused to apply them.<sup>375</sup> The Seventh Circuit's opinion in *Northrop Corp. v. Litronic Industries*<sup>376</sup> is one conspicuous example. That case presented the court with the task of interpreting § 2-207 of the Uniform Commercial Code, as codified by Illinois, which concerns the "battle of the forms"<sup>377</sup> scenario—one company making an offer using a form contract and the other accepting with its own form contract that contains discrepant terms—wherein the acceptance form contains terms that are different, rather than additional, to those in the offer form. Writing for the court, Judge Posner identified three possible rules:

One view is that the discrepant terms in both the nonidentical offer and the acceptance drop out, and default terms found elsewhere in the Code fill the resulting gap. Another view is that the offeree's discrepant terms drop out and the offeror's become part of the contract. A third view, possibly the most sensible, equates "different" with "additional" and makes the outcome turn on whether the new terms in the acceptance are materially different from the terms in the offer—in which event they operate as proposals, so that the offeror's terms prevail unless he agrees to the variant terms in the acceptance—or not materially different from the terms in the offer, in which event they become part of the contract.<sup>378</sup>

The court explained that the third view was the best, in its opinion: "This interpretation equating 'different' to 'additional,' bolstered by drafting history which shows that the omission of 'or different' from section 2-207(2) was a drafting error,

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374. *Six Cos.*, 110 F.2d at 625-26 (rejecting the single, applicable California decision because "the court failed to consider the authorities and stated its mere conclusion without reasoning," but providing as "authorities" decisions by the Second Circuit and state courts in Kansas and South Carolina).

375. See, e.g., *Northrop Corp. v. Litronic Indus.*, 29 F.3d 1173 (7th Cir. 1994).

376. 29 F.3d 1173 (7th Cir. 1994).

377. *Id.* at 1174.

378. *Id.* at 1175.

substitutes a manageable inquiry into materiality, for a hair-splitting inquiry into the difference between 'different' and 'additional.'<sup>379</sup>

Because no Illinois court had addressed this section of the Code, the Seventh Circuit had no state precedent to guide its choice of rules.<sup>380</sup> The court selected the first option, primarily because a plurality of the states to have considered the question adopted that position and "Illinois in other UCC cases has tended to adopt majority rules."<sup>381</sup> After further elaborating upon the problems in both administrability and commercial dealing that the first two positions entailed, Judge Posner observed that the previously identified "best" rule "dissolves all these problems, but has too little support to make it a plausible candidate for Illinois, or at least a plausible candidate for our guess as to Illinois's position."<sup>382</sup>

Judge Ripple concurred to emphasize that the idea that any state would adopt the flawed-but-barely-prevailing rule "is a principled approach to the dilemma faced by a federal court when, in the absence of any pronouncement by the state courts, it is required to determine the position of a state on the interpretation of a section of the Uniform Commercial Code."<sup>383</sup> He added that the result was particularly good in this case because "there is evidence that Illinois, when called upon to interpret the Code, has followed the majority approach."<sup>384</sup> Citing Judge Sloviter's article,<sup>385</sup> he concluded "that, as an institution, we should stay within the confines of our institutional role and make the best 'Erie guess' that we can. The principal opinion adopts a principled approach to that task and I am pleased to join in its adoption."<sup>386</sup>

But what is the principle? Certainly, the *Northrop* court did not avoid implementing a policy choice. It simply supplied the policy that underlies the terms-drop-out approach, rather than the better policy underlying the different-equals-additional approach.

The majority and concurring opinions justified this policy choice in large measure by noting that in other cases involving the UCC, Illinois courts have followed the majority approach.<sup>387</sup> Such a justification is wanting. The Seventh Circuit did not cite any Illinois precedent indicating that Illinois has a policy of taking the majority approach on UCC issues.<sup>388</sup> Precedent of this sort would provide a basis for opining that Illinois law prefers one possible rule over another. Rather, the *Northrop* court based its decision on the fact that Illinois courts had, in the past, sided

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379. *Id.*

380. *Id.*

381. *Northrop*, 29 F.3d at 1178.

382. *Id.* at 1179.

383. *Id.* at 1180 (Ripple, J., concurring).

384. *Id.*

385. See Sloviter, *supra* note 265.

386. *Northrop*, 29 F.3d at 1180 (Ripple, J., concurring).

387. *Id.*

388. *Id.*



with the majority approach in UCC cases.<sup>389</sup> But perhaps in those cases, the majority approach was also the best rule, and the *Northrop* court offered no reason to suppose that Illinois courts would adopt an inferior rule—more difficult to administer and rendering commercial transactions more uncertain—merely because a plurality of other courts had taken that route. In sum, the Seventh Circuit opined that Illinois courts would make a poor decision, and proceeded to adjudicate the rights of the parties accordingly.

The Seventh Circuit's decision seems to be motivated by the sense that the court's task was to predict the rule that the Illinois Supreme Court would adopt—as a factual matter, rather than a legal one. This notion, as we have seen, is wrong, but the mistake is easy to make. Similar thinking animates Professor Nash's recent argument that appellate deference to federal trial court decisions on state law should be resuscitated because the latter have greater "expertise" in predicting state law.<sup>390</sup>

To the contrary, correctly guessing how the state supreme court will resolve an unsettled legal question is no better, in terms of *Erie* and its progeny, than guessing incorrectly. The decision when made is still that of the federal court, not the state, however the state supreme court may ultimately decide the question. As Professor Clark has explained: "[E]ven if the rule in question is embraced by the state's highest court at a later date, it remains true that the rule applied in federal court did not in fact constitute a sovereign command of the state at the time the federal court rendered its decision."<sup>391</sup>

Not only did the *Erie* Court never instruct federal courts to predict state-court rulings as factual, rather than legal, matters,<sup>392</sup> subsequent Supreme Court decisions affirmatively indicated that the task for federal courts was to ascertain and apply state law qua law, not make factual predictions about what the state supreme court would do.<sup>393</sup> This point should be clear from *West*, where the Supreme Court explained that "[a] state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them."<sup>394</sup> State law is thus not a factual prediction of the future holding of the state supreme court, a proposition confirmed by *Salve Regina*.<sup>395</sup>

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389. *Id.* at 1178.

390. Nash, *supra* note 25, at 1014.

391. Clark, *supra* note 1, at 1014.

392. See Dorf, *supra* note 28, at 709 and accompanying text.

393. *West v. Am. Tel. & Tel. Co.*, 311 U.S. 233, 236 (1940); *Salve Regina Coll. v. Russell*, 499 U.S. 225, 227 (1991).

394. *West*, 311 U.S. at 236.

395. 499 U.S. at 227 ("[S]tate law is to be determined in the same manner as a federal court resolves an evolving issue of federal law: with the aid of such light as is afforded by the materials for the decision at hand, and in accordance with the applicable principles for determining state law.") (internal quotation marks and alteration omitted). For this reason, I think that Professor Nash's

*Northrop* is not entirely bad in terms of the benefits to independent judgment that I have identified here. The court identified the unsettled issue and brought its skills to bear on fleshing out three possible resolutions and the likely advantages and disadvantages of each.<sup>396</sup> Any Illinois court confronting the same issue subsequently has the Seventh Circuit's reasoning at its disposal and remains free to adopt the better-reasoned approach. And the litigants themselves have no gripe; any of the three rules was possible under Illinois law, so an Illinois court applying Illinois law might have selected the same one as did the *Northrop* court. Nor does a court necessarily err in thinking that where a state's law is unclear, the state would ultimately decide to follow the majority approach. Presumably, more jurisdictions have taken that approach because they have concluded that it is the best one available. Where "majority" is merely a proxy for "better," surmising that a state would follow the majority approach accords with the view I advocate here.

*Northrop*, however, is still wrongheaded. First, by holding that Illinois would adopt a rule other than the best one, the Seventh Circuit decreased the probability that Illinois would eventually ratify that optimal rule as its own. Second, the holding offends the dignity and competence of the state courts by assuming that they will fail to follow the reasoning that yields what the federal court believes to be the optimal result. Finally, and most important, the court provided district courts with an erroneous view of their task in ascertaining and applying state law.

What, then, should be made of the statement, quite frequently recited by federal circuit courts but only occasionally alluded to by the Supreme Court,<sup>397</sup> that a federal court's task in applying state law is to predict how the state supreme court would decide the issue? Professor Dorf has detailed that to the extent that courts, as in

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argument for a narrow reading of *Salve Regina* proceeds from an erroneous premise. He argues:

[T]he expertise required of federal courts is in analyzing existing state court jurisprudence and predicting how the state high courts would resolve the issues. Since only the state court system can resolve matters of state law definitively, it must be that the state court system as a whole has greater expertise in this regard than do the federal courts. Hence, the *Salve Regina* Court erred in suggesting that *Erie* presumes equal expertise on the part of state and federal courts to resolve matters of state law.

Nash, *supra* note 25, at 1014. This argument confuses expertise and authority. The state court system as a whole can resolve state law definitively because it, and not the federal courts, has the authority to do so. Expertise has no relevance to this fact. As Justice Jackson famously observed of the United States Supreme Court as the final arbiter of federal law: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result). Professor Nash's argument is thus susceptible to something like the converse of the critique of federal-court superiority for deciding state-law issues that I elaborated in Part III.A.

396. *Northrop*, 29 F.3d at 1175.

397. For one of the very few examples of the use of this phrase in a Supreme Court opinion, see *Thomas v. American Home Products, Inc.*, 519 U.S. 913, 917 (1996) (Rehnquist, C.J., dissenting) ("[B]y failing to predict the Georgia Supreme Court's *Banks* decision, the Eleventh Circuit has in no way slighted the State of Georgia or upset the balance of our federalism.").

*Northrop*, understand such an admonition to mean that state law, as distinct from federal law, should be ascertained using non-legal means, the instruction undermines the basic rule-of-law ideal of impersonal justice.<sup>398</sup> He has therefore advocated the abandonment of prediction entirely.<sup>399</sup>

But this is simply an erroneous understanding of the meaning of the “prediction” metaphor in this context. As we have seen, courts of a state may well diverge on issues of state law; indeed, certain state courts may take positions that are directly opposite to those of other courts in the same state. It would make no sense to say that, under these circumstances, state law is some sort of Herculean synthesis of all state-court authorities.<sup>400</sup>

Fortunately, however, federal courts are not required to so synthesize. Every state judicial system in the United States terminates in a court of last resort. For this reason, every question of state law—from outright conflicts between intermediate appellate courts to marginal inconsistencies in phrasing doctrinal standards—is capable of resolution, at least in the abstract, by the determination of the state supreme court. Making that determination—predicting how the state supreme court would resolve the state-law issue—is the task that a federal court must perform in ascertaining and applying state law. Prediction means no more than this.

#### b. A Model Opinion

The better approach, as we have seen, is for federal courts to decide unsettled state-law questions in the manner that federal courts, in their own judgment, think best. Another Seventh Circuit opinion, *Green v. J.C. Penney Auto Insurance Co.*,<sup>401</sup> furnishes an apt illustration of this approach. *Green* was a suit by a subrogee against an insurance company for breach of its duty to defend the insured, and one of the issues presented was whether such an insured could recover the attorney fees that he incurred in prosecuting the declaratory-judgment action against his insurer.<sup>402</sup>

Illinois law governed the case, but the Seventh Circuit could find “no Illinois Supreme Court case that [was] dispositive of this issue.”<sup>403</sup> The court then turned to

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398. Dorf, *supra* note 28, at 685 (“The prediction model requires lower court judges, as well as the lawyers and clients who appear before them, to conceive of law as a prediction of how the particular individuals sitting on the high court would resolve the issue presented. . . . [T]he prediction model is inconsistent with the overarching theme of the rule of law.”). He is surely right on this point. Indeed, one district judge recently decried the idea that the law depends on the identity of the judge as “the antithesis of law.” *United States v. Leach*, 325 F. Supp. 2d 557, 561 (E.D. Pa. 2004).

399. Dorf, *supra* note 28, at 655.

400. RONALD DWORIN, *LAW’S EMPIRE* 239-40 (1986); RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 81 (1977).

401. 806 F.2d 759 (7th Cir. 1986).

402. *Id.* at 765.

403. *Id.*

the state appellate courts, and recognized that “[s]everal intermediate appellate court cases [had] held that an insured may not recover attorneys’ fees and costs for bringing a declaratory judgment action against the insurer.”<sup>404</sup> But “the appellate court in the Fifth District [had] recently held that where an insurer breached its duty to defend its insured, the insured party is entitled to attorneys’ fees in both the underlying suit and the prosecution and appeal of the declaratory judgment action against its insurer.”<sup>405</sup>

After pointing out that “[s]everal courts from other jurisdictions [had] also reached” the result of the Fifth District case, the court decided to follow that rule: “In our view, *Trovillion* [the Fifth District case] is the superior rule.”<sup>406</sup> The court pointed out that this rule was consistent with language in an Illinois Supreme Court case declaring that the damages for breach of the duty to defend were compensatory.<sup>407</sup> In addition, the court explained that it agreed with criticism of the contrary rule in a leading treatise on insurance law:

[The contrary rule] appears to be unfair to the insured. . . . If the insurer can force him into a declaratory judgment proceeding and, even though it loses in such action, compel him to bear the expense of such litigation, the insured is actually no better off financially than if he had never had the contract right mentioned above.<sup>408</sup>

*Green* is the right way for federal courts to apply unsettled state law. Finding no controlling state supreme court decision, the court surveyed the state intermediate appellate authority on point and discovered a split of opinion.<sup>409</sup> Rather than avoid the question, look for trends or the lack thereof, seek to constrict liability, or make some extra-legal guess as to how the state supreme court would decide, the *Green* court selected the rule that it thought was best, situated it in the context of decisions from other jurisdictions, explained that the rule cohered purposively with principles articulated by the state supreme court, and then set forth clearly why it thought the approach it selected was the best policy choice.<sup>410</sup> Such an approach to deciding unsettled state law questions makes the best sense of *Erie* and its progeny and also facilitates the improvement of a state’s jurisprudence by providing a guide to state courts addressing the issue in the future.

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404. *Id.*

405. *Id.*

406. *Green*, 806 F.2d at 765.

407. *Id.* at 765-66.

408. *Id.* at 766.

409. *Id.* at 765.

410. *Id.* at 765-66.

### c. Independent Judgment Versus Instruction

One might fairly observe that the independent-judgment approach that I advocate resembles the federal-superiority approach rather strongly in practice. From the perspective of a litigant, this is true. The motivation of the federal court exercising independent judgment regarding unsettled state law, however, is different from that of the formalist court, which, as I have argued above, should better constrain federal courts and improve their decision-making. But their production of legal rules may nevertheless look the same to the parties appearing before them.

### D. *Viewing the Federal Court's View of State Law*

#### 1. How Should a State Court Treat a Federal Opinion on a Matter of State Law?

Another way to consider the foregoing, however, is through the eyes of a state court that encounters the state-law question after a federal court has opined on it. How should the subsequent state court treat the federal opinion? A range of views are imaginable: as it would treat a law review article, or the court of another state, or another intermediate appellate state court, or the state supreme court.

This last option, however, would turn cases like *Field* almost on their head. How can it be that the opinion of a federal court, which is incapable of definitively setting forth state law, would bind a subsequent lower state court in the same manner as would a decision by the state supreme court, which, *Erie* tells us, is the last word on state law? Some of the theories that we have examined, however, would dictate just such a result.

One is the legal formalist approach elaborated in Part III.A. If one believes (1) that unsettled questions of law are capable of correct resolution according only to their own terms, that is, as a matter of the doctrine existing at that time, and (2) that federal courts are better situated than state courts to apply their legal reasoning skills to reach such correct resolutions, then a subsequent state court should treat a federal court's opinion on an unsettled matter of state law in the same way that it would treat its state supreme court's opinion on the issue. The subsequent state court should conclude, under these assumptions, that the state supreme court would not decide any differently than did the federal court. Consequently, it should consider the federal court's opinion to be the authoritative articulation of state law on the issue and decide accordingly.

The *Northrop* court's understanding of the prediction metaphor also supports a subsequent state court treating the federal opinion like the opinion of the state supreme court. On this rationale, the federal court has made a factual assessment that the state supreme court would resolve the issue in a certain manner.<sup>411</sup> Therefore, if a

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411. See *Northrop*, 29 F.3d at 1178.

lower state court believes that it is bound by its own supreme court's resolution of an unsettled issue of law, then the state court should follow the federal opinion unless it can identify a factual error in the federal court's prediction calculus.

These theories of federal adjudication of unsettled state law would lead to the result of subsequent state courts feeling bound to apply a federal opinion as if it were the opinion of the state supreme court. But this result runs counter to the thrust of *Erie* and its progeny that state courts, not federal ones, are the organs capable of defining state law. It is also a result that no state court follows and that no federal court has instructed state courts to follow. That these theories should lead to such a result is therefore an additional reason to conclude that they cannot be correct, in addition to those that we have already discussed.

Nor would it make sense for subsequent state courts to conceptualize the federal opinion as merely a law review article. On this view, the federal opinion does no more than identify an unsettled issue of law and propose a solution. Two important aspects of the federal adjudication distinguish it from a law review article, however. First, a federal-court opinion takes as its boundaries the existing data points of state law. A law review article, in contrast, is not limited to the decisions of any particular jurisdiction. The decisions of any one state serve only to illuminate the more generalized, abstract legal issue with which the article is concerned.

Perhaps more importantly, a federal court is constrained to "do its best (not its worst)" to determine state law.<sup>412</sup> A law review article, on the other hand, is free to advocate the wholesale abolition of existing doctrines. In proposing solutions to ambiguities in law, in other words, the author of a law review article need not even purport to be applying the law. She may invent it anew.

This shades into the second distinction between a law review article and the federal opinion; the latter is adjudication. It resolves the rights of real parties to a real dispute and is the product of the record and argument developed in that court. Law review articles concerning matters of legal doctrine are not the products of an adversarial system. They might fail to grasp the practical aspects of various rules that would be apparent in the context of an actual dispute. On the other hand, law review articles might cover a particular subject in far greater detail than a federal court opinion, analyzing perspectives that were tangential to the court's focus or that were never presented to the court.

The opinion of another state's court is adjudication, but it takes as its boundaries the existing data points of its own state law. Its reasoning on an analogous issue may be attractive to a subsequent state court in another state. Because of the different starting points with respect to precedents, however, its opinion does not set forth the law of the state in question and therefore is less authoritative than a federal court opinion that does.

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412. Corbin, *supra* note 356, at 775.

I think, then, that a subsequent state court properly views a federal opinion on an unsettled state-law issue in the same manner as it would the opinion of a court of appeals in that state, rather than as a law review article, the opinion of the court of another state, or the opinion of its own supreme court. This accords with the Supreme Court's remark in *King* that "a federal court adjudicating a matter of state law in a diversity suit is, 'in effect, only another court of the State.'"<sup>413</sup>

## 2. How Should a Federal Court Treat a Federal Opinion on a Matter of State Law?

Armed with an understanding of a federal court's task in ascertaining and applying state law, we are also now able to resolve the problem of the proper weight for subsequent federal courts to accord federal circuit court precedent in a straightforward manner. This resolution requires distinguishing between the command of federal *stare decisis* and that of *Erie* and its progeny, including *Salve Regina*, to decide substantive state-law issues in the same manner as federal-law ones. First, as we have seen, at any one time, a certain data set of state-law authority exists, primarily in the form of decisions by state courts. Where these authorities do not uniformly answer the state-law question posed, it is the task of the federal court to exercise its own judgment to imagine how the data ought to be connected. This judgment is the court's determination of state law.

Second, where the federal court making such a judgment is a circuit court of appeals, its determination of the issue is a binding determination of state law—that is, of how the data of state authority should be connected. Subsequent circuit court panels and district courts within the circuit are thereby bound as matters of vertical and horizontal *stare decisis*, and this binding effect is no different for state law than it is for federal law.

Imagine, for example, that a recent decision by the Supreme Court arguably leaves open a particular issue, and federal appellate courts grappling with it have reached varying results. Once a federal circuit court of appeals opines on the issue, subsequent panels and district courts within the circuit are bound by that opinion as a matter of federal *stare decisis*, regardless of how sure those other courts are that the circuit panel interpreted the recent Supreme Court decision erroneously. For this reason, the commentator who asserted that "federal circuit court determinations of state law have no precedential value"<sup>414</sup> is incorrect. Federal determinations of state law have the same binding authority on other federal courts as does any other federal determination of law.

For the same reason, however, when a state court renders a decision on a state-law issue that the federal circuit court has addressed *after* that federal precedent, the data set for ascertaining state law has changed, and the federal circuit precedent no

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413. *King*, 333 U.S. at 161 (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945)).

414. *Determination of State Law in Diversity Cases: Salve Regina College v. Russell*, *supra* note 47, at 318.

longer controls how circuit panels and district courts resolve the issue. Consider again the relationship of the federal circuit precedent elaborating on a Supreme Court decision. If the Supreme Court subsequently renders another decision that casts doubt on the result of the circuit precedent, circuit panels and district courts within the circuit are no longer strictly bound by the circuit precedent. Rather, they must undertake to determine whether the circuit precedent remains good law in light of the intervening Supreme Court decision. This is because, pursuant to the vertical structure of the federal courts, circuit and district courts recognize that decisions by the Supreme Court are superior explications of federal law than circuit court precedents. The foregoing is true regardless of whether the subsequent Supreme Court opinion expressly identifies the circuit precedent.

A recent Seventh Circuit decision illustrates the analogy. In *Taco Bell Corp. v. Continental Casualty Co.*,<sup>415</sup> the court once again faced the question whether, under Illinois law, an insured was entitled to the attorney fees that he incurred in prosecuting a declaratory-judgment action against his insurer to establish a breach of the duty to defend—the precise issue of Illinois law that the Seventh Circuit had addressed in *Green*.<sup>416</sup> When the court rendered its decision in *Green*, Illinois precedent was unsettled.<sup>417</sup> Later, however:

[T]he case on which [the Seventh Circuit] had relied (*Trovillion*) was overruled, and it became the unanimous view of that court that the standard ‘American rule’ should apply to such cases, meaning that there was no duty of reimbursement unless the insured had only a frivolous defense to the declaratory-judgment suit, which is not contended here.<sup>418</sup>

The *Taco Bell* court therefore did not follow *Green*. Writing for the court, Judge Posner explained:

In light of the Illinois Appellate Court’s unanimity, the best prediction differs from what it was when *Green* was decided, and so that decision is no longer authoritative, just as in a case in which a U.S. Supreme Court decision shows that a previous decision by a lower court was unsound, even though the Supreme Court doesn’t mention the decision.<sup>419</sup>

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415. 388 F.3d 1069 (7th Cir. 2004).

416. *Green*, 806 F.2d at 762.

417. *Id.* at 761-62.

418. *Taco Bell*, 388 F.3d at 1077.

419. *Id.* The *Taco Bell* court added: “What is true is that the district court was bound by *Green*, as a lower court cannot overrule the decision of a higher one.... But we are not bound.” *Id.* This comment is puzzling. Appellate panels are bound by circuit precedent in the same manner as are district courts within the circuit. See *supra* note 46 and accompanying text. Or so one would think but for this statement. I suspect that the best explanation for this anomalous suggestion that



The reasoning of *Taco Bell* makes sense, but the use of the “prediction” metaphor obscures more than it clarifies. Once the state-authority data set for the state-law issue changed, the circuit precedent no longer bound other federal courts because that precedent could have done no more than imagine the state-law rule that connected the various data points that existed at the time of the federal precedent. Certainly, a subsequent state decision that supports the federal precedent provides no reason to reexamine that holding.<sup>420</sup> But a subsequent state decision that undermines the federal precedent does provide such a reason because the task for federal courts is to ascertain and apply state law, and state court decisions must be given proper regard as indicators of what that law is.<sup>421</sup>

Although the *Taco Bell* court was not tripped up by its use of the “prediction” metaphor, another recent Seventh Circuit panel was. The Seventh Circuit, in 1988, had ruled on a particular aspect of Illinois law in *Currie v. Diamond Mortgage Corp.*<sup>422</sup> When, however, that same question arose before the Southern District of Illinois in a 2003 case, *Reiser v. Residential Funding Corp.*,<sup>423</sup> “the district judge refused to follow *Currie*. The judge wrote that he found two decisions by one of the state’s five intermediate appellate courts more persuasive than *Currie* and elected to follow them instead.”<sup>424</sup> The Seventh Circuit strongly rebuked the district court: “By treating *Currie* as having no more than persuasive force, the district court made a fundamental error. In a hierarchical system, decisions of a superior court are

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district courts and subsequent panels are differently bound by circuit precedent is that *Taco Bell* was decided shortly after another Seventh Circuit decision, *Reiser*, that took a much more aggressive—albeit erroneous—approach toward the binding effect on district courts of federal precedent concerning state law. See *infra* notes 425 and accompanying text. This statement was thus an attempt by the *Taco Bell* court to account for *Reiser* while avoiding its erroneous mandate.

420. E.g., *Woodling v. Garrett Corp.*, 813 F.2d 543, 557-58 (2d Cir. 1987).

A ruling of one panel of this Circuit on an issue of state law normally will not be reconsidered by another panel absent a subsequent decision of a state court or of this Circuit tending to cast doubt on that ruling. . . . Since *Vasina*, no decision of this Court has altered the rule established there, and two New York cases have accepted the proposition that taxes need not be deducted from lost income.

*Id.*

421. *Estate of Bosch*, 387 U.S. at 465. For this reason, the “compromise” approach proposed by another commentator—“predictive precedents should bind presumptively, but a litigant’s presentation of substantial evidence of a change in state law would be sufficient to rebut the presumption and to trigger a duty to exercise independent judgment”—must be rejected. Jed I. Bergman, Note, *Putting Precedent in its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 1018 (1996). Whenever there has been a change in state law after the federal precedent, a federal court must use its independent judgment to ascertain state law, and not defer to a federal precedent.

422. 859 F.2d 1538 (7th Cir. 1988).

423. 380 F.3d 1027 (7th Cir. 2004).

424. *Id.* at 1029.

authoritative on inferior courts. . . . [D]istrict judges must follow the decisions of this court whether or not they agree.”<sup>425</sup>

This rebuke, however, was mistaken. The district judge in *Reiser* relied in part on an Illinois appellate opinion that was contrary to *Currie* and that had been decided after *Currie*.<sup>426</sup> Under these circumstances, the district court was not purporting to overrule *Currie* because that case was only a binding interpretation of Illinois law as it existed at that time. Rather, the district court determined, on the basis of subsequent state authority, that *Currie* no longer accurately reflected Illinois law.<sup>427</sup> As the Fifth Circuit has put the point, “A panel of this court cannot ‘overturn’ the decision of another panel. In diversity cases, however, we are to follow subsequent state court decisions that are clearly contrary to a previous decision of this court.”<sup>428</sup>

I think that the Seventh Circuit’s erroneous approach in *Reiser* owes primarily to the court’s misunderstanding of the task of federal courts in ascertaining and applying state law. According to the court:

A decision by a state’s supreme court terminates the authoritative force of our decisions interpreting state law, for under *Erie* our task in diversity litigation is to predict what the state’s highest court will do. Once the state’s highest court acts, the need for prediction is past. But decisions of intermediate state courts lack similar force; they, too, are just prognostications. They could in principle persuade us to reconsider and overrule our precedent; assuredly they do not themselves liberate district judges from the force of our decisions.<sup>429</sup>

Here the “prediction” metaphor seems to have confused the court. Decisions of intermediate state courts are not “just prognostications” of what the state supreme court will do any more than decisions by federal appellate courts are “just prognostications” of what the United States Supreme Court will do.<sup>430</sup> Rather, such decisions are valid pronouncements of state law that must be treated with “proper regard.”<sup>431</sup> Were it otherwise, none of the Supreme Court’s cases on state law following *Erie* would make sense.

A judicial-efficiency policy motivation may also underlie the *Reiser* court’s stubbornness. That is, the court values its own precedent and the judicial resources

425. *Id.*

426. *Id.*

427. *Id.*

428. *Farnham v. Bristow Helicopters, Inc.*, 776 F.2d 535, 537 (5th Cir. 1985); *see also Robinson v. Jiffy Executive Limousine Co.*, 4 F.3d 237, 239-40 (3d Cir. 1993) (“[R]eported panel decisions are binding on subsequent panels. . . . However, when we are applying state law and there is persuasive evidence that it has undergone a change, we are not bound by our previous panel decision if it reflected our reliance on state law prior to its modification.”).

429. *Reiser*, 380 F.3d at 1029.

430. *Id.*

431. *Estate of Bosch*, 387 U.S. at 465.

conserved by following such precedent unthinkingly. The *Reiser* court stated candidly that its precedent “represents an educated guess about how the Supreme Court of Illinois will rule. Instead of guessing over and over, it is best to stick with one assessment until the state’s supreme court, which alone can *end* the guessing game, does so.”<sup>432</sup>

Sticking with one assessment may be “best” according to some matrix that the court did not explain, but it is not the proper task for a federal court seeking to apply unsettled state law. The Supreme Court case law following *Erie* made quite clear that “[a] state is not without law save as its highest court has declared it,”<sup>433</sup> and that a “developing line of authorities [can] cast[] a shadow over the established ones.”<sup>434</sup>

The *Reiser* court is not alone in its misunderstanding of the role of federal courts in applying state law. Concurring in *In re Watts*, Judge O’Scannlain would have taken the misguided *Reiser* approach one step further had he not been constrained by contrary Ninth Circuit precedent.<sup>435</sup> He opined:

To my mind, a panel must not act in contravention of our precedent without being highly certain of its authority to do so. And that certainty is not easily obtained when, as here, the alleged change in state law comes from case law rather than statutory law.

When it is a state *statute* that has changed, the question is much simpler, particularly in this age of formal codification. . . .

But with case law, whether pure common law or judicial glosses on statutory law, the question is more difficult. We can be certain that state *case law* is an authoritative expression of state *law* only when it comes from the state’s court of last resort. Anything less leaves room for doubt. . . . And it seems to me that where there is room for doubt, we must stay our erasers.<sup>436</sup>

This view, like that of the *Reiser* court, is inconsistent with the Supreme Court’s post-*Erie* case law. Indeed, Judge O’Scannlain’s thought that changes in state law are clearly reflected only by statutory changes comes perilously close to the *Swift v. Tyson* regime itself.

#### IV. CONCLUSION

I began this examination of how federal courts should ascertain and apply unsettled state law with *Erie Railroad Co. v. Tompkins*, in which the Supreme Court announced that there is no such thing as federal general common law, nor are federal

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432. *Reiser*, 380 F.3d at 1029.

433. *West*, 311 U.S. at 236.

434. *Bernhardt*, 350 U.S. at 205.

435. *Watts*, 298 F.3d at 1084-85 (O’Scannlain, J., concurring).

436. *Id.*

courts authorized to make it. In some sense, *Erie* ratified the central insight of legal realism that law does not exist apart from the courts that pronounce it, but paradoxically, it simultaneously required federal courts to treat state law as something that could only be discovered, not made.

State law issues now arise in federal court quite frequently, not only through diversity and supplemental jurisdiction, but also in federal questions that necessarily incorporate state law. In some cases, discerning the applicable state law is not difficult—for example, where the state supreme court has recently opined on the precise issue at hand. More often, however, state law is not settled. Sometimes intermediate state courts directly conflict on points of doctrine; sometimes they provide inconsistent guidance in applying a standard; sometimes there is no state law to be found at all. In addition to the challenges presented by these situations, federal courts must grapple with the existence of federal-court precedents on state-law issues.

Federal circuit courts have not provided clear instructions to approaching the issues presented by unsettled state law. Although they frequently intone that they must decide the law as would the state supreme court, there appears to be no consensus approach to doing so. Some seek to follow emerging doctrinal trends. Others treat state law as static. Many assume that a state would side with “the majority view.” And recently, circuit courts have selected among competing views of state law by asking which would most constrict liability. These approaches are under-theorized and often contradict each other.

One response from the academy has been to champion certification procedures. I have argued here, however, that this response is inadequate. Others have rightfully objected to certification, from both federal and state perspectives, as costly and inconsistently available. In addition, we have seen that certification hinders the timely processing of cases in federal court, which, in many instances, is the primary desire of the litigants as they assess their respective positions with an eye toward settlement.

If federal courts must decide state-law issues, then, some commentators have advocated the static or liability-constricting approaches on the ground that federal courts should not usurp the policymaking function of state courts; indeed, some have argued that this is *Erie*'s constitutional command. This view, however, turns out to have virtually nothing to do with federalism, since its premises could generate very similar arguments for the “policymaking” of federal courts deciding federal law and for the alleged unfairness to a litigant in state court who loses pursuant to a rule of law later rejected by the state supreme court. In any event, federal courts that treat state law as static or select liability-constricting interpretations of state law do not avoid policymaking. They are simply making a particular policy choice.

On the other hand, *Erie*'s command to apply state law in certain circumstances is not an invitation for federal courts to instruct their institutionally disadvantaged state brethren on the proper elaboration of doctrine. Arguments exist to support an

instruction approach, but a theory of instruction falters in the face of examples of state supreme courts deciding issues that would have appeared, before the decision, to be doctrinally incorrect. The instruction approach assumes an unsustainable, formalist view of law.

I have therefore argued that federal courts must use their independent judgment in ascertaining and applying unsettled state law. One aspect of such judgment is undoubtedly policy. So far as my analysis reveals, however, that aspect cannot be avoided by federal courts, nor should it. Employing independent judgment gives the parties the benefit of adjudication according to the rule that the federal court thinks wisest, offers state courts the considered analysis of the federal court, and constrains the federal court by requiring it to take responsibility for the rule that it selects. This is what federal courts should mean when they say that they must “predict” how the state supreme court would decide an issue of state law. That is, they must use their best legal reasoning and judgment, not make a political-scientific inquiry into what state supreme court justices would think.

This position is not only consistent with *Erie*’s progeny, but it also makes the best sense of more recent Supreme Court admonitions that federal courts should treat state law as law—and not as fact or some hybrid. The position that I advocate frees federal courts faced with conflicting state-law authorities to adopt the rule that they think best. It also sheds light on the weight of federal court precedent on state-law issues. As with any other issue of law, a circuit precedent binds that court and its inferior courts, but only until another state court has spoken. Then a federal court must reexamine the precedent to see whether it still makes sense in light of the new data of state law.

How the data of state law should be configured—that is, how unsettled state law should be ascertained and applied—must ultimately be left to each federal court’s own judgment, and those courts should exercise their judgment in the best way they can.

