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# *Erie's* Unintended Consequence: Federal Courts Creating State Law

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## **ERIE'S UNINTENDED CONSEQUENCE: FEDERAL COURTS CREATING STATE LAW**

*Laura E. Little\**

I.	Surrounding Circumstances: Occurrence And Causes .....	276
II.	Practical Consequences .....	281
III.	Assessment and Conclusion .....	290

Our venerable *Erie v. Tompkins*<sup>1</sup> has produced many unexpected offspring. Consider the unlikely progeny of that decision, which focused on flexing federalism muscle and protecting out-of-state litigants by reining in overzealous federal court lawmaking. Following this mandate with vigor, federal courts have created cottage industries for many unpredicted efforts: struggles to define the difference between substance and procedure<sup>2</sup> and perennial discussions (and confusion) in bankruptcy courts about what law governs a myriad of issues,<sup>3</sup> just to mention two

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\* James G. Schmidt Professor of Law, Temple University's School of Law. Copyright 2018 by Laura E. Little. Special thanks to Ken Bergman and Nicole Roche for excellent research assistance.

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

2. The durability of the substance/procedure conundrum is remarkable. The Supreme Court has made valiant attempts to clarify the issue, starting first soon after *Erie* in *Guaranty Trust v. York*, 313 U.S. 487 (1941), and then again in a series of cases including *Hanna v. Plumer*, 380 U.S. 460 (1965), and *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). See generally Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 877, 896-913 (2011) (describing the evolution and analysis of the concept of procedure). For specific contexts related to the substance/procedure dichotomy, see, e.g., Jeffrey A. Parness, *Choices about Attorney Fee-Shifting Laws: Further Substance/Procedure Problems under Erie and Elsewhere*, 49 U. PITT. L. REV. 393 (1988).

3. Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633 (2004) (reviewing the *Erie* issues that arise in bankruptcy proceedings); John T. Cross, *State Choice of Law Rules in Bankruptcy*, 42 OKLA. L. REV. 531 (1989) (reviewing intersection of state choice of law rules and *Erie* in the context of bankruptcy proceedings). See also Charles W. Mooney Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931 (2004) (analyzing *Erie* in light of a proceduralist theory of bankruptcy).

### **SYMPOSIUM, *ERIE* AT EIGHTY: CHOICE OF LAW ACROSS THE DISCIPLINES**

intellectual challenges that *Erie* has created. And of course, one would guess the justices who decided *Erie* did not anticipate the superabundance of scholarly work exploring the decision's meaning and consequences.

Perhaps one of the most unanticipated results of the decision is the permission it granted federal courts to inject themselves into the progress of state law change. How is it that *Erie* effectively empowered federal courts to do this? As interpreted in a series of cases after *Erie*: when federal courts find themselves in the position of ascertaining the content of state law (required when federal courts are exercising diversity, supplemental jurisdiction, and beyond)<sup>4</sup> they must often predict the content of state law once they determine that state, not federal, law should govern a particular question.

Sometimes a federal court can clearly discern the content of state law from a state statute or recent state supreme court decision. Other times, state court precedent is either nonexistent or old and contrary to trends elsewhere in the United States. In these latter circumstances, federal courts are forced to decipher the current content of state law using sometimes thin and sometimes nonexistent evidence. Through that process, the federal court is effectively given an opportunity to make, or at least influence, state law. This opportunity makes it possible for the federal court to inject its own views and preferences into the choice made.

What circumstances surround this phenomenon of federal courts creating state law? When does it occur and what forces drive it? What are the practical consequences of this federal court law-making? Does the balance of these consequences counsel a change in the approach to divining state law? This article addresses these questions in turn, ending with an assessment of alternative paths.

## I. SURROUNDING CIRCUMSTANCES: OCCURRENCE AND CAUSES

Federal courts labor under both (1) a duty—made clear in *Erie*—to identify state legal principles for the purposes of ensuring fairness for diversity litigants and (2) a mandate to avoid law-making in the realm of

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4. Indeed, many circumstances exist when state law questions are imbedded in federal law claims—federal claims that provide the basis for federal question jurisdiction. *See, e.g.*, *Guilford v. Frost*, 269 F. Supp. 3d 816, 825-28 (S.D. Mich. 2017) (deciding meaning of state law in evaluating a qualified immunity defense to an alleged fourth amendment violation). For a study of the various circumstances such as this in which courts interpret and create hybrid law, *see* Laura E. Little, *Empowerment Through Restraint: Reverse Preemption or Hybrid Lawmaking*, 59 CASE WESTERN RESERVE L. REV. 955 (2009). For a helpful article on *Erie*'s application beyond diversity and supplemental jurisdiction, *see* Alexander A. Reinert, *Erie Step Zero*, 85 FORDHAM L. REV. 2341 (2017).

state law.<sup>5</sup> These arguably conflicting obligations can impose a challenging set of circumstances in the absence of crystal-clear state law. Indeed, the resulting dissonance may create a powerful incentive for courts to navigate out of the tense situation with a determinate, decisive resolution. This can, in turn, result in the federal court effectively making law.

In challenging cases, most *Erie*-directed analysis suggests that federal courts choose to satisfy their duty to promote fairness for litigants, rather than shy away (i.e., somehow find a jurisprudential exit ramp) from decisions that might look like law-making. This choice is consistent with U.S. Supreme Court's instructions on the duty of federal courts handling *Erie* questions.<sup>6</sup> Occasionally, principles of state law *stare decisis*—deferring to state law precedent on the issue of what state law would likely be if the highest state court of a state had decided an issue—complicates the matter (with the wrinkle frequently coming from federal courts generally deferring to other federal courts' best guesses at state law).<sup>7</sup> Another complication occasionally arises when a federal appellate court must decide whether to consider and apply a state law change that occurs retroactively after a district court has entered judgment on a case.<sup>8</sup> Such are the many complications of interjurisdictional power-sharing.

The confluence of these factors gives rise to three categories of cases when a federal court must be creative in deciding what legal principles should stand as “state law” for a federal court deciding state law issues: (1) when no state law on an issue exists; (2) when the federal court determines that the state law on the issue is in the process of change in the state courts; or (3) when the state precedent on the issue is outmoded, against trends in other jurisdictions, inappropriate under the circumstances of the case, or contrary to the state of the law in related

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5. Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1250 (2011) (discussing this dilemma).

6. The United States Supreme Court has made clear that a federal court may not abstain from hearing a case falling within its jurisdiction simply because the relevant state law happens to be unclear or unsettled. *Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943).

7. See *infra* notes 31-35 for further discussion of the impact of state law *stare decisis*. As for complicating federal principles: if a federal court within a particular district or circuit has previously grappled with a state law issue—not yet answered by any state court—should that federal court precedent have the usual *stare decisis* effect followed under the usual norms for federal courts? The answer is not clear given the tension between the possibly competing mandates from *Erie* and federal court rules of *stare decisis*. Jed I. Bergman, Comment, *Putting Precedent in its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 970 (1996).

8. For an investigation of this issue, see Note, Michael L. Lonergan, *A Federal Alternative to Erie Analysis of State Law During Diversity Appeals*, 50 FORDHAM L. REV. 117 (1982).

areas.<sup>9</sup> The cases in this area do not fall within neat categories, but by far the most frequent occurrence of federal court prediction falls into the first circumstance: simply no on-point state law exists. The various ways that federal courts confront this situation range from heavy-handed edicts about how state law should be to methodical attempts by a federal court to put itself (as neutrally as possible) in the shoes of the highest state court in deciding a case of first impression.

Finally, rather than simply taking the matter into their hands, federal courts may choose instead to nudge a state court to change or clarify the content of state law by certifying questions to the state's highest court.<sup>10</sup> Of course, this certification process also potentially jump-starts state law development, but the process is more consistent with the federalism spirit of *Erie* because the certification process is state-created, state-controlled, and (perhaps most importantly) the state's highest court—rather than the

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9. See, *Summers v. Fin. Freedom Acquisition LLC*, 807 F.3d 351, 356-58 (1st Cir. 2015) (deciding an issue related to Rhode Island probate and mortgage law in the absence of guidance from the Rhode Island Supreme Court); *Travelers Ins. Co. v. 633 Third Assoc.*, 14 F.3d 114,119 (2d Cir. 1994) (interpreting a New York statute that had never been construed by the New York court of Appeals, by evaluating statutory language, legislative history, statutory scheme, fabric of the relevant decisions, scholarly works, and other reliable data); *Mason v. Am. Emery Wheel Works*, 241 F.2d 906, 909-10 (1st Cir. 1957) (ruling that an earlier holding of Mississippi Supreme Court in a products liability case did not bind the federal court because Mississippi Supreme Court would “declare itself in agreement with the more enlightened and generally accepted modern doctrine” if addressing the question itself), *cert. denied*, 535 U.S. 715 (1957); *Wellin v. Wellin*, 211 F. Supp. 3d 793, 801 (D.S.C. 2016) (reasoning that although South Carolina still follows the Restatement (First) of Conflict of Laws, South Carolina courts would be willing to apply the Restatement (Second) to privilege issues because the “Second Restatement test is considered representative of the prevailing approach among states that have established a choice of law doctrine regarding privileges”); *Horizon Lawn Maint., Inc. v. Columbus-Kenworth, Inc.*, 188 F. Supp. 3d 631, 634-37 (E.D. Mich. 2016) (deciding a Michigan attorneys’ fee claim in the absence of binding state law precedent); *Miller v. Dorr*, 262 F. Supp. 2d 1233, 1238-39 (D. Kan. 2003) (reasoning that although Kansas state courts unequivocally follow the Restatement (First) of Conflict of Laws for tort cases, “it is not unreasonable to conclude that Kansas court could apply a different analysis in the area of workers compensation subrogation” since doing so would promote more uniformity and predictability); *Aetna Cas. & Surety Co. v. Dow Chem. Co.*, 883 F. Supp. 1101, 1104-05 (E.D. Mich. 1995) (applying the Restatement (Second) of Conflict of Laws to resolve an issue because—even though Michigan courts traditionally followed the Restatement (First) of Conflict of Laws—recent Michigan cases suggested a movement toward following the Restatement (Second) of Conflict of Laws); See also Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 700 n. 172 (1995), which cites and describes the following cases as examples of instances when federal courts sitting in diversity have chosen not to follow existing state supreme court decisions when dynamic changes in the state precedent appear to impugn the authority of earlier precedent: “*McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 662-66 (3d Cir. 1980) (holding that [the] Ohio Supreme Court’s decision in *Melnyk v. Cleveland Clinic*, 290 N.E.2d 916 (Ohio 1972), undermined [the] policy basis for its earlier decision in *Wyler v. Tripi*, 267 N.E.2d 419 (Ohio 1971), so that federal court was not bound to follow *Wyler* even in case[s] factually closer to *Wyler* than to *Melnyk*.”

10. See, e.g., *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 241-43 (1998) (ruling on a certified issue that had not been previously decided).

federal court—determines the answer to the contested question.<sup>11</sup> That said, many who have studied the matter find that federal courts tend not to use the certification procedure—at least that is the current trend.<sup>12</sup>

The guidance on handling questions about how to divine the content of state law originated with a statement in the *Erie* decision itself: “whether the law of the State shall be declared by its Legislature in statute or by its highest court in a decision is not a matter of federal concern.”<sup>13</sup> Through a series of subsequent U.S. Supreme Court decisions, this portion of the *Erie* decision morphed into the now-received wisdom that federal courts must follow decisions from the highest state court or—in the absence of an on-point decision—must attempt to predict what the highest court would do.<sup>14</sup> Despite this case law evolution, the idea that federal courts should be guided and perhaps bound by decisions of lower state courts when ascertaining state law has occasionally appeared in case law.<sup>15</sup> For the most part, however, courts and scholars have submerged this notion of lower state court guidance, focusing instead on decisions of the highest court of the state.<sup>16</sup>

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11. An exceptional procedure, the certification process is generally used only when the legal issue (1) implicates a matter of vital public concern, (2) is likely to recur, and (3) is likely to determine the outcome of the case. The certified question will usually be one that has been left unsettled by state courts or suffers from a split of authority. While the state court’s answer to a certified question is not absolutely binding and is technically merely informative, federal courts do not second guess the state court’s conclusions. *See infra* notes 46-51 and accompanying text for further discussion of benefits and limitations of the certification procedure.

12. For a review of reasons why federal courts use state certification procedures, *see* Note, Frank Chang, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts*, 85 GEO. WASH. L. REV. 251 (2017). That said, evidence exists indicating that both state and federal judges endorse using certification as an act of interjurisdictional cooperation. *See, e.g.*, Jonathan R. Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1688-1700 (2003).

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

14. *Wichita Royalty Co. v. City Nat’l Bank of Wichita Falls*, 306 U.S. 103, 107 (1930) (stating that it is “the duty of the federal court to apply [state law] as declared by the highest state court”). *See* Green, *supra* note 5 (stating that *Erie* requires “a federal court addressing an unsettled issue of state law to predict what the state court would do”); Dorf, *supra* note 9, at 696-99 (tracing the case law evolution toward the rule that—in ascertaining state law—federal courts should follow the rulings of the highest state court).

15. *See, e.g., infra* note 42 and accompanying text for the description of a petition for a writ of certiorari based on the complaint that the Court of Appeals for the 10<sup>th</sup> Circuit failed to follow law as announced by the intermediate court of a state.

16. *See* Dorf, *supra* note 9, at 697-98 (discussing support for and rejection of the proposition that state lower court opinions can reflect state law). *See* note 43 and accompanying text for the description of a petition for a writ of certiorari based on a complaint that the Court of Appeals for the 10<sup>th</sup> Circuit failed to follow law as announced by the intermediate court of a state.

In those instances when little state court guidance exists, federal courts tend to use a fluid analysis of a potpourri of factors and sources.<sup>17</sup> The U.S. Court of Appeals for the Third Circuit articulated a particularly freewheeling approach in *McKenna v. Ortho Pharmaceutical Corp.*,<sup>18</sup> stating that federal courts predicting state law should look to “broad policies” and “doctrinal trends” reflected in precedents, treaties, American Law Institute Restatements of the Law, and law review articles (particularly those published by in-state law schools).<sup>19</sup> With such indeterminate guidelines in place for these harder cases, federal courts enjoy substantial leeway to decide what state law *should* be.

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17. See, e.g., *In re Fair Fin. Co. v. Textron Fin. Corp.*, 834 F.3d 651, 672 (6th Cir. 2016) (deciding on the correct interpretation of Ohio’s statute of limitation when “direct guidance [from state law] is limited or altogether absent” by reference to the qualities of the Ohio statute as “broad,” Ohio case law on other matters, and “jurisprudence from other courts”); *Summers v. Fin. Freedom Acquisition LLC*, 807 F.3d 351, 356-58 (1st Cir. 2015) (deciding an issue related to Rhode Island probate and mortgage law not addressed by the Rhode Island Supreme Court, the court stated that “we start with settled principles of state law and fill the gaps by considering supplementary sources, such as persuasive authority from other jurisdictions and the teachings of learned treatises”); *United States v. Simpson*, 520 F.3d 531, 535-37 (6th Cir. 2008) (relying on Tennessee statutory construction principles, decisions of other states, and federal court interpretations in construing a provision of the Tennessee motor vehicle code that had not been interpreted by the Tennessee Supreme Court or intermediate Tennessee courts); *Vasquez v. North City Transit Dist.*, 292 F.3d 1049, 1054 (2d Cir. 2002) (stating that when no state supreme court decision is available, federal courts “should determine the result the court would reach based on state appellate opinions, statutes, and treatises”); *Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114, 119 (2d Cir. 1994) (interpreting a New York statute that had never been construed by the New York court of Appeals by evaluating statutory language, legislative history, statutory scheme, fabric of the relevant decisions, scholarly works, and other reliable data); *Guilford v. Frost*, 269 F. Supp. 3d 816, 825-28 (S.D. Mich. 2017) (deciding an issue of Michigan’s vehicle code that had not been interpreted by the Michigan Supreme Court by relying on an opinion of the Minnesota intermediate appellate court interpreting a similar provision in a Minnesota statute).

18. *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657 (3d Cir. 1980).

19. *Id.* at 662-63. For courts expressing similar approaches to prediction, see, e.g., *Summers*, 807 F.3d at 356-58 (deciding an issue related to Rhode Island probate and mortgage law not addressed by the Rhode Island Supreme Court, the court states that “we start with settled principles of state law and fill the gaps by considering supplementary sources, such as persuasive authority from other jurisdictions and the teachings of learned treatises”); *Travelers*, 14 F.3d at 119 (interpreting a New York statute that had never been construed by the New York court of Appeals by evaluating statutory language, legislative history, statutory scheme, fabric of the relevant decisions, scholarly works, and other reliable data); *Horizon Lawn Maint., Inc. v. Columbus-Kenworth, Inc.*, 188 F. Supp. 3d 631, 634-37 (E.D. Mich. 2016) (stating that when a state supreme court has not ruled on an issue, a federal court may look at all the available sources, including “‘positions expressed in a restatement of law;’ law review commentaries; and ‘decisions from other jurisdictions or the ‘majority rule’”) (citing *Bailey v. V&O Press Co.*, 770 F.2d 601, 604 (6th Cir. 1985)). For a description of another creative and possibly heavy-handed approach to difficult prediction situations, see Glassman, *infra* note 55 at 266 (stating that “at least three federal court of appeals have endorsed some of version of the proposition that when faced ‘with two opposing, yet equally plausible interpretations of state law . . . we generally chose the interpretation that restricts liabilityFalse”).

A more controversial question is whether federal courts are free to determine that existing precedent from the highest court of the state is unworthy of binding effect. Although the matter is not free from contradictory federal court decisions on this point, substantial support exists for the proposition that federal courts may legitimately conclude that, if presented with an issue at the current point of time in the particular context, the highest court in the state would likely deviate from its prior precedent. Several federal courts have expressed the view that a state supreme court decision may be ignored if “there are strongly persuasive reasons for the federal court’s belief that the state’s highest court would no longer adhere to its own decision.”<sup>20</sup> By embracing such views, federal courts have bestowed themselves with considerable latitude to determine the outcome of suits in a manner that is at odds with an existing (albeit old) state supreme court position on a particular matter.<sup>21</sup> Is there an ulterior motive for this? Read on.

## II. PRACTICAL CONSEQUENCES

Thus we see that *Erie*’s mandate often provides federal courts with substantial leeway to create or change state law. Is this good or bad? As is usually the case with questions of jurisdictional overlap, the answer is both complex and murky.<sup>22</sup>

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20. N.A. Burkitt, Inc. v. J.I. Case Co., 597 F. Supp. 1086, 1089 (D. Me 1984) (citing C. WRIGHT, A. MILLER, AND E. COOPER, 19 FEDERAL PRACTICE AND PROCEDURE §4507 at 1089).

21. Examples include: Mason v. Am. Emery Wheel Works, 241 F.2d 906, 909-10 (1st Cir. 1957) (deciding that an earlier holding of the Mississippi Supreme Court in a products liability case did not bind the federal court because the Mississippi Supreme Court would “declare itself in agreement with the more enlightened and generally accepted modern doctrine” if addressing the question itself), *cert. denied*, 535 U.S. 715 (1957); Wellin v. Wellin, 211 F. Supp. 3d 793, 801 (D.S.C. 2016) (reasoning that although South Carolina still follows the Restatement (First) of Conflict of Laws, South Carolina courts would be willing to apply the Restatement (Second) to privilege issues because the “Second Restatement test is considered representative of the prevailing approach among states that have established a choice of law doctrine regarding privileges”); Miller v. Dorr, 262 F. Supp. 2d 1233, 1238-39 (D. Kan. 2003) (reasoning that although Kansas state courts unequivocally follow the Restatement (First) of Conflict of Laws for tort cases, “it is not unreasonable to conclude that Kansas courts could apply a different analysis in the area of workers compensation subrogation” since doing so would promote more uniformity and predictability); *N.A. Burkitt, Inc.*, 597 F. Supp. at 1089-90 (interpreting a “contract clause” claim based on the Maine constitution, the court declined to follow the Maine Supreme Court interpretation of the state clause because “it is likely that the [Maine Supreme] Court will, in due course, change its approach to reflect” changes in federal court interpretation of the federal Constitution’s Contract Clause).

22. For an analysis of the interjurisdictional dynamics of sovereignty sharing with particular emphasis on a U.S. forum’s interplay with international law, but lessons for law sharing, *see generally* Paul B. Stephan, *Competing Sovereignty and Laws’ Domain*, 45 PEPP. L. REV. 239 (2018).



First a common-sense observation: two heads are generally better than one. Allowing federal courts to modernize state law or to fill in gaps where state law is lacking provides an opportunity for cross-fertilization between two different legal systems. Not only does this mean that well-designed principles from one system can be imported to another system, but it also means that the decision maker from one system (federal court) is given the opportunity to share a jurisprudential outlook that may vary from that of the other system (state court). Presumably the quality of justice in state courts benefits thereby. Even if the state court ultimately rejects the federal court's interpretation, the state court may sharpen or clarify state law in the process.

Also, one should not forget that federal court jurisprudence brims with examples of state law influencing the content of federal law. The Supreme Court has borrowed state law content when adjudicating issues relevant to federal constitutional law, federal statutory law, federal common law, and the like.<sup>23</sup> The process of predicting state law enhances knowledge of state law, which is important and useful for appreciating federalism's complexities and for informing the content of federal law. How does this enhance federal law's content? Just a few examples: giving meaning to a state-law grounded term in the U.S. Constitution (e.g., what

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23. See, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (evaluating whether state law creates an entitlement amounting to a property interest, the Supreme Court has recognized that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion"); *United States v. Craft*, 535 U.S. 274, 278-79 (2002) (holding that the rights of tenants by the entireties under state law are subject to the federal tax lien statute); *Drye v. United States*, 528 U.S. 49 (1999) (holding that the disclaimer filed by an heir under state inheritance law did not defeat a previously filed federal tax lien on the heir's inheritance, and that the inheritance was property or rights to property under the tax lien statute); *United States v. Bestfoods*, 118 U.S. 51, 62 (1998) (noting that many federal statutory schemes give "no indication that 'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute'" (quoting *Burkes v. Lasker*, 441 U.S. 471, 478 (1979))); *Paul v. Davis*, 454 U.S. 693, 710 (1976) (explaining that liberty and property interests enjoy "constitutional status by virtue of the fact that they have been initially recognized and protected by state law"); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (explaining that property interests "are not created by the Constitution" and that "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits"); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 729-30 (1979) (using state law to provide content of federal common law in the administration of certain federal loan programs); *United States v. Brosnan*, 363 U.S. 237, 240-42 (1960) (incorporating state law governing divestiture of federal tax liens as the content of federal common law in order to accommodate competing considerations of federal uniformity and well-established state procedures); *De Sylva v. Ballentine*, 351 U.S. 570, 580-81 (1956) (borrowing from state law to decide whether illegitimate children should be allowed to exercise the federal right of children to renew their deceased parents' copyrights).

is property under the Due Process Clause?),<sup>24</sup> filling interstices in a federal statutory scheme (e.g., what is the answer to corporate law successor liability under Comprehensive Environmental Response, Compensation, and Liability Act?),<sup>25</sup> and creating federal common law when a particularly strong federal interest is at stake (how do we enforce federal tax liens in the context of state marital property law?)<sup>26</sup>

Allowing cross-fertilization implicitly rejects the notion that authority is rigid and fixed. Instead, it accepts the idea that avoiding strict adherence to only one authoritative source could provide valuable guidance to all. In addition, inviting a flexible view of authority acknowledges the validity of multiple viewpoints and opens up greater possibilities for reconciliation and compromise. Both of these are salutary messages in the context of adversary litigation.<sup>27</sup> In instances when a federal court opines on a legal principle for which no state court decisions exist, the federal court may be providing useful guidance to citizens in planning their affairs and resolving their differences with each other. The federal court's efforts may also assist state courts in future state court cases in which the same legal issue emerges.

An interesting question is whether federal courts' approach to deciding state law questions furthers an underlying agenda—as is arguably at play when federal courts invoke justiciability and abstention doctrines.<sup>28</sup> Such an agenda may be ideological in a social and political sense, or it may result from governmentally oriented institutional

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24. See, e.g., *Gonzales*, 545 U.S. at 756 (evaluating whether state law creates an entitlement amounting to a property interest, the Supreme Court recognized that “a benefit is not a protected entitlement if government officials may grant or deny it in their discretion”).

25. 42 U.S.C. § 9601-9675 (2000). For example, *Bestfoods*, 118 U.S. 51 (1998), the United States Supreme Court left open the question whether state law or federal common law should provide the rules of successor liability under CERCLA. *Id.* at 63, n. 9.

26. See, e.g., *Brosnan*, 363 U.S. at 240-42 (1960) (incorporating state law governing divestiture of federal tax liens as the content of federal common law in order to accommodate competing consideration of federal uniformity and well-established state procedures).

27. Analyzing the allocation of adjudicative responsibilities between state and federal courts, Professor Barry Friedman makes a similar argument. Friedman reasons that this allocation task can be resolved without a bipolar (either/or) paradigm. Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1214-15 (2004). Friedman outlines the ways that multijurisdictional structures can be used effectively to resolve disputes. See also Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 300 (2005) (as an approach to federalism, “Dualism is fundamentally a formalist approach to the allocation of power between the states and the national government,” and a “polyphonic” approach to federalism “can accommodate plurality, dialogue, and redundancy”). For similar arguments in multiple contexts of hybrid lawmaking, see Little, *supra* note 5.

28. See generally, Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75 (1996), regarding how federal court doctrines such as justiciability and abstention doctrines can serve ulterior motives.

judgments about the most effective legal rules to govern state courts. Yet another alternative is possible: the impact of federal decision-making about the content of state law may be no more than an unwitting byproduct of federal courts earnestly seeking to fulfill *Erie*'s mandate. Within the world of this latter view, federal courts may simply be fulfilling their moral duty of faithfully and impartially upholding the U.S. Constitution and serving the governmental structure in which they operate. Indeed, if federal courts truly try to put themselves in the shoes of the highest state court rather than the state intermediate appellate court or a state trial court, then the federal court may arguably be guided by the latitude that the highest court in the state enjoys in evaluating existing trends in the law and in considering whether to deviate from precedent rendered by an earlier court. Under this view, the federal court is merely fulfilling the nature of its role. But is that really what is motivating heavy handed federal court decisions?

A definitive answer to this motivation question is, of course, unlikely ever to emerge. Humans, even principled humans, often fail to reveal their true motives in making a decision—either because they believe that they are serving a noble goal justifying nondisclosure of true “under the radar” motivation or they lack full self-knowledge about the inspirations for their decision. This is especially true when the decision maker labors under a duty of independence and impartiality, as well as public scrutiny.

Even assuming the most virtuous impartial decision-making is at work, federal court decisions on questions of state law pose substantial risks, threatening ill effects. In some instances, the process of predicting state law could be viewed as federal court law-making at its worst: not only are federal courts *making* law in a context where *Erie* unequivocally told them not to, but they are doing so under the guise of complying with *Erie*'s insistence that federalism requires deference to state authority.<sup>29</sup> From this perspective, federal courts are not only shoving their own view of justice and policy onto states, but also suggesting (perhaps inaccurately) that the state courts would want it that way. The criticism here is that federal courts deploy *Erie*'s mandate in a manner that is both hypocritical and contrary to the spirit of the decision.<sup>30</sup>

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29. *Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls*, 306 U.S. 103, 107 (1930) (suggesting that the federal court duty to apply state law as declared by the highest court in a state arises from the nature of our federalist system..

30. See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after Erie*, 15 U. PA. L. REV. 1459, 1489 (1997) (arguing that unbridled interpretation of state law is contrary to *Erie*'s purpose of ensuring “the political safeguards of federalism serve their intended function.”)

Here, we see in *Erie's* aftermath a familiar irony in federal jurisprudence: what is billed as federal restraint and deference can operate as a forceful exercise of federal influence. Federal abstention and justiciability doctrines are other common examples of this.<sup>31</sup> Using abstention and justiciability doctrines in the name of federal restraint, we have long seen how federal courts can accomplish a sometimes opposite effect of what they purport to do. Examples are broad, but two particularly salient examples are use of the standing doctrine and interpretations of 42 U.S.C. §1983 to stop any attempt for a remedy at the threshold of litigation.<sup>32</sup> Under the mantle of judicial self-control, federal courts can effectively take sides in culture wars, policy questions, and social justice initiatives. So-called principles of deference and restraint allow them to make a powerful impact on the bottom line of litigation and the fortunes of litigants.

When fulfilling their *Erie* duty, federal courts must guess at state law and venture into the legal “territory” of another sovereign; a territory that may likely be unfamiliar to the federal court. When in unfamiliar territory, courts may not be able to anticipate all consequences of their decisions. On a theoretical level, one also wonders whether the prediction process risks loss of state autonomy and sovereign identity. This, of course, is a risk that should be weighed against the salutary effects of cross-fertilization across legal systems.

Making matters worse, the practice of federal court prediction of state law yields another incentive contrary to the spirit of *Erie*: forum shopping. Indeed, prediction practice exacerbates existing forum-shopping possibilities and even expands them, promoting both horizontal forum shopping between geographic locations (choosing whether to file in state or federal court in one state versus state or federal court in another state based on the result that would likely be reached in these forums) as well as vertical forum shopping between state and federal courts within a

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31. See, e.g., Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 115 (1984) (stating that “judicial lawmaking through abstention can very directly undermine [a carefully structured federal statutory] goal”); Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 881 (2008) (describing how the United States Supreme Court has used the “standing doctrine to control the conditions of developing constitutional doctrine”).

32. For standing, see, e.g., *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007), in which the Court invoked judicial deference in order to stop at the doorstep of litigation an Establishment challenge to a faith-based initiative of the George W. Bush administration. The result? The faith-based initiative lived on. Similar examples from the 42 U.S.C. §1983 context are plentiful. As one exemplar, consider the long line of cases shutting out any federal court attempt to provide a federal remedy for violations of a federal statute for which no private right of action is authorized. See the long line of cases starting with *Maine v. Thiboutot*, 448 U.S. 1 (1980).

particular state. This complication results, in large part, from the contemporary variety in choice-of-law methodologies among the states and the intricacies of stare decisis principles. Why is this important? By definition, when opposing litigants are from different states, more than one state may have interest in their own state law applying. To resolve this clash, a choice-of-law methodology is needed.

Below is a more detailed explanation of how precisely this can occur:

At the time *Erie* was decided, most states followed the territorial approach to conflict of laws. Given this uniformity in choice-of-law approach, different jurisdictions tended to apply the same state law to given suits with multi-state elements. Thus, once a court determined that state law should govern a particular question, chances were good that any state court in the United States might ultimately resolve the specific dispute by applying the legal principles of the same state.

Take the following scenario:

If a two-car accident occurred in State A and the drivers of the cars were from State D (driver) and State V (victim), most state courts would apply the traditional approach mandating that the law of the state where the accident occurred (State A's law) be applied in a tort suit between the State D and State V parties. The content of tort principles is a state law matter. Thus, the *Erie* directive that state law, not federal law, should govern the issue originally had the effect that a federal court (1) would apply state law for issues respecting the state tort law and (2) would follow the mandate to apply the specific state choice-of-law principles of the state where they sit, but would end up with the same choice-of-law result as other federal courts around the country. The result would be the same, irrespective of which federal court in the United States decided the case—since all state courts would likely follow the same choice-of-law analysis, which would also likely result in the same choice-of-law result.

Why does this result follow? The Supreme Court ruled in *Klaxon v. Stentor*<sup>33</sup> that a federal court deciding among competing state laws should apply the choice-of-law methodology of the forum state where the federal court sits. This edict came soon after *Erie*. Accordingly, given the original uniformity in choice-of-law approaches among the states, the same choice-of-law result would likely occur no matter which federal court around the United States served as the lawsuit's forum. Thus, all federal courts would likely be applying the same choice-of-law approach.

States now follow a myriad of choice-of-law methodologies, leading to less uniformity on which state's laws might govern. Given *Klaxon v.*

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33. *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487 (1941).

*Stentor*'s<sup>34</sup> directive, this variety among state methodologies enriches the benefits for a litigant to indulge in horizontal forum-shopping among states. In other words, as hard as *Erie* might have tried to eliminate vertical (state-federal) forum shopping, horizontal (state-state) forum shopping remains—and in fact (as illustrated in detail below) may be enhanced in some situations.<sup>35</sup> In instances when a state's choice-of-law methodology is in flux or is arguably outmoded, the prediction process opens the possibility that a federal court will more likely choose to apply a new and different methodology, varying from what a state trial court would do under the circumstances. Indeed, the case law reflects numerous instances of federal courts making an apparent change from the standard choice-of-law approach traditionally followed by the state supreme court in the state where the federal court sits.<sup>36</sup> Federal court flexibility in the prediction process promotes horizontal forum shopping as well, so that the shrewd litigator has incentive to investigate closely which state location to file in, even if the litigator also has the intention of filing in federal court.

A complicating and exacerbating factor bearing on both vertical and horizontal forum shopping is stare decisis policy in state and federal courts. The doctrine of stare decisis generally holds that a court in one court system is bound by previous decisions in the same court system when the same points arise in new litigation.<sup>37</sup> But, as is nearly always the case with abstract legal principles, the matter is complicated. First, as with forum shopping generally, stare decisis divides into vertical and horizontal categories. In this context, the terms “vertical” and “horizontal” mean specific things unique to this context. Vertical stare decisis binds lower courts to decisions of higher courts within the same jurisdiction.

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34. *Id.*

35. For further discussion of *Erie*'s impact on horizontal forum shopping, see Patrick J. Borchers, *The Real Risk of Forum Shopping: A Dissent from Shady Grove*, 44 CREIGHTON L. REV. 29, 31-33 (2010). See also Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 1, 12 (2013) (noting that for class litigation, *Erie* and differences among state choice of law doctrines increase forum shopping incentives). See generally Laura E. Little, CONFLICT OF LAWS: CASES, MATERIALS, AND PROBLEMS 752-54, 757-58 (Aspen ed., 2d ed. 2018).

36. *Wellin v. Wellin*, 211 F. Supp. 3d 793, 801 (D.S.C. 2016) (reasoning that although South Carolina still follows the Restatement (First) of Conflict of Laws, South Carolina courts would be willing to apply the Restatement (Second) to privilege issues because the “Restatement Second test is considered representative of the prevailing approach among states that have established a choice of law doctrine regarding privileges”); *Miller v. Dorr*, 262 F. Supp. 2d 1233, 1238-1239 (D. Kan. 2003) (reasoning that although Kansas state courts unequivocally follow the Restatement (First) of Conflict of Laws for tort cases, “it is not unreasonable to conclude that Kansas court could apply a different analysis in the area of workers compensation subrogation” since doing so would promote more uniformity and predictability).

37. For an overview of stare decisis generally, see Little, *supra* note 35.

Horizontal stare decisis holds courts, especially appellate courts, to their own prior decisions.<sup>38</sup> Stare decisis reinforces central values of the U.S. political system: the doctrine validates that the society should be ruled by law and not the opinions of those “who temporarily occupy high office”<sup>39</sup> and seeks to ensure that government enjoys stability and predictability.<sup>40</sup>

*Erie* and subsequent cases focused on eliminating vertical forum shopping. But, as referenced immediately above, vertical forum shopping still survives. Stare decisis (particularly when combined with *Klaxon*) fuels vertical forum shopping as well. The following shows how forum shopping arises from the alchemy of *Erie* and stare decisis (with *Klaxon* thrown in for spice in this particular hypothetical).<sup>41</sup>

Let’s say a potential plaintiff’s lawyer, Violet, researches the law surrounding the claims she wants to make, which involve both State A and State B. She knows she can easily justify personal jurisdiction over the defendant in both States A and B. The parties are diverse—so filing in federal court is an option for her. Evaluating the dispute’s facts, Violet calculates that she can file in either state or federal court and in either State A or B with no viable subject matter or personal jurisdiction challenge in any of the courts. This means that she has four court options for the suit: State A federal court, State A state court, State B federal court, and State B state court. Violet’s legal research and knowledge of the facts reveal complications as to whether State A or State B law will apply to the suit: the law of State A is substantially better for her cause of action. In fact, she thinks she would lose a motion to dismiss if State B law were applied. Violet then researches the choice-of-law approach of State A and State B. She sees that State B’s choice-of-law methodology has been fixed (and stable) for the last 15 years or so, and State B would apply its own law to

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38. Timothy Oyen, *Stare decisis*, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/stare\\_decisis](https://www.law.cornell.edu/wex/stare_decisis) [<https://perma.cc/9D5F-34UB>]; Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L. J. 787, 790 (2012).

39. Earl M. Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 371 (1988).

40. Michael Gentithes, *In Defense of Stare Decisis*, 45 WILLAMETTE L. REV. 799, 799 (2009) (citing values that stare decisis serves). For a discussion of the factors that bear on how stare decisis operates, see Mead, *supra* note 38; Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 414-18 (2010); Brian C. Kalt, *Three Levels Of Stare Decisis: Distinguishing Common-Law, Constitutional, And Statutory Cases*, 8 TEX. REV. L. & POL. 277, 278-281 (2004). See generally 20 Am. Jur. 2d *Courts* § 141-148 (2005 & Supp. 2013).

41. The *Klaxon*/conflict of laws angle in this hypothetical injects a complication on an already tangled set of factors that a skilled litigator should consider before filing suit. While not all practicing lawyers are necessarily inclined to (or equipped to) puzzle through choice of law issues in deciding where to file a lawsuit, the issues often do have a profound effect on the fortunes of the litigants. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

govern her cause of action. State A's traditional choice-of-law rules would also apply State B law. But Violet has found many State A case law suggestions from the State A Supreme Court indicating that it would consider changing the current choice-of-law rules incrementally as specific cases come before the state supreme court. The orientation reflected in this State A Supreme Court dictum suggests that the State A Supreme Court might apply a choice-of-law approach that would designate State A law to govern the basics of the cause of action. In that event, Violet could likely get over the motion to dismiss and could submit highly persuasive evidence for her client at trial.

Given the general preference of courts to apply the law of the forum, Violet therefore concludes that she would best serve her client's needs by filing in State A. But which court in State A should she file in: state or federal? If Violet files in a State A state trial court, the court will likely—under *stare decisis* principles—deviate from established choice-of-law precedent of the State A Supreme Court and apply choice-of-law precedent, making clear that State B law will apply.<sup>42</sup> But if Violet files the suit in federal court in state A, the court will have the latitude of anticipating that, in fact, State A's Supreme Court would apply State A law under an updated conflict-of-law methodology: after all, the *Erie* precedent gives license to predict what a state supreme court would do under the circumstances of the particular case.

Some of the forum shopping in this scenario springs from the interplay between the jurisdictional mosaics that we know as U.S. federalism interacting with the personal jurisdiction doctrine. *Erie* touches this particular dynamic only lightly by permitting federal courts to diverge from a state's choice-of-law jurisprudence when applying that state's choice-of-law rules. But the point here is that the invitation from *Erie* case

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42. This fact pattern implicates the question of whether state courts labor under horizontal *Erie* obligations. According to Professor Michael Steven Green, horizontal *Erie* imposes the same duty on state courts as vertical *Erie* imposes on federal courts: state courts applying another state's law should interpret the law of the sister state as the supreme court of the sister state would do. *See* Green, *supra* note 5. Despite the logic and elegance of this parallel reasoning, many courts do not follow this approach. Instead, state courts routinely follow a presumption that is in tension with the principle: the presumption that another state's law is the same as the law of one's own state. *See* *Knieriemen v. Bache Halsey Stuart Shields Inc.*, 427 N.Y.S.2d 10, 15 (N.Y. App. Div. 1980) (applying presumption); *ROC-Century Assoc. v. Giunta*, 658 A.2d 223, 226 (Me. 1995) (applying presumption); *Am. Honda Fin. Corp. v. Bennett*, 439 N.W.2d 459, 460 (Neb. 1989) (applying presumption). Nonetheless, the issue needs to be considered—particularly when one appreciates that the full faith and credit principle is likely implicated. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality opinion) (holding that the Constitution requires that a state's law may govern parties' rights only when state has a "significant contact or aggregation of contacts, creating state interests with the parties and the occurrence or transaction").



law has clearly steered Violet to shop among various vertical and horizontal options and to conclude that State A federal court would be best for her client.

That result, ladies and gentlemen, is forum shopping. Yet another ironic angle emerges from *Erie*'s mandate that—in the absence of direct evidence—a federal court should predict what a state court would do.

### III. ASSESSMENT AND CONCLUSION

Thus, we have two significant ironies arising from *Erie*'s apparent direction that a federal court adjudicating an issue governed by state law should put itself in the shoes of a state supreme court: this directive invites federal courts to fabricate state law and invites litigants to shop among state and federal courts—as well as among geographic units—to find the forum most likely to create favorable law. This type of federal power assertion and litigation gamesmanship provides unseemly symbols in the name of *Erie*. But are the effects of these incentives sufficiently negative to merit a change in approach?

As reviewed above, several benefits to courts and litigants result from the prediction process: more guidance on the content of law, helpful feedback and synergies between state and federal courts, and possible efficiencies result.<sup>43</sup> Equally significant is the existing evidence on state court reactions to earlier federal court discussions on state law. These state court reactions do not generally suggest hostility. Nonetheless, in an occasional, yet attention-worthy opinion, one detects distaste by a state court recoiling from, or even protesting, the earlier prediction of a federal court.<sup>44</sup>

One opinion by the Ohio Court of Appeals even suggested that the earlier federal court decision reflected heavy-handedness in interpreting state law, taking particular offense at the federal court's conclusion that

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43. See *supra* notes 21-25 and accompanying text for further discussion of positive consequences of federal court prediction of state law.

44. For example, in *State ex rel. Elvis Presley Int'l. Mem'l Found. v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987), the court rejected a federal law interpretation on descendible rights of publicity, stating:

The United States Court of Appeals for the Sixth Circuit appears to believe that there is something inherently wrong with recognizing that the right of publicity is descendible . . . We do not share this bias . . . we recognize that the trend since the early common law has been to recognize survivability, notwithstanding the legal problems which may thereby arise.

*Id.* at 97 (citations and quotations omitted).

the state court needed help to “modernize” state law.<sup>45</sup> Similarly, the California Court of Appeals rejected a federal court ruling on homestead statutes, stating that the federal court interpretation threatened anomalous results that “would cripple the doctrine of priority liens.”<sup>46</sup> One other example shows a slight edge to the state court’s language responding to the federal courts’ approach. In this example, the courts dealt with whether the “unreasonable delay” rule applied to the recovery of stolen property, even where the original owner of the property did not know who possessed the stolen goods or where they were located. The United States Court of Appeals held that it did not,<sup>47</sup> but the highest New York state court disagreed in two separate cases, stating in one case: “We conclude that the Second Circuit should not have imposed a duty of reasonable diligence on the owners of stolen art work for purposes of the Statute of Limitations.”<sup>48</sup> Complaints about federal court overreaching are not limited to state court opinions. In a recent petition for a writ of certiorari

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45. *Watkins v. Lyle*, No. 7209, 1981 WL 2575 (Ohio Ct. App. Oct. 20, 1981), rejected a prior federal statement that the Ohio Supreme Court had overruled an earlier decision declining to apply the discovery rule in a statute of limitations dispute. In rejecting the federal court prediction, the Ohio court stated:

Appellant relies heavily on [Ohio Supreme Court decision #1] for the proposition that [the decision] has been implicitly overruled by [Ohio Supreme Court decision #2]. However, it appears that [federal court decision] was based on a desire to ‘modernize’ rather than interpret Ohio law. . . . While the ‘discovery rule’ may provide the most equitable resolution to problems concerning the bringing of medical malpractice claims, ‘modernization’ . . . must be left to the legislature.

*Id.* at \*3 n.2.

46. *Teaman v. Wilkinson*, 69 Cal. Rptr. 2d 705, 707–09 (Cal. Ct. App. 1997) (rejecting the Ninth Circuit decision in *In re Jones*, 106 F.3d 923, 924–25 (9th Cir. 1997)). In response to this decision (and another decision of the California Court of Appeals), the Ninth Circuit overruled the *Jones* decision. *In re Watts*, 298 F.3d 1077, 1081–83 (9th Cir. 2002) (stating that upon “reexamining our interpretation of [the statute] in light of [the California Court of Appeals decisions], we conclude that, if confronted with the issue, the California Supreme Court would follow the rationale of [these decisions] and not the approach that we adopted in *Jones*.”)

47. *DeWeerth v. Baldinger*, 836 F.2d 103, 108 (2d Cir. 1987).

48. *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 430 (N.Y. 1991). Consider as well the following description of an appeals court’s attempt to predict the position of the Pennsylvania Supreme Court on whether to adopt the Restatement (Third) of Torts:

The anomaly [of federal court’s dispensing a different brand of justice than state courts on state law issues] is . . . ‘abhorrent’ [and] fundamentally unfair. . . . Yet that is exactly what happened as a result of the Third Circuit’s prediction that Pennsylvania would adopt the Restatement (Third). . . . and its stubborn refusal to back off that prediction, despite the Pennsylvania Supreme Court’s failure to adopt the Restatement (Third) for five years, even though Pennsylvania’s justices were presented opportunities to make the change. . . . [T]he Pennsylvania Supreme Court finally did speak and determined not to adopt the Restatement (Third).

Doris DeTosto Brogan, *Less Mischief, Not None: Respecting Federalism, Respecting States and Respecting Judges in Diversity of Jurisdiction Cases*, 51 TULSA L. REV. 39, 41 (2015).

filed in the U.S. Supreme Court, litigants stridently explained that the Court of Appeals for the Tenth Circuit improperly ignored existing lower state court precedent, creating a decision that is inimical to *Erie* and federalism principles.<sup>49</sup>

These examples are not unique, but other examples show state courts taking a different approach to prior federal court proceedings. In some examples, the state court cites to the prior federal court interpretation, and straightforwardly concludes something to the effect of ‘Nope, they got it wrong.’<sup>50</sup> Still, other examples reveal little, reflecting only ambiguous or silent state court responses to earlier federal court interpretations.<sup>51</sup> But in many other instances, state courts embrace and apply the earlier federal

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49. *Aspen Insurance (UK) Ltd. v. Black & Veatch Corp.*, 882 F.3d 952 (10th Cir. 2018), cert. denied on Oct. 1, 2018 (No. 17-1662).

50. For an overview of cases in which the state court rejected an earlier federal court prediction, see Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit’s Experience*, 115 PENN ST. L. REV. 377, 407 (2010) (noting a long history of instances when “federal courts sitting in diversity are later overruled by state high courts.”) See also the following description by Court of Appeals Judge Guido Calabresi:

[T]he concept of duty in the tort law of New York is virtually unique to New York and very complicated. As a result, federal judges who deal with the concept in a New York tort case frequently get it wrong. They may be right in thinking that what they hold is what New York law ought to be, but it ain’t New York law!

Guido Calabresi, *Federal and State Courts: Restoring A Workable Balance*, 78 N.Y.U. L. REV. 1293, 1300 (2003).

51. See *Lake Land Empl. Grp. of Akron, LLC v. Columber*, 804 N.E.2d 27 (Ohio 2004) (noting disagreement among lower Ohio courts on a contract consideration issue and rendering a holding consistent with an earlier federal court prediction, but not citing the earlier federal court decision). For an example of ambiguity, consider the Superior Court of Massachusetts, which flatly rejected an attempt by the U.S. Court of Appeals for the First Circuit to interpret Massachusetts’ adoption of U.C.C. section §2-207 without the guidance of Massachusetts case law: *S&F Concrete Contractors, Inc. v. Strickland Sys., Inc.*, No. CA933525, 1995 WL 808874, at \*6 (Mass. Super. Apr. 25, 1995) (stating that “[this] Court is persuaded that [federal court’s interpretation] is in fact an incorrect application of § 2-207.”) In another example, it is unclear whether the state court was annoyed. Certainly, the state supreme court did not agree with the federal court that had earlier interpreted the issue of whether privity of contract was required under Mississippi law to recover under an implied-warranty tort claim. The Mississippi Supreme Court stated: We are also conscious of suggestion made in the decision of [the court of appeals judge in an earlier First Circuit case]. [W]e find, however, that it is not necessary to pass upon or disturb the former opinions of this Court in order to reach a decision in this case.” *Harrist v. Spencer-Harris Tool Co.*, 140 So. 2d 558, 561 (Miss. 1962).

court opinion,<sup>52</sup> sometimes even stating that the federal predictions were helpful.<sup>53</sup>

Is it an awful state of affairs when federal courts do their best to predict state law and the state courts comfortably reject that prediction? The answer is no. The state court response is part of a vibrant intellectual dialogue that creates good results. The weight of evidence suggests that the prediction model is working in a satisfactory way. Both state and federal courts are ruminating on a difficult subject, one court (federal) is telling the other court (state) what the first court thinks is right under the circumstances, and the second court (state)—the one with the final say on the matter—is considering the view of the first court to consider the question, but ultimately comes to a different conclusion. One must think that justice is served by the process. With that being said, the expressions of state court resentment with what was perceived as federal court overreaching is cause for concern.

What would be an alternative to the prediction model that might address these concerns? A few options emerge. First, one might conclude that dismissal of an action presenting a difficult question of federal law is arguably an abdication of judicial responsibility, counter to Congress's intent in enacting 28 U.S.C. §1332 (at least in the context of a damages

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52. In *Ash v. Cont'l Ins. Co.*, the Superior Court of Pennsylvania considered numerous federal court interpretations of Pennsylvania law regarding the statute of limitations for bad faith claims. *Ash v. Cont'l Ins. Co.*, 861 A.2d 979, 982–84 (Pa. Super. Ct. 2004), *aff'd*, 593 Pa. 523, 932 A.2d 877 (Pa. 2007) (citing *Haugh v. Allstate Ins. Co.*, 322 F.3d 227 (3d Cir. 2003)); *Lochbaum v. U.S. Fid. & Guar. Co.*, 136 F. Supp. 2d 386 (W.D. Pa. 2000) *aff'd* 265 F.3d 1055 (3d Cir. 2001); *Nelson v. State Farm Mut. Auto. Ins. Co.*, 988 F. Supp. 527 (E.D. Pa. 1997); *Woody v. State Farm Fire and Cas. Co.*, 965 F. Supp. 691 (E.D. Pa. 1997)). The superior court turned to federal court decisions for guidance because no prior appeals court had considered the issue and state trial courts applied different statutes of limitations to bad faith actions. Rejecting some of the state trial court decisions, the superior court followed the federal court decisions and held that a two-year statute of limitations applied. *Ash*, 861 A.2d at 981-84. *See also* *Ario v. Deloitte & Touche LLP*, No. 734 MD 2002, 2008 WL 6626953 (Pa. Commw. Ct. June 13, 2008) (deciding an insolvency issue consistent with an earlier federal court prediction and explaining why another earlier federal court decision was distinguishable); *Swagelok Co. v. Young*, No. 78976, 2002 WL 1454058, at \*4 (Ohio Ct. App. July 3, 2002) (agreeing with earlier federal court prediction that that continued employment constitutes adequate consideration to render a restrictive covenant enforceable); *Marr Scaffolding Co., Inc. v. Fairground Forms, Inc.*, 682 A.2d 455, 456 (R.I. 1996) (agreeing with a prior federal district court ruling regarding whether “omnibus language” in a general release provision effectively releases unnamed third parties, stating that “[w]e now fulfill [the federal district court’s] prophecy”); *Bowling v. Heil Co.*, 511 N.E.2d 373, 380 n.5 (Ohio 1987) (embracing an earlier state court decision on comparative negligence principles, the court stated that the federal court, “faced with this issue two years ago, accurately predicted the result we reach today”).

53. *See, e.g., Kirchner v. K & L Gates LLP*, 46 A.3d 737, 753 (Pa. Super. Ct. 2012) (stating “[w]e find the rationale expressed by the federal appeals court in [an earlier decision on the issue] helpful” in fashioning the state court’s own judgment on the matter).

case).<sup>54</sup> Insisting on certification in any case of absent or ambiguous state law is likely to impose burdens on litigants and state courts,<sup>55</sup> although increasing the use of certification may be an option. The U.S. Supreme Court has suggested the certification procedure is “particularly appropriate” when state law is unsettled or novel.<sup>56</sup> It is important to note, however, that the certification option has limitations. For example, several states receive certified questions only from federal appeals courts, thus making the procedure unavailable to the front line—federal district courts.<sup>57</sup> Once a federal district court makes a decision, a federal appeals court may be loathed to reject that judgment by certifying. Also, the process is slow, and the state’s highest court does not always get the benefit of viewing a full factual record.

Another possibility for avoiding the downsides of engaging federal courts in *Erie*-guessing is to invigorate the *Thibodaux* abstention

54. See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S.706, 721 (1996) (holding that federal courts have the power to dismiss a case on abstention grounds only where the parties request discretionary relief such as an injunction).

55. Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 250 (2005-2006) (describing delay caused by certification). A 1995 study of certification determined that federal district court judges waited an average of 8.2 months for an answer to a certification question, and court of appeals judges waited an average of 6.6 months for an answer to their certified questions. These findings were based on relatively low response rates to the questionnaire forming the basis of this study. JONA GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE (Am. Judicature Soc’y 1995) (cited in Brogran, *supra* note 48 at 76). Judge Guido Calabresi apparently does not put weight on this concern with delay and effect on state courts, arguing the following:

Federal judges don’t like to certify because we think we know, better than the states, what state law ought to be. But that isn’t the point. We should be humble. We should realize that it is state law, and hence that it is up to the states. Moreover, we should recognize that the parties have a right to have state, rather than federal, judges decide issues of state law. If we are unwilling to certify frequently—indeed to certify almost all of the time—then a more radical solution would be to have Congress pass a law allowing the parties to petition the highest court of the state to review, if it chooses, a decision on state law made by the federal court of appeals.

See Calabresi, *supra* note 50 1301-1302. Judge Calabresi further suggests that the federal courts take the first crack at an opinion before certifying—a suggestion that would alleviate strain on the state courts.

56. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (stating that the decision whether to certify “rests in the sound discretion of the federal courts,” and that certification is “particularly appropriate in view of the novelty of the questions and great unsettlement” of the state law at issue). For vibrant advocacy in favor of more use of certification, see, e.g., Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373 (2000).

57. Paul A. LeBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999, 1000 n.4 (1985).

doctrine,<sup>58</sup> which enables a federal court to abstain in order to allow a state court to clarify uncertain issues of state law in the diversity of jurisdiction context when an important state interest that is “intimately involved” with the state government’s “sovereign prerogative” hangs in the balance.<sup>59</sup> The potential reach of this abstention doctrine, however, is limited. The U.S. Supreme Court has made clear that uncertainty in state law does not alone justify abstention<sup>60</sup> and has limited the power to justify dismissing a case—unless only a discretionary remedy is sought, and (perhaps most importantly) has sent a strong message that federal courts should abstain only in extraordinary circumstances.<sup>61</sup> What is counseled from the state court push back in some cases, as well as the tension between prediction practices and *Erie*’s policies, is a sensitive and restrained approach to prediction.<sup>62</sup> In other words, when federal courts deploy their duty to predict state law, they should proceed cautiously, mindful that the ultimate power to say what state law is rests with the highest court of the state. That’s the bottom line.

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58. The doctrine is named after *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

59. *Id.* at 28. On the difference between certification and abstention, see Deborah J. Challener, *Distinguishing Certification from Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 RUTGERS L.J. 847 (2007).

60. *Meredith v. Winter Haven*, 320 U.S. 228, 235-37 (1938) (holding that federal courts should not abstain in diversity cases simply because state law is unclear).

61. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716, 721 (1996) (holding that federal courts should abstain only rarely and have the power to dismiss a case on abstention grounds only where the parties are discretionary relief such as an injunction).

62. For an argument in favor of a more aggressive approach to interpreting state law, see, e.g., Arthur L. Corbin, *The Laws of the Several States*, 50 YALE L. REV 763, 775 (1941) (arguing that when interpreting state law, federal courts should use “judicial brains, not a pair of scissors and a paste-pot.”)