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# LESS MISCHIEF, NOT NONE: RESPECTING FEDERALISM, RESPECTING STATES AND RESPECTING JUDGES IN DIVERSITY JURISDICTION CASES

Doris DelTosto Brogan\*

## I. INTRODUCTION

[M]ischievous in its consequences, baffling in its application, untenable in theory . . . a perversion of the framers of the First Judiciary Act. It results in two independent lawmakers within the same state emitting conflicting rules concerning the same transactions. The fortuitous circumstance of residence of one of the parties at the time of the suit determines what rule is to prevail in particular litigation.<sup>1</sup>

Justice Frankfurter so described the effect of the much-maligned case of *Swift v. Tyson*,<sup>2</sup> discredited by commentators and judges alike, and overruled by *Erie Railroad Co. v. Tompkins*.<sup>3</sup> Drawing on both the Constitution and the Rules of Decisions Act (“RDA”), *Erie* emphatically ended the practice of federal courts sitting in diversity creating their own version of the state law they were to apply by holding that the federal diversity courts must apply the law as articulated by the appropriate state court.<sup>4</sup> At least, that was the intention. But almost seventy-five years later, it seems we still have mischief—situations in which the “fortuitous circumstance of residence of the parties” can result “in two independent law makers within the same state emitting conflicting rules concerning” identical transactions—the very situation Justice Frankfurter described as perverse and set out to end in *Erie*.<sup>5</sup>

Pennsylvania provides a most vivid example of this mischief. Because of the Third

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1. Philip B. Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 198 (1957) (citing Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. REV. 499, 526-27 (1928)).

2. *Tyson v. Swift*, 41 U.S. 1 (1842).

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

4. *See id.* at 78-79.

5. *See* Kurland, *supra* note 1.

Circuit's decision in *Berrier v. Simplicity Manufacturing*,<sup>6</sup> for five years, a party bringing a products liability action governed by the substantive law of Pennsylvania in a Pennsylvania state court, would try the case under § 402A of the Restatement (Second) of Torts.<sup>7</sup> But if that party brought the same products liability action in a federal court in Pennsylvania sitting in diversity, the court would try the case under the Restatement (Third) of Torts.<sup>8</sup> The Restatement (Second) of Torts § 402 differs significantly from comparable sections of the Restatement (Third) of Torts,<sup>9</sup> and these differences will, in many cases, result in opposite outcomes.<sup>10</sup> If we understand anything about the holding of *Erie* and its progeny,<sup>11</sup> it is that federal courts sitting in diversity are supposed to apply the same substantive law as would their state court counterparts.<sup>12</sup> Any other result would do violence to the principle of uniformity within a state upon which the *Erie* decision is based.<sup>13</sup> “The anomaly of having two courts across the street (or as the Supreme Court now prefers to say, ‘a block away’)<sup>14</sup> dispensing justice in similar cases” where they are required to apply the same law, but actually applying different substantive laws “is

6. *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 60-61 (3d Cir. 2009).

7. *See* *Schmidt v. Boardman Co.*, 11 A.3d 924 (Pa. 2011) (applying Section 402A of the RESTATEMENT (SECOND) OF TORTS); *Lance v. Wyeth*, 4 A.3d 160, 169 (Pa. Super. Ct. 2010) (“Until and unless our [Pennsylvania] Supreme Court alters its approach to strict liability, we will continue to adhere to established principles.”) (citing *Bugosh v. Allen Refractories Co.*, 932 A.2d 901, 911 (Pa. Super. Ct. 2007)). *See also* *Burk v. Hillerich & Bradsby Co.*, 2009 WL 7039607, at n.2 (Pa. Com. Pl. Aug. 31, 2009) (holding that although Pennsylvania may be moving towards adopting the Restatement (Third) of Torts as per *Berrier*, the court was bound by precedent to apply the Restatement (Second) of Torts) (citing *Berrier*, 563 F.3d at 60-61); *Wiggins v. Synthes (U.S.A.)*, 29 A.3d 9 (Pa. Super. Ct. 2011); *Reott v. Asia Trend, Inc.*, 7 A.3d 830 (Pa. Super. Ct. 2010); *Kolar v. Buffalo Pumps Inc.*, 2010 WL 5312168 (Pa. Com. Pl. Aug. 2, 2010); *Ferris v. Golf Car Supply Co.*, 2010 WL 5573793 (Pa. Com. Pl. July 8, 2010); *Balliet v. Toyota Motor Sales USA, Inc.*, 2010 WL 5576205 (Pa. Com. Pl. July 2, 2010); *Grugnale v. Tymosky*, 2010 WL 4356954 (Pa. Com. Pl. May 27, 2010); *Kiak v. Crown Equip. Corp.*, 989 A.2d 385 (Pa. Super. Ct. 2010); *Shaffner v. Aesys Techs., LLC*, 2010 WL 605275 (Pa. Super. Ct. Jan. 21, 2010); *Gresik v. PA Partners, L.P.*, 989 A.2d 344 (Pa. Super. Ct. 2009); *Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823 (Pa. 2012).

8. *See* *Covell v. Bell Sports, Inc.*, 651 F.3d 357 (3d Cir. 2011); *Berrier*, 563 F.3d 38 at 60-61; *Lynn ex rel. Lynn v. Yamaha Golf-Car Co.*, 894 F. Supp. 2d 606 (W.D. Pa. 2012); *Sansom v. Crown Equip. Corp.*, 880 F. Supp. 2d 648 (W.D. Pa. 2012); *Giehl v. Terex Utils.*, 2012 WL 1183719 (M.D. Pa. Apr. 9, 2012); *Hoffman v. Paper Converting Mach. Co.*, 694 F. Supp. 2d 359 (E.D. Pa. 2010).

9. *See Sansom*, 880 F. Supp. 2d at 654 (noting that determining which Restatement governs is important because the Restatement (Third) of Torts differs notably from its predecessor).

10. *See id.* While the famous “outcome determinative” language announced in *Guaranty Trust* was found vague, it captures the essence of *Erie* as focused by subsequent cases. *See* *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (narrowing “outcome-determinative” language holding that *Erie* rule rooted in part in idea that it is unfair for result of a litigation to differ materially depending on whether brought in state or federal court; *See also* *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 416 (1996); *Salve Regina Coll. v. Russel*, 499 U.S. 225, 234 (1990). *See also* *DeJesus v. Knight Indus.*, 599 F. App'x 454 (3d Cir. 2015) (mem.), in which the Third Circuit reversed the district court's dismissal of plaintiff's case based on application of the Restatement (Third) of Torts and remanded the case for reconsideration in light of the Pennsylvania Supreme Court's decision in *Tincher v. Omega Flex, Inc.* 104 A.3d 328 (Pa. 2014) (Pennsylvania court reverses *Azzarello* but remains a Restatement (Second) jurisdiction). *Id.* at 399.

11. *Erie* has been described as having “caused more angst among first-year law students than any other single concept.” *See* Donald L. Doernberg, *The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest A More Straightforward Form of Erie Analysis*, 109 W. VA. L. REV. 611, 613-14 (2007).

12. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). *See also* *Ferens v. John Deere Co.*, 494 U.S. 516, 534 (1990) (“‘accident’ of federal diversity jurisdiction” should not alter result) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 638 (1964)).

13. *Klaxon*, 313 U.S. at 496.

14. *Ferens*, 494 U.S. at 524 (citing *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945)).

abhorrent,<sup>15</sup> fundamentally unfair,<sup>16</sup> and, according to accepted (although not uncontroversial) *Erie* jurisprudence, unconstitutional.<sup>17</sup> It undercuts state sovereignty and threatens crucial principles of federalism.<sup>18</sup> Perhaps more important, it undermines ordinary citizens' faith in the legitimacy of the legal system.

Yet that is exactly what happened as a result of the Third Circuit's prediction that Pennsylvania would adopt the Restatement (Third) in *Berrier v. Simplicity Manufacturing*,<sup>19</sup> and its stubborn refusal to back off that prediction,<sup>20</sup> 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.<sup>21</sup> In November 2014, the Pennsylvania Supreme Court *did* finally speak and determined not to adopt the Restatement (Third).<sup>22</sup> This article uses the *Berrier* line of cases as a backdrop to explore important issues involving the proper role of federal courts sitting in diversity in predicting what state courts will do in the face of uncertain state law and how the federal courts should respond when it appears their predictions are wrong. I first examine the problem of wrong *Erie* guesses, using *Berrier* as an illuminating example. I then examine the *Erie* decision in detail, including the nature of diversity jurisdiction, how *Erie* came to be decided, and the question of the decision's constitutional basis. Concluding that *Erie* is constitutionally compelled, I take the position that the *Erie* guess process involves serious federalism issues that must be considered in fashioning an approach to how federal courts ascertain state law in diversity cases, and more important, how they should respond when it becomes apparent that they have made wrong *Erie* guesses. I posit that diversity courts

15. See Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 271 (1946).

16. See, e.g., John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 712-13 (1974) (suggesting the Court was concerned with unfairness of subjecting person litigating against citizen of different state to a body of law different from that applied to neighbor litigating similar matter with co-citizen); Jed I. Bergman, *Putting Precedent in its Place: Stare Decisis and Federal Prediction of State Law*, 96 COLUM. L. REV. 969, 981-82 (1996).

17. See Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxton*, 72 TEX. L. REV. 79, 80 (1993) (underpinnings of *Erie* doctrine both constitutional and statutory); Donald Earl Childress III, *Redeeming Erie: A Response to Suzanna Sherry*, 39 PEPP. L. REV. 155, 157 (2011) (while *Erie* is controlling law, little agreement about why or upon which grounds doctrine rests); Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987, 1039 n.26 (2011) (citing RICHARD H. FALLON, JR. ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 563 (6th ed. 2009)) (controversy surrounds *Erie* as constitutional holding).

18. See, e.g., Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1675, 1682-83 (1992) (suggesting *Erie* dialogue should focus on intrusion of federal courts into functioning of state courts). Judge Sloviter notes that even correct *Erie* guesses raise federalism concerns, and that the effect of the intrusion is "even more significant . . . as it involves areas of law that . . . traditionally [are] associated with state sovereignty." See also Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after Erie*, 145 U. PA. L. REV. 1459, 1505, 1515 (noting cases such as these "raise judicial federalism concerns" and that aggressive prediction by federal courts "arguably deprives states of their constitutional prerogative to regulate the rights and duties of the parties"); David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1256 (2007).

19. *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 60-61 (3d Cir. 2009).

20. See *Covell v. Bell Sports, Inc.*, 651 F.3d 357 (3d Cir. 2011); *Sikkelee v. Precision Airmotive Corp.*, 2012 WL 5077571 (3d Cir. 2012).

21. See *Walnut St. Assocs., Inc. v. Brokerage Concepts, Inc.*, 20 A.3d 468 (Pa. 2011); *Gresik v. Pa. Partners*, 989 A.2d 344 (Pa. Super. Ct. 2009).

22. See *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 399 (Pa. 2014) (THE RESTATEMENT (THIRD) OF TORTS was "problematic" and was therefore not adopted; the Pennsylvania Supreme Court reverses *Azzarello* but remains a Restatement (Second) of Torts jurisdiction).

must be activist in how they ascertain state law. They should not be bound to stale precedent but should look to all available judicial resources to predict how a state court would decide the case. This approach is essential in order to achieve *Erie*'s goals and is essential to ensure fairness to the litigants involved. But, given this activist approach, I conclude that these courts must be more nimble in correcting wrong *Erie* guesses to avoid perpetuating the very two-tiered system of justice *Erie* sought to eradicate. This approach will help minimize diversity jurisdiction's "federalism-tinged insult"<sup>23</sup> and will help ensure that federal diversity courts (to paraphrase Professor Glassman) do less mischief if not none at all.<sup>24</sup>

## II. *BERRIER V. SIMPLICITY*: IT SEEMED LIKE A GOOD IDEA AT THE TIME

Wayne Berrier and Brenda Gregg brought an action against a lawnmower manufacturer, alleging that the manufacturer should be held liable under products liability and negligence theories for the injuries their daughter suffered when the girl's grandfather ran over her leg with a riding mower.<sup>25</sup> Faced with the question of whether Pennsylvania products liability law would extend its protections to a bystander who was not an intended user, the federal district court concluded that Pennsylvania followed Section 402A of the Restatement (Second) of Torts,<sup>26</sup> and further that Pennsylvania retained the "intended user doctrine and all its permutations."<sup>27</sup> The child was deemed an innocent bystander, and therefore not an intended user.<sup>28</sup> The district court did not like the outcome. It contrasted the result that would be reached under the Restatement (Second)—dismissal—with that which would be reached under the Restatement (Third)—the suit would go forward—noting that it "expressed grave doubts as to the logic of preventing an innocent bystander from recovering for injuries caused by an allegedly defective product particularly when . . . the Restatement (Third) . . . has retreated from the very genesis of the 'intended user' doctrine." But the court believed that it was constrained by Pennsylvania precedent and that Pennsylvania courts were unyielding in applying the intended user doctrine of the Restatement (Second), thus foreclosing any cause of action on behalf of the child and requiring dismissal of the case.<sup>29</sup> On appeal, the Third Circuit Court of Appeals came to the opposite conclusion, vacating the district court's judgment and reinstating the plaintiffs' claims.<sup>30</sup> The court found that there was no controlling case on point in Pennsylvania regarding innocent bystander liability, and it predicted that Pennsylvania would adopt Sections 1 and 2 of the Restatement (Third) of Torts, which would not limit

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23. Marcus, *supra* note 18, at 1256.

24. See Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 294 (2006).

25. *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 40 (3d Cir. 2009). The Berriers (the Pennsylvania Supreme Court refers collectively to the Plaintiffs as the Berriers) originally filed suit in the Court of Common Pleas in Philadelphia County. Simplicity, the defendant, removed the case to the federal district court on diversity grounds. *Id.* at 44.

26. *Berrier v. Simplicity Corp.*, 413 F. Supp. 2d 431, 437-39 (E.D. Pa. 2005), *vacated and remanded sub nom. Berrier*, 563 F.3d 38 (3d Cir. 2009).

27. *Id.* at 442.

28. *Id.* at 443.

29. *Id.* at 442.

30. See *Berrier*, 563 F.3d at 60-61.

a strict products liability cause of action to only a user or consumer.<sup>31</sup> The court distinguished the Pennsylvania precedent the district court had found controlling, *Phillips v. Cricket Lighters*, finding that case dealt not with bystander liability but rather with unintended user liability.<sup>32</sup> Based on this, the court found that Pennsylvania law was uncertain.<sup>33</sup> Further, the court looked to serious criticism of Pennsylvania products liability jurisprudence by members of the Pennsylvania Supreme Court in *Phillips* and other cases and to suggestions that the time was right for Pennsylvania to adopt the Restatement (Third) of Torts.<sup>34</sup> In sum, the district court found that it must apply clear controlling precedent (though “express[ing] grave doubts as to the logic of” that precedent),<sup>35</sup> as it was found. However, the Third Circuit found *no* controlling Pennsylvania Supreme Court precedent on this issue, and concluded that what authority did exist was confusing. It therefore undertook a predictive analysis, leading it to take a leap and to conclude Pennsylvania would adopt the Restatement (Third) of Torts.<sup>36</sup>

The Third Circuit’s prediction was not unfounded, given what jurists, commentators, and litigants described as Pennsylvania’s incomprehensibly convoluted products liability jurisprudence,<sup>37</sup> nor were its initial conclusions that the law of Pennsylvania might soon change.<sup>38</sup> At the time *Berrier* was decided, the Pennsylvania Supreme Court had just granted allocatur in *Bugosh v. Allen Refractories Co.*,<sup>39</sup> for the express purpose of deciding whether Pennsylvania should adopt the Restatement (Third),<sup>40</sup> a fact the Third Circuit noted.<sup>41</sup> The real mischief lies in the court’s continued adherence to the prediction in the face of what became compelling evidence that Pennsylvania was not ready to make the leap.

Asked to reconsider its position two years later in *Covell v. Bell Sports*, the Third Circuit declined, stating emphatically that “federal district courts applying Pennsylvania

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31. *See id.*

32. *Id.* at 45. In *Phillips*, a two-year-old child managed to take a lighter from his mother’s purse and started a fire that killed him, his mother, and his brother. The Pennsylvania Supreme Court, in a splintered decision (one of many splintered decisions wrestling with Pennsylvania’s incomprehensible evolution of products liability jurisprudence), the court dismissed the products liability claim, finding that to state a design defect claim under Pennsylvania law, the plaintiff must show that the design was unsafe for its *intended user* and that a two-year-old was not an intended user of a disposable lighter. *See Phillips v. Cricket Lighters*, 841 A.2d 1000, 1008 (Pa. 2003).

33. *See Berrier*, 563 F.3d at 45.

34. *See id.* at 46.

35. *Berrier*, 413 F. Supp. 2d at 442.

36. *See Berrier*, 563 F.3d at 53 (Justice Saylor’s concurring opinion in *Phillips* foreshadows Pennsylvania courts’ adoption of sections 1 and 2 of the Restatement (Third) of Torts).

37. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 897-98 (1998); Erin L. Ginsburg, *Revisiting Restatement Second or Third?: The Uncertain Status of Product Liability Law in Pennsylvania*, 81 PA. B.A.Q. 139 (2010); Patrick Lavelle, *Crashing Into Proof of a Reasonable Alternative Design: The Fallacy of the Restatement (Third) of Torts: Products Liability*, 38 DUQ. L. REV. 1059, 1094-1100 (2000).

38. It is clear from the discussions of Justice Saylor in *Phillips* and Justice Newman in *Mineral Products* that there was substantial support on the Pennsylvania Supreme Court to adopt the Third Restatement’s approach to product liability in an appropriate case. *See Berrier*, 563 F.3d 38 at 57 (3d Cir. 2009); Pa. Dep’t of Gen. Servs. v. U.S. Mineral Prods. Co., 898 A.2d 590 (Pa. 2006); *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003).

39. *Bugosh v. Allen Refractories Co.*, 932 A.2d 901 (Pa. Super. Ct. 2007).

40. *Bugosh v. I.U. N. Am., Inc.*, 971 A.2d 1228 (Pa. 2008) (per curiam).

41. *See Berrier*, 563 F.3d at 57 n.27. Oddly, while the court in *Berrier* cited *Bugosh*, it did so in a footnote, and did not explicitly discuss the Pennsylvania Supreme Court’s grant of allocatur in *Bugosh*. *Id.*

law to products liability cases should look to . . . the Restatement (Third).<sup>42</sup> By the time *Covell* was decided, the Pennsylvania Supreme Court had dismissed the appeal in *Bugosh* as “improvidently granted,”<sup>43</sup> and the Pennsylvania courts continued to apply the Restatement (Second). Yet, given another chance to correct its prediction a year after *Covell*, the Third Circuit stood its ground in *Sikkelee v. Precision Airmotive*,<sup>44</sup> relying both on the rule of the circuit doctrine and the court’s apparent firm conviction that the Pennsylvania Supreme Court was poised to adopt the Restatement (Third) of Torts.<sup>45</sup> Thus, for a period of five years, state trial courts and state intermediate appellate courts, bound by rules of vertical stare decisis,<sup>46</sup> applied the Restatement (Second) of Torts,<sup>47</sup> while the Third Circuit Court of Appeals, and, arguably, the federal district courts within the Circuit, applied the Restatement (Third) of Torts.<sup>48</sup> This created, as counsel for the Covells described it, “a two tiered system of justice” in Pennsylvania.<sup>49</sup> Five years might not seem like a long time, but this particular wrong guess had broad impact because of the large number of products liability cases federal courts sitting in diversity hear. By way of example, federal district courts sitting in Pennsylvania heard 15,898 products liability cases in 2012 and 1,445 cases in 2013.<sup>50</sup> In contrast, Pennsylvania state courts heard 661

42. *Covell v. Bell Sports*, 651 F.3d 357, 360-63 (3d Cir. 2011).

43. *Bugosh*, 971 A.2d at 1229.

44. *Sikkelee v. Precision Airmotive Corp.*, No. 12-8081, 2012 WL 5077571 (3d Cir. Oct. 17, 2012).

45. *Id.*

46. See also Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 3 (1994) (“The doctrine of hierarchical precedent holds that an inferior court must follow precedent established by a court superior to it.”). Other commentators refer to this as “vertical precedent,” a term that will be used throughout this article. See, e.g., Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460-61 (2010) (“[T]he rules of ‘vertical precedent’ obligate a lower court to follow a decision of a superior court within its judicial system.”).

47. See *supra* note 8 and cases cited therein.

48. Federal District Courts in Pennsylvania were split regarding whether they are bound to apply the Restatement (Third) of Torts, pursuant to the Third Circuit’s *Berrier/Covell* prediction, or the Restatement (Second) of Torts, which is “the actual pronouncement[] of law by state appellate courts.” *Sweitzer v. Oxmaster, Inc.*, No. 09-5606, 2010 WL 5257226, at \*5 (E.D. Pa. Dec. 23, 2010) (applying Restatement (Second) of Torts). See also *Sansom v. Crown Equip. Corp.*, 880 F. Supp. 2d 648, 656 (W.D. Pa. 2012) (applying Restatement (Third) of Torts); *Thompson v. Med-Mizer, Inc.*, No. 10-cv-2058, 2011 WL 1085621 (E.D. Pa. Mar. 21, 2011) (applying Restatement (Second) of Torts); *Milescu v. Norfolk S. Corp.*, 807 F. Supp. 2d 214 (M.D. Pa. 2010) (Restatement (Second) of Torts); *Hoffman v. Paper Converting Mach. Co.*, 694 F. Supp. 2d 359 (E.D. Pa. 2010) (applying Restatement (Third) of Torts); *Martinez v. Skirmish, U.S.A., Inc.*, No. 07-5003, 2009 WL 1676144 (E.D. Pa. Jun. 15, 2009) (applying Restatement (Third) of Torts); *Richetta v. Stanley Fastening Sys., L.P.*, 661 F. Supp. 2d 500 (E.D. Pa. 2009) (applying Restatement (Third) of Torts); *Durkot v. Tesco Equip. LLC*, 654 F. Supp. 2d 295 (E.D. Pa. 2009) (applying Restatement (Second) of Torts). Judge Hornak of the District Court for the Western District of Pennsylvania analyzed the defendant’s summary judgment motion under both the Restatement (Second) of Torts and the Restatement (Third) of Torts. See *Vaskas v. Kenworth Truck Co.*, No. 3:10-cv-1024, 2013 WL 101612 (M.D. Pa. Jan. 8, 2013); *Kordek v. Becton, Dickinson & Co.*, 921 F. Supp. 2d 422 (E.D. Pa. 2013); *Lynn*, 894 F. Supp. 2d at 606.

49. Michael D. Brophy, *Third Circuit Reaffirms Prediction That Pennsylvania Will Adopt Third Restatement of Torts*, GOLDBERG SEGALLA NEWSLETTER (July 19, 2011), available at <http://www.goldbergsegalla.com/resources/news-and-updates/third-circuit-reaffirms-prediction-pennsylvania-courts-will-adopt-third-r> (last visited Dec. 18, 2013). 2011 ADMIN. OFF. PA. CTS. 2011 CASELOAD STATS. UNIFIED JUD. SYS. PA. 27 (2012), available at <http://www.pacourts.us/assets/files/setting-768/file-3460.pdf?cb=e9b11e>; 2012 ADMIN. OFF. PA. CTS. 2012 CASELOAD STATS. UNIFIED JUD. SYS. PA. 27 (2013), available at <http://www.pacourts.us/assets/files/setting-768/file-2598.pdf?cb=f7774f>; 2013 ADMIN. OFF. PA. CTS. 2013 CASELOAD STATS. UNIFIED JUD. SYS. PA. 27 (2014), available at <http://www.pacourts.us/assets/files/setting-768/file-3597.pdf?cb=f73b98>.

50. See Table 4.5, ADMIN. OFF. U.S. CTS. JUD. BUS., JUDICIAL FACTS AND FIGURES, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2012/Table405.pdf> (listing products liability cases filed between 1990 and 2012 using twelve month periods ending June 30 of each year); Table C-

products liability cases (not including mass torts) in 2011, 558 in 2012, and 752 in 2013.<sup>51</sup>

### III. MISTAKEN ERIE GUESSES

The problem of wrong *Erie* guesses is not new, nor limited to this particular factual context, nor to the Third Circuit.<sup>52</sup> In her often cited article questioning the continued wisdom of maintaining diversity jurisdiction, then Third Circuit Chief Judge Dolores K. Sloviter noted that the Third Circuit had made its share of mistaken *Erie* guesses, noting that “[i]t is not that Third Circuit judges are particularly poor prognosticators. All of the circuits have similar problems in predicting state law accurately,”<sup>53</sup> despite the fact federal court judges are, some would argue, “institutionally advantaged,” and possess superior resources for judging.<sup>54</sup>

Gregory Acquaviva collected instances of federal court predictions being corrected by subsequent state court holdings, noting that “[c]aselaw and scholarship are replete with instances where federal courts sitting in diversity are later overruled by state high courts.”<sup>55</sup> For example, in 1954, the First Circuit, sitting in diversity and applying Mississippi tort law, predicted that the Mississippi Supreme Court would reverse long standing Mississippi precedent and abandon the requirement of privity in personal injury actions against manufacturers.<sup>56</sup> Relying on the First Circuit’s prediction of Mississippi law, the Fifth Circuit subsequently ruled in several additional cases that lack of privity does not bar recovery by the plaintiff.<sup>57</sup> Thus, plaintiffs who brought claims in federal

11. ADMIN. OFF. U.S. CTS. JUD. BUS. U.S. CTS. ANN. REP., 2013, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C11Sep13.pdf> (listing products liability cases commenced in 2012 and 2013 during 12-month periods ending September 30, 2012 and 2013).

51. See 2011 ADMIN. OFF. PA. CTS. 2011 CASELOAD STATS. UNIFIED JUD. SYS. PA. 27 (2012), available at <http://www.pacourts.us/assets/files/setting-768/file-3460.pdf?cb=e9b11e>; 2012 ADMIN. OFF. PA. CTS. 2012 CASELOAD STATS. UNIFIED JUD. SYS. PA. 27 (2013), available at <http://www.pacourts.us/assets/files/setting-768/file-2598.pdf?cb=f7774f>; 2013 ADMIN. OFF. PA. CTS. 2013 CASELOAD STATS. UNIFIED JUD. SYS. PA. 27 (2014), available at <http://www.pacourts.us/assets/files/setting-768/file-3597.pdf?cb=f73b98>.

52. See, e.g., *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413, 428-29 (1st Cir. 1996) (providing example of case where federal “wrong guess” was subsequently proven to be erroneous in *Bliss v. Stow Mills, Inc.*, 786 A.2d 815 (N.H. 2001)); *Slater v. Verizon Comm’ns, Inc.*, 2005 WL 488676, at \*3 (D.N.H. Mar. 3, 2005). For additional examples of “wrong guesses,” see *Luzadder v. Despatch Oven Co.*, 834 F.2d 355, 359 (3d Cir. 1987); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 627 (7th Cir. 1997); *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748 (5th Cir. 1995); *Rufino v. United States*, 829 F.2d 354 (2d Cir. 1987).

53. See Sloviter, *supra* note 18, at 1679-81.

54. See, e.g., Glassman, *supra* note 24, at 269-70 (arguing for the contribution federal courts make in “instructing” state courts and developing the common law, noting that it is “more likely” that “federal courts are substantially more capable than their state brethren because, institutionally, they are comparatively advantaged in dealing with questions of law”). Within his article, Professor Glassman cites to two articles. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (listing five reasons why federal courts are advantaged in deciding cases and shaping law); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and Proposal*, 91 HARV. L. REV. 317 (1977) (noting that his survey of five volumes of the Federal Reporter and three sections of the Restatement (Second) of Torts indicate that federal diversity cases made a disproportionate and positive contribution to the development of state law).

55. 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). For examples of “corrected” federal court predictions, see *W.S. Ranch Co. v. Kaiser Steel Corp.*, 388 F.2d 257, 264-65 nn.11-16 (10th Cir. 1967); *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483, 486-87, nn.5-9 (5th Cir. 1964); Jerome A. Braun, *A Certification Rule for California*, 36 SANTA CLARA L. REV. 935, 937-40 (1996); Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1673 n.3 (2003).

56. See *Mason v. Am. Emory Wheel Works*, 241 F.2d 906, 910 (1st Cir. 1957).

57. See Bradford R. Clark, *supra* note 18, at 1515 (citing *Necaise v. Chrysler Corp.*, 335 F.2d 562, 572-73 (5th Cir. 1964); *Grey v. Hayes-Sammons Chem. Co.*, 310 F.2d 291, 297 (5th Cir. 1962)). The influence of one federal district court’s interpretation of state law on other courts should not be underestimated. The Fifth Circuit



courts pursuant to diversity jurisdiction—courts ostensibly applying Mississippi law—gained the benefit of the “more enlightened” products liability law, allowing suits against manufacturers, while those relegated to the Mississippi state courts could not sue manufacturers for their injuries because of the privity rule. As Professor Bradford Clark noted, “[f]or nine years (from 1957 to 1966) federal courts recognized and applied ‘substantive rules of common law’ that Mississippi had yet to adopt (and might never have adopted).”<sup>58</sup>

*DeWeerth v. Baldinger*<sup>59</sup> captures one of the most storied examples of a wrong *Erie* guess. The case centered around a dispute over the ownership of a Monet painting that disappeared from a home in Southern Germany during World War II.<sup>60</sup> In an action commenced by the original owner to reclaim the painting, the Second Circuit considered an unanswered question of state law regarding whether the New York statute of limitations required an original owner to use due diligence in actively seeking the return of stolen goods.<sup>61</sup> Finding that due diligence was required, the Second Circuit held that the plaintiff’s efforts did not meet that standard.<sup>62</sup> This federal court holding, however, was later directly contradicted by New York state courts in *Solomon R. Guggenheim Foundation v. Lubell*,<sup>63</sup> in which the New York Court of Appeals concluded that the Second Circuit had misapplied New York law, finding that the court, “should not have imposed a duty of reasonable diligence on the owners of stolen art work for the purposes of the Statute of Limitations.”<sup>64</sup>

Calling it a comedy of errors, the California Court of Appeals chronicled a case to demonstrate the cascade effect some wrong *Erie* guesses may have. The court traced the impact of the mistake all the way to the U.S. Supreme Court:<sup>65</sup>

The district court correctly interpreted the limited scope of the holdings

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was not bound to apply the First Circuit’s prediction by the rules of stare decisis. See Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 692 (noting that courts will examine relevant decisions by other circuits as guidance but will not be bound by such decisions). But courts federal courts do often rely on out-of-circuit decisions. See, e.g., *Gilstrap v. Amtrak*, 998 F.2d 559, 560 (8th Cir. 1993) (while the court considered state appellate cases and the Restatement, it specifically noted that the Ninth Circuit had cited the case at issue as persuasive authority, thereby holding the case to be good law); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 283 (2d Cir. 1981) (holding that where one court of appeals makes a decision of first impression on state law, other circuits should defer to that holding except in instances where that court of appeals clearly erred); Scott Dodson, *The Forum Defendant Rule in Arkansas*, 2007 ARK. L. NOTES 73, 78 (2007) (noting that the Ninth Circuit “relied upon the fact that eight other circuit courts had held similarly”); Marcus, *supra* note 18, at 1308 (discussing how other circuits followed the Fifth Circuit after it was forced to change course as a matter of circuit precedent); John O’Shea Sullivan, Ashby L. Kent, and Amanda Wilson, *Trial Practice and Procedure*, 62 MERCER L. REV. 1217, 1231 (2010) (describing how the Eleventh Circuit relied on decisions from the Fifth and Third Circuits as persuasive authority to determine its own holding).

58. Bradford R. Clark, *supra* note 18, at 1515. The Mississippi Supreme Court overruled the 1928 precedent requiring privity in *Stove Mfg. Co. v. Hodges*, 189 So. 2d 113, 118 (Miss. 1966), nine years after the First Circuit’s prediction in 1957 and four years after the Fifth Circuit’s adoption of this prediction in 1966.

59. 836 F.2d 103 (2d Cir. 1987).

60. See *id.* at 104.

61. See *id.*

62. See *id.* at 109-10.

63. *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991).

64. *Id.* at 430.

65. *Pac. Emp’rs Ins. Co. v. City of Berkeley*, 158 Cal. App. 3d 145, 155 (Ct. App. 1984) (citing *Six Cos. of Cal. v. Joint Highway Dist. No. 13 of Cal.*, 311 U.S. 180, 188 (1940)) (stating that the Supreme Court misinterpreted California law).

in the California cases, and therefore reached a correct result under California law. The court of appeals also reached the correct result, but stated that it was contrary to California law, which it incorrectly interpreted and then disapproved and refused to follow. The Supreme Court then held that the court of appeals should have followed California law, which it too stated incorrectly, and reversed, reaching an ultimately improper result under the law of this state.<sup>66</sup>

The California court described the broader effect of this string of errors, noting that at least one commentator confidently pointed to the Supreme Court's misinterpretation as the final word on California law, a word that carried with it the force of the imprimatur of the U.S. Supreme Court.<sup>67</sup>

Judge Guido Calabrese commented that the fact that federal courts often get the state law wrong encourages the very forum shopping *Erie* sought to avoid:

One party or the other tries to get into federal courts because it hopes that the federal courts will get the law wrong . . . . For instance, the concept of duty in the tort law of New York is virtually unique to New York and is very complicated. As a result, federal judges who deal with the concept of duty 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!<sup>68</sup>

When state law is clear and current, the diversity court's task is relatively easy. When state law is unsettled, unclear, or indeterminate, or arguably even perceived by the court as anachronistic or wrong-headed<sup>69</sup> the task becomes more complex, requiring consideration of a range of source material and the need to do something more than simply restate the law.<sup>70</sup> It is in these cases that wrong *Erie* guesses most often occur. Yet when a federal court makes a wrong *Erie* guess, the federal rules of stare decisis and both horizontal (the rule of the circuit doctrine employed by all eleven circuits) and vertical precedent, inhibit, or even prevent timely correction and perpetuate the disorder illustrated by the *Berrier/Covell* line of cases.<sup>71</sup>

Judge Charles Clark's description of the more overarching *Erie* problem aptly captures the challenge this article takes on:

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66. *Id.*

67. *Id.* (citing Justin Sweet, *Liquidated Damages in California*, 60 CALIF. L. REV. 84, 123 n.182 (1972)).

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

69. *See, e.g.*, *McInnis v. Harley Davidson Motor Co.*, 625 F. Supp. 943, 956 (D.R.I. 1986); *Roy v. Star Chopper Co., Inc.*, 584 F.2d 1124, 1128 (1st Cir. 1978); *Taco Bell Corp. v. Cont'l Cas. Co.*, 388 F.3d 1069, 1077 (7th Cir. 2004).

70. *See* Bradford R. Clark, *supra* note 18, at 1461.

71. *See, e.g.*, Bergman, *supra* note 16, at 970; Bradford R. Clark, *supra* note 18, at 1461. *See also* L. Lynn Hogue, *Law in A Parallel Universe: Erie's Betrayal, Diversity Jurisdiction, Georgia Conflict of Laws Questions in Contracts Cases in the Eleventh Circuit, and Certification Reform*, 11 GA. ST. U. L. REV. 531, 532 (1995) (describing development of dual bodies of law and noting that such "dualism" is exactly what *Erie* sought to end).

[T]he problem touches two ever fascinating vistas of American thought—one the nature of our federal system and the difficulties of adjusting the spheres of authority of two independent, co-ordinate and largely competitive sovereignties operating in the same territory, and the other . . . how judges can ever decide cases, particularly hard ones.<sup>72</sup>

While there is a wealth of commentary on *Erie*,<sup>73</sup> most of it focuses on more thrilling matters including whether *Erie* was constitutionally compelled,<sup>74</sup> whether it was rightly decided or should be overruled,<sup>75</sup> and the true meaning and location of the ephemeral line between substance and procedure.<sup>76</sup> There has been surprisingly little scholarly consideration of the federalism concerns raised by diversity jurisdiction generally, and *Erie* specifically. This article takes on that matter.

We begin with what might seem the all too familiar history of diversity jurisdiction and *Erie*, necessary for the illumination it provides to why this all matters.

#### IV. MAKING “LAW IN A PARALLEL UNIVERSE”<sup>77</sup>

Article III of the United States Constitution created diversity jurisdiction,<sup>78</sup> specifying, *inter alia*, that “[t]he judicial Power [of the United States] shall extend . . . to Controversies . . . between Citizens of different States.”<sup>79</sup> While the decision to include the grant of federal diversity jurisdiction was controversial among the Constitution’s drafters,<sup>80</sup> Congress apparently felt no similar equivocation and acted immediately to

72. Charles E. Clark, *supra* note 15, at 269.

73. *Erie* has been described as having “caused more angst among first-year law students than any other single concept.” Doernberger, *supra* note 11, at 613-14. *Erie* has provided a virtual cottage industry for legal scholars. *Id.* (*Erie* has captured the attention of generations of academics). See also Charles E. Clark, *supra* note 15, at 269; Gene R. Shreve, *From Swift to Erie: An Historical Perspective Harmony & Dissonance*, 82 MICH. L. REV. 869 (1984).

74. See Patrick Woolley, *Erie and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1760-70 (2006); Philip Richter, *Considerations Relating to the Enactment of Venue Schemes as Applied to Specialty Courts*, 93 COLUM. L. REV. 1738 (1993); Gregory Gelfand & Howard B. Abrams, *Putting Erie on the Right Track*, 49 U. PITT. L. REV. 937 (1988); Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245 (2008); Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CFA and Shady Grove*, 106 NW. U. L. REV. 1 (2012); Craig Green, *Repressing Erie’s Myth*, 96 CALIF. L. REV. 595 (2008).

75. See MICHAEL GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012); Kurland, *supra* note 1, at 189 (1957); Marian O. Boner, *Erie v. Tompkins: A Study in Judicial Precedent*, 40 TEX. L. REV. 619, 637 (1962); Maxwell H. Herriott, *Has Congress the Power to Modify the Effect of Erie Railroad Co. v. Tompkins?*, 26 MARQ. L. REV. 1 (1941); Keeffe, et al., *Weary Erie*, 34 CORNELL L. REV. 494 (1949); Bergman, *supra* note 16.

76. See Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103 (2011); Joseph Scott Miller, *Substance, Procedure, and the Divided Patent Power*, 63 ADMIN. L. REV. 31 (2011); Sergio J. Campos, *Erie as a Choice of Enforcement Defaults*, 64 FLA. L. REV. 1573 (2012); Allan Ides, *The Supreme Court and the Law to Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the Erie Doctrine and Related Problems*, 163 F.R.D. 19 (1995); *Choice of Procedure in Diversity Cases*, 75 YALE L.J. 477 (1966); Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801 (2010).

77. Hogue, *supra* note 71, at 533.

78. The term “diversity jurisdiction” is sometimes used to refer to a second basis of jurisdiction, or those involving cases between “Citizens [of a State], and foreign . . . Citizens.” Borchers, *supra* note 17, at 79 n.1 (quoting CHARLES A. WRIGHT & MARY KAY KANE, *THE LAW OF FEDERAL COURTS* 127 (4th ed. 1983)). For the purposes of this article, consideration is only given to citizens of different states.

79. U.S. CONST. art. III, § 2, cl. 2.

80. See, e.g., *Lumbermen’s Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 55 (1954) (Frankfurter, J., concurring)

implement the Constitutional grant in the Judiciary Act of 1789.<sup>81</sup> Controversy regarding the wisdom of diversity jurisdiction itself, as well as regarding the accuracy of what is assumed to be original rationale,<sup>82</sup> continues to this day.<sup>83</sup> Yet periodic calls for its abolition have never gained momentum.<sup>84</sup> Indeed, both the Multi-forum Jurisdiction Act, which became law in 2002,<sup>85</sup> and the Class Action Fairness Act, which became law in 2005,<sup>86</sup> breathed new life into diversity jurisdiction, expanding its reach by extending federal jurisdiction in complex litigation to cases where there is only minimal diversity.<sup>87</sup> Since 1806, when the Supreme Court handed down its brief opinion in *Strawbridge v. Curtiss*,<sup>88</sup> courts have consistently interpreted all formulations of the general grant of diversity jurisdiction to require complete diversity of citizenship.<sup>89</sup> Congress' action in expanding the jurisdictional base cuts against suggestions that Congress might be considering abandoning diversity jurisdiction altogether.

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(noting that diversity jurisdiction aroused opposition from its very inception); PAUL M. BATOR, PAUL M. MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 18 (2d ed. 1973) [hereinafter HART AND WECHSLER]; Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 485-503 (1928); Robert L. Jones, *Finishing A Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1002 (2007) (“[D]iversity jurisdiction was arguably the most controversial aspect of federal jurisdiction contained in the Constitution.”) (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 81 (1923)).

81. Judiciary Act of 1789, § 11, 1 Stat. 73 (1789), *cited in* *Hertz Corp. v. Friend*, 559 U.S. 77, 84-85 (2010) and *reprinted in* HART AND WECHSLER, *supra* note 80, at 1050. It is worthy of note that even this first specification of diversity jurisdiction included a minimum jurisdictional amount of \$500. Act of Sept. 24, 1789, § 11 Stat. 73, 78 *reprinted in* HART AND WECHSLER, *supra* note 80, at 1050. According to Hart and Wechsler, the jurisdictional amount was included to “prevent defendants from being summoned long distances to defend small claims.” *Id.* at 33. For a detailed description of the origins and historical context surrounding the grant of diversity jurisdiction and its implementation, see Borchers, *supra* note 17, at 86-110.

82. *See, e.g.*, ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 296 (5th ed. 2007); Borchers, *supra* note 17, at 86-87; John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 9 (1963); Jones, *supra* note 80 (observing that the Framers were more concerned with juries than judges in creating diversity jurisdiction).

83. *See, e.g.*, CHERMERINSKY, *supra* note 82, at 300-02; THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 31 (1994) (noting that the Department of Justice Report recommended the abolition of diversity jurisdiction even though it was unlikely to occur); Hogue, *supra* note 71, at 533 (noting that the report of the Proposed Long Range Plan for the Federal Courts published in 1995 recommended curtailing diversity jurisdiction); Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 99, 107 (1990); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1829, 1834 (2008) (practicality of diversity jurisdiction has been debated since founding of United States); Sloviter, *supra* note 18 (noting that diversity jurisdiction should be limited because it is “an usurpation of state law decision-making”); U.S. Dep’t of Justice, *Needs of the Federal Courts—Report of the Department of Justice Committee on Revision of the Federal Judicial System* (1977).

84. *See, e.g.*, *Burford v. Sun Oil Co.*, 319 U.S. 315, 337 (1943) (“[T]he many powerful and persistent legislative efforts to abolish or restrict diversity jurisdiction have ever since the Civil War been rejected by Congress. Again and again legislation designed to make inroads upon diversity jurisdiction has been proposed to Congress, and on each occasion Congress has deliberately refused to act.”). In the 1930s, the Senate Judiciary Committee twice reported bills for abolition of diversity jurisdiction. HART AND WECHSLER *supra* note 80, at 1053; *see also* CHERMERINSKY, *supra* note 82, at 302; TONY FREYER, *HARMONY AND DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM* 108-09 (1981); Hessel Yntema & George Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 873-88 (1931).

85. 28 U.S.C. § 1369 (2012); *See* JoEllen Lind, “*Procedural Swift*”: *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 738 (2004).

86. *See* Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in 28 U.S.C. § 1332).

87. *See* 28 U.S.C. 1332(d) (2012); *Ventimiglia v. Tishman Speyer Archstone-Smith Westbury, L.P.*, 588 F. Supp. 2d 329, 333 (E.D.N.Y. 2008) (establishing that the Class Action Fairness Act expanded federal diversity jurisdiction); Lind, *supra* note 85, at 738.

88. *Strawbridge v. Curtiss*, 7 U.S. 267 (1806).

89. *See* *U.S. Motors v. Gen. Motors Europe*, 551 F.3d 420, 423 (2009). *See also* HART AND WECHSLER, *supra* note 80, at 1064-65.

When the founders created diversity jurisdiction, they fashioned two independent, parallel judicial systems, both competent to hear a group of the same cases—a structure unique, even peculiar to, and some suggest inconsistent with, our system of federalism.<sup>90</sup> Why? Most authorities point to a concern with prejudice against out-of-state litigants by state courts as the motivation,<sup>91</sup> and this has become the traditionally accepted rationale. Some commentators challenge this explanation.<sup>92</sup> Judge Friendly suggests that diversity jurisdiction was aimed more at perceived prejudices of state legislators than any concern with the courts themselves.<sup>93</sup> Robert Jones argues that the framers were more worried about juries than judges.<sup>94</sup> Judge Friendly, Judge Posner, and others also make a case that the real issue was not as much bias against one state resident by the home state of another, as it was concern that the states would favor individual debtors and plaintiffs in actions against creditor/companies. The federal courts were perceived as more favorably inclined toward the company/creditors.<sup>95</sup> Stephen Burbank notes that tort plaintiffs generally preferred to sue state courts when suing businesses because they, too, perceived the federal courts favored business interests.<sup>96</sup> Tony Freyer notes that corporations preferred to at least have the option of resort to federal court.<sup>97</sup> Diversity jurisdiction gave the creditor/companies the option to remove to federal court if they were out of state citizens, as was often the case.

Nonetheless, the Supreme Court embraced the traditional view of prejudice against out-of-state litigants early on, and has never backed away from it.<sup>98</sup> Chief Justice Marshall wrote in *Bank of U.S. v. Deveaux*:

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90. See Calabresi, *supra* note 68 (noting that “our system of parallel state and federal courts is unusual in a federalism, to put it mildly”); Marcus, *supra* note 18, at 1256.

91. See *Hertz Corp. v. Friend*, 559 U.S. 77, 85 (2010); *Hanna v. Plumer*, 380 U.S. 460, 467 (1965); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938); *Lumbermen’s Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954); *Martin v. Hunter’s Lessee*, 14 U.S. 304, 347 (1816) (“The constitution has presumed (whether rightly or wrongly we do not inquire) that . . . state prejudices, state jealousies . . . might sometimes obstruct or control, or be supposed to obstruct or control, the regular administration of justice . . . No other reason than that which has been stated can be assigned” to the grant of diversity jurisdiction.); Yntema, *supra* note 84, at 873-76; Friendly, *supra* note 80, at 492 (1928) (citing *Bank of U.S. v. Deveaux*, 9 U.S. 61, 87 (1809)); *DiRuggiero v. Rodgers*, 743 F.2d 1009, 1019 (3d Cir. 1984) (noting current efficacy of concern for prejudice and finding that “an essential core of diversity jurisdiction is of particular importance to actions arising out of interstate custody disputes” because such cases “truly represent one of the contemporary essential functions of the diversity grant”).

92. See, e.g., CHEMERINSKY, *supra* note 82, at 296-97; Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119 (2003); Borchers, *supra* note 17, at 86-87; David Crump, *The Case for Restricting Diversity Jurisdiction: The Undeveloped Arguments, From the Race to the Bottom to the Substitution Effect*, 62 ME. L. REV. 1 (2010) (arguing that the Framers were concerned more with juries than judges in creating diversity jurisdiction); Wilfred Feinberg, *Is Diversity Jurisdiction an Idea Whose Time Has Passed?*, 61 JUL. N.Y. ST. B.J. 14 (1989); Frank, *supra* note 82, at 9; Jones, *supra* note 80 (arguing that the Framers were concerned more with juries than judges in creating diversity jurisdiction); Sloviter, *supra* note 18, at 1672-73.

93. See Friendly, *supra* note 80, at 495.

94. See Jones, *supra* note 80.

95. See RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 139-41 (1985); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1463-65 (2008); Friendly, *supra* note 80, at 496-97; Kurland, *supra* note 1, at 195; Kramer, *supra* note 83, at 100.

96. See Purcell, *supra* note 83, at 1849.

97. FREYER, *supra* note 84.

98. See Burbank, *supra* note 95, at 1460 (citing *Bank of United States v. Deveaux*, 9 U.S. 61, 87-88 (1809) (noting that the constitutional grant of diversity-of-citizenship jurisdiction was intended to make available a neutral forum for litigants worried about local bias in courts of states other than their own)).

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.<sup>99</sup>

As recently as 1996, the Court explained that the grant of diversity jurisdiction was designed to make the federal courts available as an alternative, neutral forum for the adjudication of state-created rights.<sup>100</sup>

The traditional rationale illuminates the role of federal judges sitting in diversity: they were to administer state law as though they were wearing the robes and sitting on the benches of their state court counterparts, but without the perceived taint of local bias.<sup>101</sup> This seems fair enough, but, as Professor David Marcus argues, “the very grant of diversity jurisdiction is itself a federalism-tinged insult, since it implies that organs of state government cannot properly ensure a just proceeding.”<sup>102</sup>

This tinge is compounded by the fact that the process of judging often requires some degree of interpretation, some degree of extrapolation and some degree of filling in gaps. HLA Hart’s “no vehicles in the park” hypothetical offers a glimpse of how even a seemingly straightforward rule can require interpretation or clarification.<sup>103</sup> This necessarily entangles the court in creating law and in making policy. In diversity cases, it is a federal judge with neither accountability to the electorate of a state nor authority to make or create (as opposed to ascertain or identify) state law who does this.<sup>104</sup>

And, in the era of *Swift*, there was a lot more than a tinge of insult to federalism in how the federal courts wielded diversity jurisdiction. Federal judges created rather than discovered state law with what amounted to free rein in all but a few circumscribed areas.

#### V. *SWIFT V. TYSON*: THE TRUTH IS OUT THERE<sup>105</sup>

Section 34 of the First Judiciary Act (The Rules of Decision Act)<sup>106</sup> specifies that the law to be applied by federal courts sitting in diversity is the law of the states. In the famous case of *Swift v. Tyson*, this language was interpreted to bind federal judges sitting in diversity *only* to the written law of the states—statutes—including “the construction thereof adopted by local tribunals, and to rights and titles to things having permanent locality.”<sup>107</sup>

99. *Deveaux*, 9 U.S. at 87.

100. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426 (1996).

101. *See Marcus, supra* note 18, at 1250.

102. *Id.* at 1256.

103. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-15 (1958); Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1134 (2008).

104. *See* Bradford R. Clark, *supra* note 18, at 1472.

105. *The X-Files*, (1993-2002), opening credits.

106. Rules of Decision Act, ch. 20, sec. 4505 § 34, 1 Stat. 92 (1789) (codified as amended at 28 U.S.C. § 1652 (2006)), *cited in* Childress, *supra* note 17, at 156 n.4 [hereinafter “RDA”].

107. *Swift v. Tyson*, 41 U.S. 1, 18 (1842) (“The true interpretation of the 34th section limited its application to state laws, strictly local, that is to say the positive statutes of the state, and the construction thereof adopted by

*Swift* dealt with several intricate, even dubious, credit transactions involving negotiable instruments among investors and speculators in several states.<sup>108</sup> At issue was the legal question of whether a preexisting debt can constitute valid consideration for a contract, though the context of the transaction really raised issues of equity and clean hands, fraud, and the reliability of negotiable instruments—questions that Michael Greve quite accurately describes as “vital to the commercial world” at the time.<sup>109</sup> Justice Story first considered and analyzed New York precedent, as the case would be governed by New York law under choice of law principles.<sup>110</sup> He concluded that New York courts would find that a preexisting debt did *not* constitute valid consideration for a contract.<sup>111</sup> Alas, he then found the unambiguous New York precedent he had just identified quite unsatisfactory.<sup>112</sup> Concluding, and perhaps conceding, that the doctrine was “fully settled in New York,” Justice Story reasoned that while such precedent was worth considering, it was not binding on the federal court because it “differs from the principles established in the general commercial law.”<sup>113</sup> Federal judges had the same, if not greater, ability and authority to discover and interpret the “general law” as did state court judges.<sup>114</sup>

Having positioned the question as one of general law, Justice Story surveyed the Supreme Court’s own precedent on the issue, and that of England, Connecticut, Massachusetts, as well as several learned treatises, and concluded that a preexisting debt did indeed constitute valid consideration for contract in this context (subsequent bona fide purchasers of negotiable instruments).<sup>115</sup> He noted the importance of the rule as a “benefit and convenience of the commercial world.”<sup>116</sup>

To be clear, *Swift* dealt with an unmistakably commercial matter, an area that at the time was generally accepted as lying outside the sphere over which states were given exclusive dominion and more important, one requiring national uniformity for the U.S. economy to flourish.<sup>117</sup> Justice Story explained that § 34, the RDA, requiring diversity courts to apply state substantive law, “does not extend to contracts and other instruments of a *commercial nature*, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of *commercial jurisprudence*.”<sup>118</sup> The matter in controversy drew on law that was part of a larger law merchant, an area that was assumed to require uniformity, so it fit the “general common law” paradigm comfortably.<sup>119</sup> Greve suggests that the commercial law Justice

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the local tribunals, and the rights and titles to things having a permanent locality, such as the rights and titles to real estate and other matters immovable and intraterritorial in their nature and character.”).

108. See GREVE, *supra* note 75, at 136.

109. *Id.* at 137.

110. *Swift*, 41 U.S. at 16 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

111. *Swift*, 41 U.S. at 16-18.

112. *See id.* at 19-22.

113. *Id.* at 19.

114. *See id.*

115. *See id.* at 20-22.

116. *Swift*, 41 U.S. at 18-22.

117. *Id.* at 18-19.

118. *Id.* at 19 (emphasis added).

119. *Id.* Justice Story cites the Latin, “*Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit.*” *Id.* at 19. The text, loosely translated, means: “It will not be one law at Rome, another at Athens, and another is now, after the other: yea, and among all races, and at all times the law of one and the same shall prevail.” Translation of the Latin phrase, GOOGLE TRANSLATE.

Story referred to in *Swift* did not include just “anything having to do with economic exchange,’ such as a retail sale to consumers, a real estate transaction, or the execution of a will.”<sup>120</sup> Rather, Greve contends, it referred to “contractual relations *among businessmen*.”<sup>121</sup> Further, *Swift* involved negotiable instruments, which Greve describes as providing “a source of liquidity and as the chief medium of exchange in long-distance transfers of capital and credit,” crucial to the recovery of a then flagging U.S. economy.<sup>122</sup> Justice Story specifically included “ordinary contracts and written instruments”<sup>123</sup> in what he deemed covered by general common law, expanding the scope a bit beyond what Greve apparently contemplates and a bit beyond what many consider interstate and international commerce. But still, the subject matter in *Swift* drew on a circumscribed commercial law or law merchant, and was on its face very much a part of interstate commerce. Bradford Clark noted that at the time *Swift* was decided, the state courts would accept this as a correct view.<sup>124</sup>

Held to its facts and reasoning then, Justice Story’s decision in *Swift* was more modest than the popular caricatures would suggest. Yet the case has been roundly criticized, even maligned by scholars and jurists to the point of cliché.<sup>125</sup> This is due in large part to how *Swift*’s language was unmoored from its facts, its holding, and its rationale by courts ostensibly applying its doctrine during the century after *Swift* was decided. As these courts “spit the bit” and ventured far beyond *Swift* itself, they paid nominal homage to *Swift*’s limited holding, finding broad authority in the case’s sweeping language—language such as: “[B]ut they [decisions of state tribunals] cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed.”<sup>126</sup> And

[I]t will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect.<sup>127</sup>

The *Swift*-era diversity courts took this language as a license and applied it to develop a federal general common law whose reach was both broad and deep, expanding their authority far in excess of what Justice Story might have imagined or would have likely condoned.<sup>128</sup> Federal courts infringed on state authority by displacing state law in

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See also Borchers, *supra* note 17, at 111 (recognizing that general law refers to the law “applicable to transstate and transnational cases”); Charles E. Clark, *supra* note 15, at 274-76 (noting that *Swift*’s reference to general law was to matters that “transcend the artificial limits set by state boundary lines”).

120. GREVE, *supra* note 75, at 138.

121. See *id.* (emphasis in original).

122. *Id.* at 137.

123. *Swift*, 41 U.S. at 19.

124. Bradford R. Clark, *Erie’s Constitutional Source*, 95 CALIF. L. REV. 1289, 1292 (2007).

125. The criticism, though widespread, is not universal. See, e.g., GREVE, *supra* note 75, at 372 (arguing *Erie* is wrong and making a case for *Swift* throughout his book. At one point he states that the *Swift* regime was “properly applied” and “uniquely suited to a system of competitive federalism.”).

126. *Swift*, 41 U.S. at 19.

127. *Id.* at 18.

128. See Bradford R. Clark, *supra* note 124, at 1292-94; Gelfand & Abrams, *supra* note 74, at 943; Marcus,



clearly local matters.<sup>129</sup> Professor Corbin suggests that the abuse was not as widespread as lore might represent, reporting that “even before [the *Erie*] decision was rendered, the federal courts generally tried to discover and apply the common law of . . . the particular state.”<sup>130</sup> But Corbin admits that only some courts followed this practice, and even those did so out of grace, not because they believed they were required to exercise restraint. Further, it is pretty clear that many federal courts had quite frequently disregarded or even nullified local law to apply what they perceived as a superior law or, more accurately under the doctrine of the dominant legal theory of the day the “correct” law. Justice Frankfurter summed it up in *Guaranty Trust of New York v. York* as follows:

This impulse to freedom from the rules that controlled State courts regarding State-created rights was so strongly rooted in the prevailing views concerning the nature of law, that the federal courts almost imperceptibly were led to mutilating construction even of the explicit command given to them by Congress to apply State law in cases purporting to enforce the law of a State.<sup>131</sup>

The Supreme Court endorsed this broad interpretation of *Swift*, at least for a time.<sup>132</sup>

For example, in *Lane v. Vick*, a case involving the construction of a provision of a will specifying the devise of a Mississippi testator’s Mississippi real property, the Supreme Court affirmed a lower court decision that ignored on-point Mississippi precedent, explaining: “This court do[es] not follow the state courts in the construction of a will or any other instrument, as they do in the construction of statutes.”<sup>133</sup> It added, “[t]he mere construction of a will by a state court does not, as the construction of a statute of the state, constitute a rule of decision, for the courts of the United States.”<sup>134</sup> The Court said this despite the virtually universally recognized jurisprudence of the era—that matters of probate are local to the domicile of the decedent and matters of real property to the situs of the property. In the arena of choice of law, the strength and resilience of these concepts to this day reflect consensus that such matters are of the greatest concern to the particular state.<sup>135</sup> As such, they represent archetypically local matters and are no part of the

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*supra* note 18, at 1258.

129. Bradford R. Clark, *supra* note 124, at 1294; Marcus, *supra* note 18, at 1258 (“[F]ederal judges consistently expanded-and arguably perverted-Swift’s mandate.”).

130. Arthur L. Corbin, *The Laws of the Several States*, 50 YALE L.J. 762, 764 (1941). For example, in describing why suit in *Erie* was brought in the Southern District of New York, Professor Younger employs his patented colorful story telling style: “Then into a federal court! But which? The district court in Pennsylvania or the district court in New York? Not Pennsylvania, certainly . . . [T]he Third Circuit Court of Appeals, which included Pennsylvania, had fallen into the disagreeable habit of deferring to local law, relying less upon the ‘general’ law of *Swift v. Tyson* than did other circuits.” Irving Younger, *What Happened in Erie*, 56 TEX. L. REV. 1011, 1016 (1978) (internal citation omitted).

131. *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 102 (1945) (internal citations omitted).

132. *Id.* at 102 (citing *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 540 (1941)).

133. *Lane v. Vick*, 44 U.S. 464, 476 (1845). The language of the case includes this use of the word “do” which appears in current syntax to be grammatically incorrect; however, the author’s use of the pronoun “they” and the “do” again in the next part of the sentence indicates that the author of the opinion is using “court” as a plural collective noun.

134. *Id.* at 477.

135. *See, e.g., Clarke v. Clarke*, 178 U.S. 186, 190 (1900) (“It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and

commercial law described by Justice Story in *Swift*. Yet, the Supreme Court endorsed ignoring controlling state precedent.

In *Rowan v. Runnels*, an extraordinary example of overreaching, Chief Justice Taney applied U.S. Supreme Court precedent in a diversity case that should have applied Mississippi law to enforce a slave contract despite a Mississippi Supreme Court opinion that clearly held such contracts were barred by the Mississippi Constitution.<sup>136</sup> Justice Taney simply rejected the interpretation of the state's own supreme court regarding the meaning and applicability of the state's own constitution, substituting instead the judgment of the federal judiciary, an especially extreme episode given that a state court's interpretation of its own constitution had—even under the *Swift* regime—been given virtually absolute deference.<sup>137</sup>

*Parramore v. Denver & R.G.W.R. Co.*,<sup>138</sup> a case brought under Utah's wrongful death statute, provides another example of federal court intrusion. In *Parramore*, the Eighth Circuit found that the federal district court was not required to apply the Utah Supreme Court's case law on contributory negligence, explaining as follows: “in the consideration of that [contributory negligence] and other questions of general or commercial law the national courts are not bound by or required to follow the decisions of the state courts.”<sup>139</sup> The court swept a basic tort law defense into the commercial law portfolio by simple judicial conclusion:

[T]he power is granted to them and the duty is imposed upon them [the federal district courts] . . . to consider and decide questions of general and commercial law, with proper respect and esteem for the opinions of the state courts, but nevertheless as their own knowledge, wisdom, and judgment dictate. The court below was not required to follow the decisions of the Supreme Court of Utah upon the question of contributory negligence.<sup>140</sup>

Tort law defenses hardly seem part of the law merchant requiring unified jurisprudence, but rather seem to constitute the very sort of local law that Justice Story contrasted to the commercial law in his opinion in *Swift*. David Marcus cites Edward A.

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transfer, and for the effect and construction of wills and other conveyance.”) See *Lane*, 44 U.S. at 482 (McKinley, J., dissenting) (“[I]n obedience to the act of Congress before referred to, this court have laid it down, in many cases, as a sound and necessary rule, that they should follow the state decisions establishing rules and regulating titles to real estate. And in the following cases they have applied the rule to the construction of wills, devising real estate.”) See also EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS, & SYMEON SYMEONIDES, *CONFLICT OF LAWS* 995-99, 1051-52 (West, 3d. ed. 2000) [hereinafter *CONFLICT OF LAWS*]; Patricia A. Carteaux, *Conflicts of Law and Successions: Comprehensive Interest Analysis As A Viable Alternative to the Traditional Approach*, 59 TUL. L. REV. 389, 392 (1984). To be sure, this last material addresses state-to-state choice of law issues, but the decisive and fundamental characterization of matters involving decedents' estates, and especially land, as invariably being governed by the situs rule, provides strong evidence that the matter involved in *Lane* was local in the most fundamental sense.

136. *Rowan v. Runnels*, 46 U.S. 134, 139 (1847).

137. See *Gresham v. Leslie*, 50 F.2d 900 (7th Cir. 1931); *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 556 (1940); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *Portero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876 (9th Cir. 2011); *United States v. Miami Univ.*, 294 F.3d 797, 811 (6th Cir. 2002).

138. *Parramore v. Denver & R.G.W.R. Co.*, 5 F.2d 912, 914 (8th Cir. 1925).

139. *Id.*

140. *Id.*

Purcell's findings that "by the close of the nineteenth century, a general common law in the federal courts had displaced state common law of tort and contract."<sup>141</sup> Bradford Clark notes that federal courts had "vastly expanded the range of legal questions subject to the *Swift* doctrine' to include 'such historically local matters as punitive damages, property and torts.'"<sup>142</sup>

Driving this post-*Swift* expansion of federal common lawmaking was, according to most commentators, the dominant legal theory of the day, which envisioned a truly "common" law—common to all legal systems and certainly common among the co-habitants of a unified federal system.<sup>143</sup> According to this approach, the law exists as part of a larger tapestry, discoverable and applicable, shared in common among states and nations. Reason<sup>144</sup> figures prominently in many articulations of the approach of most jurists of the time.<sup>145</sup> Influenced by natural law theorists' vision of a universe of ascertainable law, illuminated by a moral light<sup>146</sup> and the related conception, of law as science,<sup>147</sup> this approach embraced the "then-prevailing view that courts must 'find,' not 'make,' the law"<sup>148</sup> and on the idea that federal judges were just as qualified to find the law as were state court judges. Indeed, some would argue that federal courts are privileged in their ability to discover the law for a variety of reasons. For example, Greve proposes that in divining the law, local courts might "be biased in a way in which federal courts are not."<sup>149</sup> Greve points as well to the federal courts' more global perspective, especially important where litigants from multiple jurisdictions are involved.<sup>150</sup> Other commentators, including Professor Benjamin Glassman, offer a slightly more impolitic rationale, suggesting that federal judges are "institutionally advantaged," bringing smaller caseloads, smarter clerks, and even greater legal skills to the table.<sup>151</sup> The question of institutional advantage is controversial and affects even post-*Erie* discussions of how federal court judges should discharge their duties in diversity cases. Whether advantaged or merely

141. Marcus, *supra* note 18, at 1258 n.40 (citing EDWARD A. PURCELL, JR. LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, at 61 (1992)).

142. Bradford R. Clark, *supra* note 18, at 1476 (citing FREYER, *supra* note 84, at 71). See also Bradford R. Clark, *supra* note 124, at 1294.

143. Guar. Trust Co. v. York, 326 U.S. 99, 101 (1945) ("[Erie] did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare."). See also Doernberg, *supra* note 11, at 620.

144. That is, the reasoning power of the judges who decide cases. William Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 921 (1988).

145. *Id.*

146. For a detailed description of natural law theories, see *Natural Law Theories*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/entries/natural-law-theories> (last visited Jan. 5, 2014).

147. See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 429 (1995) ("[J]urists, like scientists, were seeking truth, and where this search for juristic truth could be separated from political ends."). Lessig describes this type of science as quite different from our current understanding, noting its Baconian influence and contemplating that "general principles could be tested by reference to the actual data of this science, common law decisions." *Id.* at 430. Judges were to bring order and structure to the disparate rules and decisions. *Id.*

148. Borchers, *supra* note 17, at 115.

149. GREVE, *supra* note 75, at 142.

150. See *id.* at 230-311; see also Note, *Of Lawyers and Laymen: A Study of Federalism, The Judicial Process, and Erie*, 71 YALE L.J. 344, 354-55 (1960) (drawing on studies of international tribunals to suggest the importance of tribunals' understanding of the broader implications of their actions and how such actions have implications for federal courts' role in diversity jurisdiction).

151. See, e.g., Glassman, *supra* note 24, at 269-73.

equal to state court judges in the task, the result followed that, under the then ever-expanding *Swift* doctrine, even when sitting in diversity, federal judges were free to exercise independent discretion and were not necessarily bound by state court articulations when they disagreed with the accuracy of the state court judge's divining of universal legal principles.<sup>152</sup> Justice Frankfurter's legendary words describe the approach, although with perhaps a bit of hyperbolic metaphor:

Law was conceived as a "brooding omnipresence" of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law, even in cases where a legal right as the basis for relief was created by State authority *and could not be created by federal authority* and the case got into the federal court merely because it was "between Citizens of different States."<sup>153</sup>

Bradford Clark quotes from *Erie* to make the point: "the *Swift* doctrine rest[ed] upon the assumption that there is a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."<sup>154</sup> In other words, the truth is out there, and it is the same truth for all courts—part of a seamless web of discernible law. With respect to matters in their competence, states might opt out of this universal common law by statute or constitution, but absent such an explicit opt-out by an individual state, all states were assumed to cleave to a shared body of law. That shared body of law was what the federal and the state court judges would explore and interpret, each with equal competence to discern the nuances.<sup>155</sup>

While acknowledging the influence of this legal theory, Greve adds dimension to the reasons for the federal courts' post-*Swift* activism: "[t]he pro-competitive thrust of the *Swift* principle and the states' protectionist and exploitative impulses pushed in opposite directions."<sup>156</sup> He thus argues that the federal government's constitutional mandate to protect commerce provided, and he asserts, *still* provides, a legitimate basis for creation of a robust federal general common law.<sup>157</sup>

The fact remains, the federal courts continued to expand the *Swift* doctrine, even as the states increasingly claimed their own right to formulate state law.<sup>158</sup> And this was so,

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152. See Borchers, *supra* note 17, at 115-18; Bradford R. Clark, *supra* note 18, at 1475 (internal citations omitted).

153. Guar. Trust Co. v. York, 326 U.S. 99, 102 (1945) (internal quotation marks omitted) (emphasis added). The brooding omnipresence metaphor should not be taken too literally nor applied too simplistically. As Susan Bandes notes, "neither Justice Story nor subsequent Justices who expanded the reach of *Swift* experienced themselves as communing with a brooding omnipresence." Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829, 855 (2001) (reviewing EDWARD PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000)).

154. Bradford R. Clark, *supra* note 18, at 1475 (citing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

155. See *Swift v. Tyson*, 41 U.S. 1, 18-19 (1842); GREVE, *supra* note 75, at 372.

156. GREVE, *supra* note 75, at 145-46.

157. See *id.*

158. Bradford R. Clark, *supra* note 18, at 1476.

even in cases where states had adopted specific statutes, heightening the conflict and creating the illogical, even unjust situation where litigants with virtually identical cases obtained diametrically opposed results “for no other reason than the existence or failure of diversity jurisdiction.”<sup>159</sup> Justice Frankfurter summed it up in the quote that opened this article, referring to *Swift*’s “mischievous consequences” under which the “fortuitous circumstance of residence of one of the parties at the time of the suit” results in “two independent law makers within the same state emitting conflicting rules concerning the same transactions.”<sup>160</sup> This led to transparent forum shopping—not state-to-state,<sup>161</sup> but state to federal—and perverse manipulation, culminating in the notorious *Black and White Taxi* case.

In that case, a railroad company, incorporated through a charter granted by the Kentucky legislature, entered a contract with Black and White, then a Kentucky incorporated taxi company, granting it exclusive rights to park on railroad property and pick up disembarking passengers.<sup>162</sup> Brown and Yellow, another Kentucky incorporated taxi service, began parking on railroad property and picking up passengers.<sup>163</sup> The railroad company did nothing to prevent this, so Black and White sued the railroad company, as well as Brown and Yellow, in the federal district court citing diversity of citizenship and seeking enforcement of its contractually granted monopoly.<sup>164</sup> This seems pretty straightforward, except for the fact that in order to secure jurisdiction in the federal court, Black and White dissolved itself as the Kentucky corporation that was the original party to the contract, reincorporated in Tennessee, and, with the cooperation of the railroad, re-entered a contract identical to the original one.<sup>165</sup> The Supreme Court acknowledged the actions and motivations—

Respondent’s incorporators and railroad representatives, *preferring to have this controversy determined in the courts of the United States, arranged to have respondent organized in Tennessee to succeed to the business of the Kentucky corporation and to enter into this contract in order to create a diversity of citizenship.*<sup>166</sup>

But the Court found there was no fraud or inappropriate manipulation of diversity jurisdiction.<sup>167</sup>

Why would the railroad and Black and White go to such lengths to create diversity jurisdiction? Kentucky was one of a minority of states that would have found the contract

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159. Gelfand & Abrams, *supra* note 74, at 943.

160. See Kurland, *supra* note 1, at 198 (quoting Frankfurter, *supra* note 1, at 526-27); see also William M. Wiecek, *The Debut of Modern Constitutional Procedure*, 26 REV. LITIG. 641, 673 (2007).

161. Discouraging state-to-state forum shopping is a core goal of most choice of law regimes, though it is a goal never fully realized. See Borchers, *supra* note 17, at 120. Professor Borchers views interstate forum shopping as more troubling than intrastate forum shopping. *Id.* at 121.

162. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 522-23 (1928).

163. See *id.* at 522.

164. See *id.* at 524.

165. See *id.* at 523-24.

166. See *id.* (emphasis added).

167. *Black & White Taxicab*, 276 U.S. at 524.

in question unenforceable. By creating diversity jurisdiction, the parties to the contract were able to “select” the law more favorable to their transaction and so evade the otherwise applicable state laws of Kentucky.<sup>168</sup> True to the *Swift* doctrine, the Court first declared that the matter was one of “general common law” and then examined that common law, mining its own precedent, and the holdings of courts in eighteen different states, from Rhode Island to Texas (including Kentucky), as well as English authority. It found that its own precedent, and that of the majority of jurisdictions (fifteen states, plus England), would enforce such a contract. The court concluded, “[t]he cases cited show that the decisions of the Kentucky Court of Appeals holding such arrangements invalid are contrary to the common law as generally understood and applied.”<sup>169</sup>

The case created a firestorm of criticism and unquestionably represented the zenith of the *Swift* era.<sup>170</sup> It also galvanized the efforts of critics of the doctrine, whose distain for *Swift* had become a rising chorus.<sup>171</sup> They now had a worst-case example at which to point. At the same time, the dominance of the natural law/general common law/oracular tradition<sup>172</sup> was eroding in the face of new legal theories, among them positivism and legal realism.<sup>173</sup> Thus, *Swift* was being attacked on both theoretical<sup>174</sup> and practical<sup>175</sup> grounds: legal theorists increasingly posited “the political reality” that judges deciding open questions were *making* rather than *finding* law,<sup>176</sup> and that the only law that existed was that declared by a sovereign. At the same time, practitioners and commentators pointed to the problems of intrastate forum shopping, the rise of abusive litigation tactics, and the unfairness of similarly situated litigants being held to different legal rules.<sup>177</sup> Following the *Black and White Taxi* case, the Supreme Court backed off some from its more expansionist tendencies,<sup>178</sup> but the change came too late to save *Swift*.

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168. To be clear, there is virtually no question that Kentucky’s invalidating law would have applied to a contract executed in Kentucky, to be performed in Kentucky and involving two Kentucky parties. *See, e.g.*, RESTATEMENT (FIRST) CONFLICT OF LAWS §§ 332, 358 (1934).

169. *Black & White Taxicab*, 276 U.S. at 528. It should be noted that the court did not point to any special status of the railroad in interstate commerce. Further, the passengers were typically transported across town. *See* Robert J. Condlin, “A Formstone of Our Federalism”: *The Erie/Hanna Doctrine & Casebook Law Reform*, 59 U. MIAMI L. REV. 475 (2005).

170. *See, e.g.*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73 (1938); Charles E. Clark, *supra* note 15, at 278; GREVE, *supra* note 75, at 223; Shreve, *supra* note 73, at 875 (citing FREYER, *supra* note 84).

171. *See* *Balt. & O.R. Co. v. Baugh*, 149 U.S. 368, 394-405 (1893) (Field, J., dissenting); *Gelpcke v. City of Dubuque*, 68 U.S. 175, 209-10, 219-20 (1863) (Miller, J., dissenting); *Turk v. Newark Fire Ins. Co.*, 4 F.2d 142, 145 (E.D. Pa. 1925); *Cole v. Pa. R.R.*, 43 F.2d 953, 956-57 (2d Cir. 1930); *Kuhn v. Fairmont Coal Co.*, 179 F. 191, 210 (4th Cir. 1910); *Hartford Fire Ins. Co. v. Chicago*, 70 F. 201, 208-09 (8th Cir. 1895) (Caldwell, J., dissenting).

172. Professor Casto uses the term “oracular” to describe the model where judges serve as “living oracles.” *See* William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 913 (1988) (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1765)).

173. *See id.* at 907; GREVE, *supra* note 75, at 223; Bradford R. Clark, *supra* note 18, at 1476; Gelfand & Abrams, *supra* note 74, at 943. Some commentators suggest too much emphasis has been put on the causal connection between the advent of positivist theory and the outcome in *Erie*. *See, e.g.*, Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 676 (1998).

174. *See* Lessig, *supra* note 147, at 430-32; Purcell, *supra* note 83, at 1834-35.

175. *See* *Lumbermen’s Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 58 (1954); Kurland, *supra* note 1, at 198 (quoting *Frankfurter*, *supra* note 1, 526-27); Goldsmith & Walt, *supra* note 173, at 688; Younger, *supra* note 130, at 1017-18.

176. *See* Lessig, *supra* note 147, at 430-31. *See also* Bradford R. Clark, *supra* note 18, at 1476.

177. *See* GREVE, *supra* note 75, at 223; FREYER, *supra* note 84, at 90-91.

178. *See* Goldsmith & Walt, *supra* note 173, at 688; GREVE, *supra* note 75, at 223; FREYER, *supra* note 84, at 107, 125.

In 1938, almost a century after *Swift* was decided, the Court decided *Erie Railroad Co. v. Tompkins*, a case that presented “humdrum facts”<sup>179</sup> but that hit the legal world “like a thunderbolt.”<sup>180</sup> Despite almost 100 years of precedent and no indication by Congress that Justice Story had gotten the meaning of the RDA wrong, *Erie* overruled *Swift*, citing not only the RDA, but also and, more significant, constitutional infirmities that had not been raised or briefed by the litigants.<sup>181</sup> Presumably, the Court took this bold action to correct what Justice Frankfurter described as a “perversion.”<sup>182</sup> But, as we have seen above, the displacement of state law by federal courts and the inconsistencies in the law applied by tribunals ostensibly applying the same law, were not eliminated when Brandeis waved his *Erie* wand.<sup>183</sup> To understand why and to fashion a solution, we must examine what *Erie* held, how Brandeis supported the holding, how *Erie* has been interpreted and applied, and what the jurisprudential and practical concerns are that swirl throughout what has become known as the *Erie* Doctrine.

VI. *ERIE*: “SO BEAUTIFULLY SIMPLE, AND SO SIMPLY BEAUTIFUL”<sup>184</sup>

In his legendary article praising *Erie*,<sup>185</sup> Judge Friendly wrote:

The complementary concepts—that federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states whereas state courts must follow federal decisions on subjects within national legislative power where Congress has so directed—seem so beautifully simple, and so simply beautiful, that we must wonder why a century and a half were needed to discover them, and must wonder even more why anyone should want to shy away once the discovery was made.<sup>186</sup>

But *Erie*’s simple rule came in an unexpected case. Late one night in 1934, Harry Tompkins, a resident of the village of Hughestown, Pennsylvania, was walking on the beaten footpath close to and parallel with the railroad tracks that ran through the village.<sup>187</sup> According to his testimony, he heard a train whistle and saw the train’s headlight, but kept to the path, as he had walked it many times with no problem. He described the engine passing him and said he then saw something black “that looked like a door” coming toward him. He threw his hands up. The next thing he knew, he was waking up in the hospital

179. GREVE, *supra* note 75, at 224.

180. *Id.* at 223; *see also* Younger, *supra* note 130, at 1011-18 (describing Mr. Tompkins’s story, from his ill-fated walk along the tracks to his selection of lawyers).

181. *See, e.g.*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938).

182. Kurland, *supra* note 1, at 198 (citing Frankfurter, *supra* note 1, at 526-27).

183. *See supra* notes 1-28 and 52-68 and accompanying text.

184. Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 422 (1964).

185. *See* Norman Dorsen et. al., *Seventy-Fifth Anniversary Retrospective: Most Influential Articles*, 75 N.Y.U. L. REV. 1517, 1534 (2000).

186. *See id.* at 1535. (citing Friendly, *supra* note 184, at 422). Greve suggests that Judge Friendly’s elegant praise of *Erie*, may in fact have been faint praise. GREVE, *supra* note 75, at 241.

187. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 69 (1938); Younger, *supra* note 130, at 1013-14.

with most of his arm amputated.<sup>188</sup>

Tompkins retained three young New York lawyers to handle his case.<sup>189</sup> Their preliminary research indicated that the law of Pennsylvania, which would surely govern under inter-state choice of law principles,<sup>190</sup> permitted recovery only if Tompkins could show that the railroad's conduct causing his injury had been wanton or willful.<sup>191</sup> He could not make this showing. At best, the railroad was negligent for allegedly leaving a door open on a moving train, or allowing some other fixture to protrude.<sup>192</sup> Pennsylvania was in the minority in adopting this rule. The overwhelming majority of jurisdictions would find a pedestrian on a regularly used walkway along railroad tracks was owed a standard duty of reasonable care.<sup>193</sup> Tompkins' only chance to prevail was to sue in federal court in diversity and to convince a federal judge to apply general common law, to wit, the clear majority rule that would impose the standard duty of care. Alas, the federal courts in Pennsylvania chose to respect the larger body of local law in such cases, and almost certainly would have applied Pennsylvania state law to Tompkins' case.<sup>194</sup>

But all was not lost. Tompkins and his lawyers found a federal court more amenable to the general law theory. They sued the Erie Railroad in the Federal District Court for the Southern District of New York, pursuant to diversity jurisdiction, an option available because the railroad was a New York corporation and Tompkins was a Pennsylvania citizen.<sup>195</sup> Drawing on the broadest interpretation of the *Swift* doctrine, the New York district court applied not the law of Pennsylvania, but the majority rule that would hold the railroad to a standard duty of care.<sup>196</sup> The jury awarded Mr. Tompkins \$30,000.<sup>197</sup> The Second Circuit affirmed.<sup>198</sup> In affirming the judgment, the Second Circuit first declared the legal question a matter of general law about which the federal courts were "free, in absence of a local statute, to exercise their independent judgment as to what the law is."<sup>199</sup> The court drew on precedent from a broad range of federal and state courts *other* than those of the Commonwealth of Pennsylvania<sup>200</sup> and concluded that the more plaintiff-friendly standard duty applied. Accordingly, the court affirmed the trial court's judgment.<sup>201</sup>

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188. *Erie*, 304 U.S. at 69; Younger, *supra* note 130, at 1014.

189. *See* Younger, *supra* note 130, at 1014.

190. *Erie*, 304 U.S. at 80. Pennsylvania applied the traditional *lex loci delicti*, or place of the wrong rule at the time; thus Pennsylvania law would apply. *See* Griffith v. United Airlines, Inc., 203 A.2d 796, 801 (Pa. 1964); *see generally* James Audley McLaughlin, *Conflict of Laws: The Choice of Law Lexi Loci Doctrine, the Beguiling Appeal of a Dead Tradition, Part One*, 93 W. VA. L. REV. 967 (1991).

191. *Erie*, 304 U.S. at 80.

192. *See id.* at 81 (Butler, J., dissenting).

193. *See id.* at 81-82 (Butler, J., dissenting).

194. FREYER, *supra* note 84, at 124; *see also* Younger, *supra* note 130, at 1016 (stating that the Third Circuit was more deferential to state articulated common law).

195. *Erie*, 304 U.S. at 69.

196. *Id.* at 81-82.

197. *Id.* at 70.

198. *See generally* Tompkins v. Erie R.R. Co, 90 F.2d 603 (2d Cir. 1937), *rev'd*, *Erie*, 304 U.S. 64.

199. *Tompkins*, 90 F.2d at 604.

200. *Id.* (noting that "the defendant concedes that the great weight of authority in other states is to the contrary" of the Pennsylvania rule).

201. *Id.* ("Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its train.").



The Railroad appealed, and the Supreme Court granted *certiorari* to decide, presumably, the question as framed by the Railroad: whether the Second Circuit erred by refusing to apply “the Pennsylvania rule either on principles of comity or by virtue of the [RDA].”<sup>202</sup> The Railroad did not challenge *Swift* or argue for its reversal, but rather it argued that the Second Circuit had misapplied the *Swift* doctrine and that the cases where the Supreme Court had approved the application of general common law were distinguishable from this case.<sup>203</sup> Specifically, the Railroad posited that because the Pennsylvania rule was so well established, it must be found controlling pursuant to doctrines of comity and the mandate of the Rules of Decision Act, even if the matter fell into the twilight area between clearly local and clearly general law.<sup>204</sup> To distinguish this case from *Swift*, and other cases where the federal courts had imposed their own rule, the Railroad relied on Justice Story’s language describing state court declarations of law as “often reexamined, reversed, and qualified,” arguing in contrast that the law of Pennsylvania was conclusive and “established with sufficient definiteness and finality.”<sup>205</sup> Therefore, the Railroad contended that the rule was not uncertain and, thus, should be respected and controlling. The point is, the litigants did not raise the argument that the *Swift* doctrine was unconstitutional or even that the Court in *Swift* (as distinct from the Second Circuit in the case at hand) had misapplied the RDA. Rather, the plea was that this case fell outside the *Swift* rule, and that the Second Circuit misapplied the controlling precedent.

In April 1938, in a Supreme Court term that Greve described as, “full of surprises,”<sup>206</sup> Justice Brandeis delivered his epic decision. *Erie* overruled a venerable, almost century-old precedent, shocking not only due to the formidable power of stare decisis<sup>207</sup> but more remarkable because it declared the *Swift* doctrine unconstitutional. In doing so, the Court ignored two of its own policies: first, it hinged its decision on an issue not raised or briefed<sup>208</sup>—though it apparently was discussed robustly at oral argument<sup>209</sup>—and second, it decided a constitutional issue when there was a non-

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202. Brief for Appellant at 2, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), (No. 367) 1938 WL 63879.

203. *Id.* at 27.

204. *Id.* at 27-38.

205. *Id.* at 28-29.

206. GREVE, *supra* note 74, at 225.

207. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (elaborating on respect for precedence); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 585 (2001); see William R. Casto, *supra* note 172, at 928 n.17 (citing in part *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)) (noting that Justice Brandeis himself held a view of stare decisis that caused him to resist overruling judicial decisions that made even serious mistakes in interpreting statutes, believing these matters were best corrected by legislatures, not courts).

208. *Erie*, 304 U.S. at 82 (Butler, J., dissenting) (describing how no constitutional question was suggested or argued in the lower courts).

209. See *id.* (citing *Olson v. United States*, 292 U.S. 246, 262 (1934)); *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 494 (1933); *Gunning v. Cooley*, 281 U.S. 90, 98 (1930) (stating that no constitutional question was suggested or argued, and the Court will not consider any question not raised below and presented by the petitioner). Notably, Kiendl, who handled the oral argument for *Erie*, wrote to the Yale Law School Librarian: “At the time of the oral argument, I had not proceeded very far before Mr. Justice Brandeis pointedly inquired about our views with regard to the *Swift v. Tyson* case . . . . Practically all the members of the Court then participated in a discussion of *Swift v. Tyson*, and a large part of my argument revolved around it.” See Younger, *supra* note 130, at 1028-29 (citing FREDERICK C. HICKS, *MATERIALS AND METHODS OF LEGAL RESEARCH* 376 (1942)).

constitutional basis by which it could arguably have disposed of the case.<sup>210</sup> Further, never before had the Court overruled a line of precedent by finding the course pursued by the Supreme Court itself was unconstitutional.<sup>211</sup>

Questions remain as to the precise constitutional basis upon which Justice Brandeis anchored his opinion and as to whether *Erie* was in fact constitutionally compelled.<sup>212</sup> These questions—whether *Erie* is constitutionally compelled, and if so, by which constitutional provisions—are important to the task at hand. Thus, we now turn to the opinion in *Erie* itself, for, “in seeking to understand a decision we surely should begin with the text.”<sup>213</sup>

In his opinion in *Erie*, Justice Brandeis wasted no time with niceties. Instead he opened the opinion with a salvo: “The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved.”<sup>214</sup> As noted above, this question was not raised by either of the parties, but was apparently the reason certiorari was granted on the case, originally described by Justice Brandeis’ clerk as “just another diversity case.”<sup>215</sup>

From the stunning opening line, Justice Brandeis went on to narrate an objective statement of the facts, the procedural posture and the legal arguments of the parties, eventually circling back to where he had begun: “[b]ecause of the importance of the question whether the federal court was free to disregard the alleged<sup>216</sup> rule of the Pennsylvania common law, we granted certiorari.”<sup>217</sup>

In the first part, Brandeis summarized the *Swift* doctrine as holding that federal courts sitting in diversity need not apply the unwritten law of the state as declared by the state’s highest court and that they were free to exercise independent judgment regarding what the common law of the state is or should be.<sup>218</sup> Then he placed a small piton he would use in his eventual constitutional rationale for reversal, by quoting language from a

210. *Erie*, 304 U.S. at 87-88 (Butler, J., dissenting). Indeed, Justice Brandeis himself was noted for his insistence that the Supreme Court avoid constitutional issues if there were any other basis for the decision. CHARLES ALAN WRIGHT ET AL., 19 FED. PRAC. & PROC. § 4505 (2d ed. 2012).

211. See FREYER, *supra* note 84, at 144.

212. See GREVE, *supra* note 75, at 226, 372.; WRIGHT ET AL., *supra* note 210; Borchers, *supra* note 17, at 117-19; Gelfand & Abrams, *supra* note 74, at 946-47; Stephen Hochhauser, *Do We Want Activist Federal Judges Who Think They Have a Mandate to Right Wrongs?*, 36 WESTCHESTER B.J. 10, 14 (2009).

213. Casto, *supra* note 172, at 927-28.

214. *Erie*, 304 U.S. 64, 69 (1938). These are the very first words of the Court’s opinion.

215. FREYER, *supra* note 84, at 130.

216. Apparently Justice Brandeis did not want to imply that the Supreme Court was making a final finding on the exact content of the Pennsylvania law. Mr. Tompkins was an extremely sympathetic plaintiff. Recently laid off from the Pittston Stove works, he had supported himself, his wife, and his baby by picking up odd jobs. On the night of the accident, he was walking home after visiting his sick mother-in-law. His injury was grievous. See FREYER, *supra* note 84, at 122-23. Brandeis had his clerk research thoroughly the law of Pennsylvania to determine whether there might be some basis for Tompkins to recover, and the clerk found none. *Id.* at 132-33. Apparently out of some concern for not unnecessarily foreclosing any possible recovery by Tompkins, the Court’s opinion made no reference to whether or not the law of Pennsylvania, as argued by the Railroad, was correct. *Id.* at 137. Rather, Justice Brandeis limited his holding to overruling the Second Circuit’s decision to displace Pennsylvania law with the Court’s determination of general common law.

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

218. See *id.* In his opinion, Justice Brandeis accurately described how the *Swift* doctrine had evolved. Justice Brandeis then quoted Justice Story from his *Swift* opinion, in which Story stated, “[t]he true interpretation of the 34th section limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character,” which gave a slightly fairer gloss to the actual holding and reasoning of *Swift* as distinct from its later application. *Id.*

Supreme Court opinion discussing whether federal courts sitting in equity actions must apply state law. In that opinion, the Court noted the RDA “‘is merely declarative of the rule which would exist in the absence of the statute.’”<sup>219</sup> Brandeis extrapolated from this that the federal courts applying the *Swift* doctrine had “assumed, in the broad field of ‘general law,’ the power to declare rules of decision which Congress was confessedly without power to enact as statutes.”<sup>220</sup> Brandeis did not elaborate, but laid the foundation for a constitutional argument with this language.

He next recited the growing criticisms of *Swift*’s construction of Section 34 of the RDA, referring to “recent research of a competent scholar” (Professor Charles Warren) that, according to Brandeis, “established the construction given [the RDA] by the Court [under the *Swift* doctrine] was erroneous.”<sup>221</sup>

Then, he rolled out the poster child for change: the *Black and White Taxi* case, pulling no punches in describing the manipulation of citizenship designed to manufacture diversity of citizenship so the railroad and taxi company could enforce a monopolistic contract void in Kentucky where all the action took place.<sup>222</sup>

Justice Brandeis next drew on experience with *Swift* over decades that “revealed [*Swift*’s] defects.”<sup>223</sup> He pointed out that the national uniformity of law that *Swift* was supposed to achieve had not been realized because state courts persisted in declaring their own opinions on matters of common law. He pointed out as well, that not only did *Swift* fail to achieve national uniformity, but also, ironically, it created a lack of uniformity of law within individual states. He criticized the uncertainties created because courts found it impossible to identify reliably the “line of demarcation between the province of general law and that of local law.”<sup>224</sup> More damning, having not achieved its goals, the price paid was high—the doctrine had created serious mischief. Diversity of citizenship was conferred to prevent “apprehended discrimination in state courts against those not citizens of the state.”<sup>225</sup> But *Swift* precipitated “grave discrimination by noncitizens against citizens” because it “made the rights enjoyed vary according to whether enforcement was sought in the state or federal court.”<sup>226</sup> And, he noted, the “privilege” of picking the forum, belonged to the noncitizen. This effect, Justice Brandeis concluded, made “impossible equal protection of the law.”<sup>227</sup> Exacerbating the discrimination, he argued, were both the broad sweep of what federal courts were willing to label “general law”<sup>228</sup> and the wide

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219. *Id.* at 72 (citing *Mason v. United States*, 260 U.S. 545, 559 (1923)) (“The statute, however, is merely declarative of the rule which would exist in the absence of the statute.”).

220. *Id.* at 72.

221. *Id.* As noted below, Professor Warren’s conclusions have been called into question by many scholars, and despite this citation, Justice Brandeis does not appear to rely heavily on Warren’s research in his *Erie* reasoning.

222. *Erie*, 304 U.S. at 71, 73-75.

223. *Id.* at 74.

224. *Id.*

225. *Id.*

226. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74-76 (1938); see also *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949).

227. *Erie*, 304 U.S. at 75.

228. *Id.* at 75-77. Justice Brandeis listed, in addition to “questions of purely commercial law,” the disregard of state law regarding other issues that might intuitively seem to be local in nature: the ability of a carrier to limit negligence liability; punitive damages; tort liability committed by persons or on property located in the state; interpretation of local deeds, mineral conveyances, and “even devises of real estate.” *Id.*

range of persons able to take advantage of diversity of citizenship by being, at least in some cases, “willing to remove from their own state and become citizens of another”<sup>229</sup>— a reference to our poster child, the Black and White Taxi case.

Justice Brandeis concluded the second part of the Court’s opinion by reprising the “injustice and confusion” caused by the *Swift* doctrine noting the many calls for statutory abolition or circumscribing of diversity jurisdiction motivated, he reasoned, by Swiftian abuses.

Against this background, he launched the constitutional attack: “[i]f only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.”<sup>230</sup> This statement was a nod to the doctrine of stare decisis, especially powerful when a long-standing rule involving a question of statutory interpretation is at stake, and Congress has made no effort to correct it. No, the mischief called for a more radical approach: “[b]ut the unconstitutionality of the course pursued has now been made clear, and compels us to do so.”<sup>231</sup>

He opened the third part with the holding and its new rule: “[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,” further clarifying that the law of the state explicitly includes not only statutes, but the unwritten common law declared by the state’s highest court.<sup>232</sup> Strictly speaking, only these last fourteen words were necessary to undo the problems with *Swift*, as it was *Swift*’s holding that federal diversity courts were not required to follow state court decisions, only statutes, that needed correcting. Yet the other language, including not only the finding of unconstitutionality, but also the equally important pronouncement that “[t]here is no federal general common law,”<sup>233</sup> transformed the legal landscape.

The Court’s opinion relied on both the RDA and the Constitution. Additionally, the Court made it clear that while the real infirmity was the constitutional one, it was *not* declaring the RDA itself unconstitutional. Rather, the Court found that *Swift* had misinterpreted the RDA’s statutory mandate and that this misinterpretation made *Swift* itself, and the sprawling doctrine it spawned, unconstitutional.

Strategically, Justice Brandeis needed the constitutional hook in *Erie*. Had *Swift* merely misinterpreted Congress’ intent in the RDA, Congress could easily have corrected this error by amending the statute in the years during which the *Swift* doctrine had attained epic proportions of intrusion on state lawmaking prerogative. Because there were many calls for reform or revision and even for abolition of diversity jurisdiction altogether, it cannot be argued that the concerns about *Swift* and the abuses of its progeny were something Congress just missed.<sup>234</sup> Further, the research by Charles Warren regarding the

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229. *Id.* at 75-77.

230. *Id.* at 77.

231. *Id.* at 77-78.

232. *Erie*, 304 U.S. at 71, 78.

233. *Id.* at 78.

234. While amendments to Section 34 of the Judiciary Act of 1789 (RDA) have from time to time been suggested, the section stands as originally enacted. *See Erie*, 304 U.S. at 77 n.20; *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting); *see also Note, Devices to Avoid Diversity Jurisdiction*, 44 HARV. L. REV. 97, 100 n.1 (1930) (citing Frankfurter, *supra* note 1; HART AND WECHSLER, *supra* note 80, at 1053) (reporting report that Senator Norris twice introduced bills calling for the abolition of diversity jurisdiction); *see generally* Dudley O. McGovney, A

true intent of the RDA upon which Justice Brandeis relied in making the argument that *Swift* misapplied the RDA, had been called into question by several commentators, even at the time, as it has by many more since.<sup>235</sup>

And, as several commentators note, Justice Brandeis held to a judicial philosophy that would avoid overruling judicial opinions that made even serious mistakes in interpreting statutes, believing correction of such misinterpretations best left to the legislatures.<sup>236</sup> Thus, the constitutional hook was critical to the decision, especially for it to stick in burying *Swift*.

Yet, as noted, many have criticized the constitutional holding and rationale of the decision as unfounded and have wondered which (if any) constitutional provisions compelled the decision.<sup>237</sup> Professor David Currie dubbed it “a bit of judicial hyperbole which, having served its purpose, should not be permitted to mislead even the most literal-minded reader.”<sup>238</sup> Professor Craig Green insists *Erie*’s constitutional “foundations are cracked.”<sup>239</sup> But despite these critiques, *Erie* has been interpreted and applied as a constitutional doctrine, although perhaps not immediately after it was decided.<sup>240</sup> As Professor Lind stated, “the gravitational pull of *Erie* is decidedly constitutional.”<sup>241</sup> Wright and Miller offer an even more definitive statement: “[i]n the end, given the Supreme Court’s role as the final authority on constitutional matters, *Erie* must be accepted as a constitutional decision.”<sup>242</sup> The constitutional mandate of *Erie* cannot be ignored, and the precise nature of this constitutional mandate, though oblique, affects how the federal courts should undertake the task of ascertaining<sup>243</sup> and applying state law. The constitutional underpinnings of *Erie* help define how federal courts should approach their role in diversity and, as important, illuminate the nature and seriousness of the problem when they get it wrong.

## VII. *ERIE*’S CONSTITUTIONAL BASIS

The source of *Erie*’s constitutional mandate does not leap out from the opinion, surprising given Justice Brandeis’ quite remarkable gifts of legal analysis and exposition. Wright and Miller point out that for an opinion overruling a longstanding and important

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*Supreme Court Fiction: III*, 56 HARV. L. REV. 1225 (1943).

235. See GREVE, *supra* note 75, at 143-44, 226; FREYER, *supra* note at 84, at 112-13; Casto, *supra* note 172, at 909 n.17; Borchers, *supra* note 17, at 103-05.

236. See Casto, *supra* note 207, at 909 n.17.

237. Kurland, *supra* note 1, at 199-200; WRIGHT ET AL., *supra* note 210, § 4505 nn.11-17; Childress, *supra* note 17, at 157; Aaron Nielson, *Erie As Nondelegation*, 72 OHIO ST. L.J. 239, 242 (2011).

238. Kurland, *supra* note 1, at 199 (quoting Brainerd Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 468-69 (1955), condensed in *The Erie Doctrine and Transfers of Civil Actions*, 17 F.R.D. 353, 372 (1955)).

239. Craig Green, *Repressing Erie’s Myth*, 96 CALIF. L. REV. 595, 596 (2008).

240. WRIGHT ET AL., *supra* note 210, at nn.18-22.

241. Lind, *supra* note 85, at 733.

242. WRIGHT ET AL., *supra* note 210, at nn.33-33.1; see also Bradford R. Clark, *supra* note 124, at 1296-97 (noting the third passage of the opinion as “cryptic,” but stating that the Court’s conclusion was “unmistakably clear”: *Swift* was “an unconstitutional assumption of powers”) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928))).

243. The verb “ascertaining” is used here self-consciously to encompass the broadest range of approaches the federal court may take.

doctrine, “the constitutional discussion . . . is remarkably abbreviated.”<sup>244</sup> What are the possibilities?

Early in the opinion, Justice Brandeis charged that the *Swift* doctrine makes “impossible equal protection of the law.”<sup>245</sup> But surely Justice Brandeis was not using these words to refer to the Equal Protection clause of the Constitution. Application of different laws in different courts (state to state or state to federal) does not present distinctions so irrational that they would fail the forgiving standard then applicable under the Equal Protection clause,<sup>246</sup> as evident from the minimalist approach taken to constitutional restrictions on state choice of law regimes, even at the time of *Erie*.<sup>247</sup> Further, at the time *Erie* was decided, it was unclear whether the Equal Protection clause even applied against the federal government.<sup>248</sup> Justice Brandeis must have been using these words in their vernacular sense for rhetorical impact; perhaps he meant that the *Swift* doctrine created unfairness—inequitable treatment of parties.<sup>249</sup> We must look elsewhere for his constitutional grounding.

Language in the opinion also suggests that the Enumerated Powers Doctrine and the Tenth Amendment might provide the constitutional basis for *Erie*.<sup>250</sup> Together these provisions define the balance of power between the federal and the several state sovereigns.<sup>251</sup> The Tenth Amendment reserves to the states and their people all authority not specifically delegated to the federal government, and the Supremacy Clause provides that where the federal government is authorized to act and does so, its power trumps state power.<sup>252</sup> As Justice O’Connor wrote in *Gregory v. Ashcroft*, “[o]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government. . . . ‘[T]he States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.’”<sup>253</sup> Thus, the combined operation of the Tenth Amendment and the Enumerated Powers Doctrine does at first appear to be a plausible constitutional basis and may even have been in Brandeis’ mind as he wrote *Erie*.<sup>254</sup> But, as most commentators quickly noted, *Erie*’s very facts undercut this as the sole constitutional hook<sup>255</sup> Congress could have legislated the duty of care owed by an interstate common carrier to a trespasser on the right of way. This fact alone undermines both the Enumerated Powers Doctrine and Tenth Amendment as the

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244. FEDERAL PRACTICE & PROCEDURE, *supra* note 210; *see also* Bradford R. Clark, *supra* note 124, at 1296-97.

245. *See Erie*, 304 U.S. at 75.

246. *See, e.g.*, *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (Equal protection permits wide discretion classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.”).

247. *See* CONFLICT OF LAWS, *supra* note 135, §§ 3.31, 3.34-35.

248. *See* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). *See also* Craig Green, *Repressing Erie’s Myth*, 96 CALIF. L. REV. 595, 603 (2008); Bradford R. Clark, *supra* note 124, at 1299-1300; George Rutherglen, *Reconstructing Erie: A Comment on the Perils of Legal Positivism*, 10 CONST. COMMENT. 285, 296 (1993).

249. *See, e.g.*, Rutherglen, *supra* note 248, at 286-87.

250. U.S. CONST. art. I, § 8, cls. 2-17; U.S. CONST. amend. X.

251. U.S. CONST. art. I, § 8, cls. 2-17; U.S. CONST. amend. X.

252. *See* U.S. Const. amend. X; U.S. Const. art. II, § 2 (providing that the Constitution, as well as laws and treaties made pursuant to the Constitution by federal government, are the supreme laws of the land and preempt conflicting state laws).

253. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

254. *See generally* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

255. *Id.*

sustaining constitutional rationale.<sup>256</sup>

Aaron Nielson makes a case for non-delegation as the constitutional basis for *Erie*, building on other commentators' arguments regarding the separation of powers and Supremacy Clause, and the Court's 2004 decision in *Sosa v. Alvarez-Machain*.<sup>257</sup> Regarding *Swift*, Nielson makes an "either or" argument.<sup>258</sup> First, Nielson posits, if Congress did not delegate broad common law-making power to the federal courts, the *Swift* regime was unconstitutional because of the Supremacy Clause and other issues.<sup>259</sup> The converse and more interesting proposition is the non-delegation argument: If Congress either did or were to delegate broad common law-making power to the federal courts in the future, such delegation would violate the non-delegation doctrine.<sup>260</sup> Nielson explains the non-delegation doctrine as protecting the constitutional separation of powers and extending its reach to the federal courts.<sup>261</sup> "Because '[t]he Constitution provides that all legislative Powers herein granted shall be vested in a Congress of the United States,'" in its non-delegation jurisprudence, the Supreme Court has "'insisted that the integrity and maintenance of the system of government ordained by the Constitution mandates that Congress generally cannot delegate its legislative power to another Branch.'"<sup>262</sup> Nielson continues, explaining that when Congress can appropriately delegate, it must provide the recipient with "intelligible principles" and clear standards against which to measure its action.<sup>263</sup> Nielson's syllogism continues: It makes sense that if the Court has held Congress cannot delegate broad ranging power to the executive branch, Congress may neither do so to the judicial branch.<sup>264</sup> This sensible logic leads to Nielson's conclusion: The *Swift* doctrine's approval of an ever-widening, federal common law ceded to the federal courts' "unbridled power" with no intelligible guiding principles or standards against which to measure its discretion in making common law.<sup>265</sup> Thus, "*Swift*'s interpretation of the RDA was unconstitutional [because] . . . Congress cannot make such an expansive and unchanneled delegation of authority to federal courts under the nondelegation doctrine."<sup>266</sup>

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256. See Bradford R. Clark, *supra* note 124, at 1298-99. In effect, if the constitutional infirmity were based on the tenth amendment and the enumerated powers doctrine, the holding would have significant case-in-controversy problems. See also Aaron Nielson, *Erie As Nondelegation*, 72 OHIO ST. L.J. 239, 256-60 (2011); see also Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie As the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 143-44 (2011).

257. Nielson, *supra* note 237, at 244-45. See also *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). A Mexican national, captured and brought to US for trial, sued under Alien Torts Act, relying on "the law of nations" as basis for his claim of tort liability. Citing, *inter alia*, *Erie*, the Court held that Alien Tort Statute which grants federal district courts jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States," is jurisdictional statute that grants only power for federal courts to hear specified claims, and does not create underlying cause of action.

258. See generally Nielson, *supra* note 237.

259. *Id.*

260. *Id.* at 262-63.

261. *Id.* at 263 (quoting Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CALIF. L. REV. 405, 407 (2008)).

262. *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 371 (1989)).

263. Nielson, *supra* note 237, at 263-65. The cases cited involve delegation by Congress to the executive and administrative agencies.

264. *Id.* at 266.

265. *Id.* at 301-02.

266. *Id.* at 301.

Nielson's idea that *Erie*'s constitutional basis lies in the non-delegation doctrine is persuasive and important but not sufficient. *Erie*'s constitutional basis and reach must speak to other important infirmities of *Swift* and its progeny; such issues are illustrated in *Berrier*, *Covell* and other similar cases. The essence of the mischief is disruption of balance of authority struck by the constitutionally created structure of a federal union made up of relatively independent member states. In short, it is “‘about federalism’ . . . that is, about respect for ‘the constitutional role of the States as sovereign entities,’”<sup>267</sup> and the appropriate apportionment of authority between the nation and the individual states. The word sovereignty can invite controversy regarding its true meaning in the classical and contemporary sense, controversy whose final resolution is unnecessary to and distracting from the focus of this discussion.<sup>268</sup> For our purposes, we need only understand that the people (in whom power or sovereignty must originate) delegated to each entity (the nation and the states) specified law-giving authority—this is what conflict of law scholars call “legislative jurisdiction.” The people accomplished this through the Constitution; when read in its entirety, the Constitution provides the blueprint for the somewhat peculiar,<sup>269</sup> indeed revolutionary system of government that is ours—a system that is, as Justice Powell observed in his dissent in *Garcia v. San Antonio Metro Transit Authority*, proclaimed in our nation's very name: the United States of America.<sup>270</sup>

Thus, *Erie* finds its constitutional anchor in “the constitutional structure” understood “to embody certain broad principles—‘big ideas,’ if you will—drawn from the history of legal and political theory.”<sup>271</sup> Or, to quote Justice Kennedy in *Alden v. Maine*, “not by the text of [any article or amendment] alone but by fundamental postulates implicit in the constitutional design.”<sup>272</sup> The constitutional anchor for *Erie* is not solely derived from the

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267. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 887 (2000) (Stevens, J. dissenting) (quoting *Coleman v. Thompson*, 501 U.S. 722, 726 (1991)); *Alden v. Maine*, 527 U.S. 706, 713 (1999). See also Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 811-12 (1989) (no question *Erie* was constitutionally required, and its “holding in chief was about the fundamental empowerment of the of the nation” contrasted with the states); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 709 (1995) (“[I]t is federalism, not legal realism or positivism, that lies at the heart of the *Erie* doctrine.” (citing Rutherglen, *supra* note 248, at 294-95)).

268. See, e.g., Patrick McKinley Brennan, *Against Sovereignty: A Cautionary Note on the Normative Power of the Actual*, 82 NOTRE DAME L. REV. 181 (2006); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 144 (2001) (“One might legitimately question the usefulness of ‘sovereignty’ to describe the complicated allocation of authority between the federal and state governments. Neither government, after all, possesses the unaccountable authority that the classical theorists of unitary sovereignty envisioned.”) (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160-61 (1765)). Professor Young, while acknowledging the controversy, finds the word useful in discussions of the respective roles of the nation and the state. *Id.*

269. See Guido Calabresi, *supra* note 68, at 1293 (“[O]ur system of parallel state and federal courts is unusual in a federalism, to put it mildly.”). See also Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1643 (2000) (“[F]ederalism was the unique contribution of the Framers to political science and political theory.”) (quoting *United States v. Lopez* 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) (internal quotation marks omitted)); *Printz v. United States*, 521 U.S. 898, 920 (1997) (“[A] legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain and are governed by it.”) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (internal quotation marks omitted)).

270. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 560 (1985) (Powell, J., dissenting) (“A unique feature of the United States is the *federal* system of government guaranteed by the Constitution and implicit in the very name of our country.”).

271. Young, *supra* note 269, at 1603.

272. *Alden*, 527 U.S. at 729, as quoted in Young, *supra* note 269, at 1616. See also Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1055 (1981); *Garcia*, 469 U.S. at 585-86 (O'Connor, J.,



Tenth Amendment<sup>273</sup> or Enumerated Powers Clause.<sup>274</sup> Rather, *Erie* is rooted in the Tenth Amendment, the Enumerated Powers Clause,<sup>275</sup> the Eleventh Amendment,<sup>276</sup> the Supremacy Clause,<sup>277</sup> the Commerce Clause,<sup>278</sup> the Guarantee Clause,<sup>279</sup> the Full Faith and Credit Clause,<sup>280</sup> the Privileges and Immunities Clauses,<sup>281</sup> the Separation of Powers,<sup>282</sup> the Non-delegation Doctrine,<sup>283</sup> and from the grant of diversity jurisdiction itself.<sup>284</sup> No one provision can do all the work—each is necessary but not sufficient if standing alone; read together, these provisions support *Erie*'s holding as constitutionally compelled.

To return to *Erie*'s facts, Congress might have legislated the duty of care owed an individual walking on the right of way of an interstate railroad, but absent congressional action, specific and rooted in an enumerated power, or as in *Boyle v. United Technologies*, a significant conflict in an important area involving a “uniquely federal interests” that justified federal preemption,<sup>285</sup> the national government—acting through federal courts—could not simply create its own version of the law on a vast canvas in conflict with a state's otherwise operative common law. As Professor Weinberg noted, *Erie*'s holding was not directed only to the federal courts but rather to the empowerment *vel non* of the nation.<sup>286</sup> “*Erie* held, precisely, that ‘the nation’ lacks power to make state law; that power is reserved to the states.”<sup>287</sup>

*Erie*'s constitutional holding is also important—important not only in the sometimes

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dissenting). Justice O'Connor, dissenting in *Garcia*, argued that constitutionality must be determined by carefully taking into account “the spirit of the constitution” and cited Professor Sandalow, to wit: the Court in interpreting whether a particular exercise of power is constitutional, must look to the “entire Constitution . . . taking into account, so far as they are relevant, all of the values to which the Constitution-as interpreted over time-gives expression.” *Garcia*, 469 U.S. at 585-86 (1985) (O'Connor, J., dissenting) (citing Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1055 (1981)).

273. U.S. CONST. amend. X.

274. U.S. CONST. art. I, § 8, cl.18.

275. *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011) (majority opinion) (“The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it. Impermissible interference with state sovereignty is not within the enumerated powers of the National Government.”).

276. U.S. CONST. amend. XI.

277. *Id.* art. VI, cl. 2.

278. *Id.* art. I, § 8, cl.3.

279. *Id.* art. IV, § 4.

280. *Id.* § 1.

281. U.S. CONST. art IV, § 2, cl.1.

282. U.S. CONST. arts. I-III.

283. U.S. CONST. art. I, § 1.

284. 28 U.S.C. § 1332 (2012).

285. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 502-04 (1988). Justice Scalia, writing for a sharply divided Court, found that the government contractor defense immunized a military contractor from liability for the death of a Navy pilot who drowned when he could not escape from his helicopter following a crash. Justice Scalia reasoned that in “a few areas, involving ‘uniquely federal interests,’ . . . are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called ‘federal common law.’” *See also id.* at 517-21 (Brennan, J., dissenting). Four Justices—Justices Brennan, Marshall, Blackmun and Stevens—dissented, three concluding that interposing the government contractor defense against the clear holdings of the applicable state law was inconsistent with *Erie*, and with the Court's prior preemption jurisprudence.

286. Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 811-12 (1989).

287. *Id.* at 812.

abstract scholarly debates regarding the role of the states versus nation and the dignity of each, but more critically, important for protecting the individual citizen's liberty. Justice Kennedy observed in *Bond v. United States* that “[f]ederalism secures the freedom of the individual. . . . [The] allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived.”<sup>288</sup> Justice Kennedy pointed to, among other things, the greater sensitivity and responsiveness of local governments to “the needs of a heterogeneous society,” allowing not only the experimentation often cited as one of the great benefits of a federal union, but also allowing the opportunity for more direct citizen involvement than possible with the centralized national government.<sup>289</sup> *Erie*'s subject matter of torts—the law concerned with balancing the social good of providing redress to those injured against the social good of protecting various otherwise legitimate and useful activities—lies squarely within what has been historically the states' sphere of authority. The balance is best struck locally. To be sure, the contours of federalism need fluidity.<sup>290</sup> The expansion and contraction of Congress' power to legislate pursuant to the Commerce Clause demonstrate this.<sup>291</sup> But the design of federalism requires process and attention to source of authority, and this detail protects the delicate balance that is essential to our unique and quite remarkable “compound Republic.”<sup>292</sup>

So in the end, we can conclude that the RDA as interpreted by *Erie* did not announce new law or change anything. Rather the RDA and *Erie* simply state the constitutionally-mandated obvious: When a federal court hears a case pursuant to diversity jurisdiction, the only law available for it to apply is the law that the state court would have applied had the case been heard there. *Erie* clarifies that this is not simply legislative choice that might be modified by an act of Congress, but a constitutional imperative that may not be altered except through the amendment process.

Nice enough, but now we face the jaguar's dilemma:<sup>293</sup> We know federal courts sitting in diversity should apply the law that the state courts would apply in a perfect world (and by perfect, absent any bias). But, similar to Kipling's jaguar, the courts are left not knowing how to tell exactly what that law is.

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288. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

289. *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted)). See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 582 (1985). See also Lind, *supra* note 85, at 722.

290. See Thomas B. Bennett, *The Canon at the Water's Edge*, 87 N.Y.U. L. REV. 207, 247 (2012) (constitutional values such as federalism may shift over time). See also Young, *supra* note 269, at 178.

291. See, e.g., William F. Fischer, *Deadbeat Dads As Champions of Federalism? Lopez's Dramatic (Unintended?) Effect on Commerce Clause Jurisprudence as Illustrated by the Child Support Recovery Act*, 86 MARQ. L. REV. 107 (2002) (Supreme Court has alternated between narrow and broad constructions of Commerce Clause); Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause After Lopez and Morrison*, 11 WM. & MARY BILL RTS. J. 403, 407-439 (2002) (noting debate over the proper scope of Congress's regulatory powers); Jennifer J. Roy, *Beyond States; Rights and Gun Control: United States v. Lopez: Necessary but Limited* 15 ST. LOUIS U. PUB. L. REV. 129, 130 (1995) (noting Supreme Court's expansion and contraction of federal power over commerce).

292. See THE FEDERALIST NO. 51, at 323 (James Madison) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments . . . Hence a double security arises to the rights of the people.”) (quoted in *Printz v. United States*, 521 U.S. 898, 922 (1997)).

293. RUDYARD KIPLING, *JUST SO STORIES FOR LITTLE CHILDREN* 101-02 (1902). Kipling describes the dilemma of the jaguar cub: “My mother said that when I meet a Hedgehog I am to drop him into the water and then he will uncoil, and when I meet a Tortoise I am to scoop him out of his shell with my paw. Now which of you is Hedgehog and which is Tortoise? because, to save my spots, I can't tell.”

VIII. *ERIE'S* SIMPLE RULE

*Erie* stated simply 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,” clarifying that the law of the state may be declared by either the state’s legislature, or by its highest court (common law).<sup>294</sup> “The essence of diversity jurisdiction is that a federal court enforces State law and State policy.”<sup>295</sup> In short, the voice adopted by the state “should utter the last word.”<sup>296</sup> But this seemingly straightforward injunction at best vastly oversimplifies the task, and at worse, may even mislead by implying that there exists a “readily accessible and easily understood body of state law.”<sup>297</sup>

In reality, the law of any given state (indeed, all “law”) at any given time may be non-existent, undeveloped, underdeveloped, obsolete, obscure or opaque. It may be evolving, transforming, accreting or avulsing. This places federal judges in an uncomfortable, even precarious position. While judges always must use their best analytical skills and every resource in their judicial toolboxes to articulate the applicable rule of law, in diversity cases, federal judges must do so knowing that they are bound by *Erie*’s mandate requiring them to apply, but not declare, state law and are subject to being chided later for getting it wrong in a way distinctly different from the correction offered by the next level of appellate court in a purely vertical judicial hierarchy.<sup>298</sup> Judge Charles Clark hinted at federal judges’ discomfort observing “our colleagues of the state judiciary . . . furnish—or gaily or maliciously or indifferently refuse to furnish—the ‘brute raw data’” that is used in ascertaining the applicable state law.<sup>299</sup> What’s a federal judge to do?

IX. BEAT A VERY BRAVE RETREAT?<sup>300</sup>

We begin by dispensing with two enticing approaches to the difficult cases: abstention and certification. Discretion being the better part of valor, might a diversity court avoid thorny questions of state law altogether by invoking abstention? The Supreme Court has said no, significantly limiting the use of abstention by diversity courts facing tough state law questions, permitting it in only the most rare circumstances.<sup>301</sup> “[F]ederal courts have a ‘virtually unflagging obligation . . . to exercise the jurisdiction given

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

295. *Angel v. Bullington*, 330 U.S. 183, 191 (1947).

296. See *Erie*, 304 U.S. at 78.

297. See *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 661 (3d Cir. 1980).

298. See Charles E. Clark, *supra* note 15, at 291.

299. *Id.* at 269.

300. *Monty Python and the Holy Grail* (Python (Monty) Pictures 1975) (referring to the minstrel’s song “Brave Sir Robin”).

301. See *Meredith v. City of Winter Haven*, 320 U.S. 228, 236 (1943) (no policy would allow abstention in diversity cases merely because the state law involved is uncertain or difficult to determine). See also *Burford v. Sun Oil Co.* 319 U.S. 315, 333 (narrow exception allowing for federal courts sitting in equity, to abstain from cases that present difficult and important questions of state regulatory law, where the state has a comprehensive, complex and unified regulatory scheme); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (holding “[F]ederal courts may decline to exercise their jurisdiction, in otherwise ‘exceptional circumstances,’ where denying a federal forum would clearly serve an important countervailing interest”) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)).

them.”<sup>302</sup> As the Court explained in *Cohens v. State of Virginia*, “[w]e have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not.”<sup>303</sup>

In *Meredith v. City of Winter Haven*, the Court noted that “diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience,” emphasizing that when “jurisdiction is properly invoked,” it is “the duty of the federal courts . . . to decide questions of state law.”<sup>304</sup> In those rare instances where abstention might be permitted, a diversity court may step back; cases where the exercise of diversity jurisdiction might entangle the federal court in a “skein of state law,” complex, and intricately tied to the essence of state sovereignty, “that must be untangled,” for a decision to be made, or cases that involve novel, difficult, important questions and where litigation currently pending in the state court would definitively and authoritatively determine the controlling rule.<sup>305</sup> But even in these rare instances, the Court makes a clear distinction between dismissing and staying the proceedings.<sup>306</sup> The Court permits federal courts greater, but still extremely limited, discretion to stay diversity proceedings pending resolution by a state court than to outright dismiss such actions.<sup>307</sup> In short, the Court permits abstention only in rare and circumscribed situations and then strongly favors delay, not dismissal.

The Court gets this absolutely right. To permit abstention freely, even in the form of a stay, would interject needless delay in litigation, and unnecessarily burden litigants who seek the federal forum. As Justice Douglas dissented in *Clay v. Sun Insurance*, “[t]here 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>308</sup> Further, resort to abstention would deprive the system and the litigants of the particular talents of the federal judiciary—not to create state law, but to ascertain state law.<sup>309</sup>

Federal courts have another option, closely related to but conceptually distinct from abstention: certification.<sup>310</sup> Certification permits federal court judges, when faced with an ambiguous, novel or difficult question of state law, to ask the state court judges to offer a definitive answer as to what the state law is.<sup>311</sup> Virtually all states offer federal courts the

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302. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 821 (1976) (quoted in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)).

303. 19 U.S. 264, 404 (1821).

304. See *Meredith*, 320 U.S. at 234.

305. See *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361, (1989); See also *Meredith*, 320 U.S. at 237.

306. See *Quackenbush*, 517 U.S. at 720.

307. *Id.* at 721 (quoting *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959) (“Unlike the outright dismissal or remand of a federal suit, we held, an order merely staying the action ‘does not constitute abnegation of judicial duty.’”). Compare *Louisiana Power & Light Co.*, 360 U.S. at 30 (court upheld stay), with *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 187 (1959) (court reversed dismissal). Both cases were decided on the same day.

308. *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 228 (1960) (Douglas, J., dissenting).

309. See *Meredith*, 320 U.S. at 237 (1943). See also Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 213 (2003) (suggesting that federal judges’ consideration of unsettled questions of state law beneficial to evolving jurisprudence). See also *Mason v. Am. Emory Wheel Works*, 241 F.2d 906, 910 (1st Cir. 1957).

310. See Nash, *supra* note 55, at 1714-15.

311. See generally JONA GOLDSCHMIDT, *CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE*.

option to certify questions of state law to the state's highest court,<sup>312</sup> and the Supreme Court does speak fondly of it as a strategy to minimize federalism friction with the states in diversity cases.<sup>313</sup> Many commentators and judges applaud certification,<sup>314</sup> but in fact, it carries some of the same infirmities—albeit to a lesser degree—as abstention.

The precise process differs from state to state, but in essence, a federal court (in some states this must be the court of appeals but others permit district courts to certify questions) identifies the question of law and then asks the state's highest court to answer the question.<sup>315</sup> The receiving state court typically requires the parties to brief the matter, and will review as much of a record as has been created in the federal court, but depending on when the question is certified, a complete record may or may not be part of the certification package. Once the state court decides the question posed (if it accepts the certification), it sends the answer back to the certifying court, at which point the state court's jurisdiction over the matter ends. The federal court then applies this answer to the matter at hand—usually.<sup>316</sup>

While certification seems to provide a welcome answer to the *Erie* concerns raised here, it does not offer a panacea, and should be invoked only in the most nettlesome cases.<sup>317</sup> Though arguably less burdensome than abstention, certification still carries costs in terms of time and expense for the parties who, litigating the matter in the federal court, must then wait to be called by the state court to brief and argue their case before a second tribunal, and then must wait for that tribunal's decision before going back to the federal court and proceeding with their case.<sup>318</sup> As Judge Bruce Selya points out, often by the time certification comes up as an option the case has proceeded through trial and is at the Circuit

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312. See WRIGHT, MILLER, COOPER & AMAR, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 3D § 4248 (noting that many states have certification procedures generally based on the Uniform Certification of Questions of Law). See also Nash, *supra* note 55, at 1674; Bradford R. Clark, *supra* note 18, at 1544; see Cochran, *supra* note 309 (discussion of efficiencies or not of certification generally and analysis of cases).

313. See *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

314. See Bradford R. Clark, *supra* note 18, at 1545-56 (arguing that certification is uniquely suited to further principles of judicial federalism under *Erie* and for adoption of “presumption in favor of certification in cases presenting novel questions”). See also Acquaviva, *supra* note 55, at 385.

315. See Nash, *supra* note 55, at 1694. See also GOLDSCHMIDT, *supra* note 311 (providing a detailed description of each state's certification process as of 1994 and charting the certification in practice).

316. See generally Nash, *supra* note 55. Professor Nash notes that for a time at least, some federal courts questioned whether they were bound by the answer to the question certified, but that recently virtually all agree that they should be bound by the answer provided. This undoubtedly is the correct answer. To ask the question and then reject the answer would surely exacerbate what Professor David Marcus has described (see note 23 *supra*) as diversity jurisdiction's “federalism-tinged insult.” See also Cochran, *supra* note 309, at 208 (stating that most courts consider the state court answer binding).

317. See *City of Houston v. Hill*, 482 U.S. 451, 471 (1987).

318. See *Kremen v. Cohen*, 325 F.3d 1035, 1052-53 (9th Cir. 2003) (Kozinski, J., dissenting) (“Certification burdens litigants, who foot the bill while their lawyers reargue the controversy in a different forum. The parties will now file briefs in the California Supreme Court, explaining why it should or should not accept the certification request . . . Next, they will reply to each other's briefs . . . If the court accepts the request, the parties will file more briefs and replies, arguing the case on the merits . . . Once the state supreme court sends the case back to us, the parties will no doubt want to argue some more over how we should interpret its response. These are the sorts of things that make lawyers rich but litigants understandably frustrated.”). See also Bruce M. Selya, *Certified Madness: Ask A Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 689-90 (1995) (claiming that certification regularly achieves economies is empirically unproven and, counterintuitive); *Lehman Bros.*, 416 U.S. at 394 (Rehnquist, J., concurring) (“While certification may engender less delay and create fewer additional expenses for litigants than would abstention, it entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court.”).

Court of Appeals level.<sup>319</sup> “The process can quite literally take years,” according to Judge Selya.<sup>320</sup>

A comprehensive 1995 study of certification undertaken by Jona Goldschmidt (an advocate for the broad use of certification) found that those federal district court judges responding to his survey (based on a 30% response rate)<sup>321</sup> waited an average of 8.2 months for an answer to their most recent certification question, and circuit court of appeals judges responding (based on a 33% response rate)<sup>322</sup> waited an average of 6.6 months for an answer to their certified questions.<sup>323</sup> Professor Rebecca Cochran examined certification in the context of one state—Ohio.<sup>324</sup> Professor Cochran looked at all fifty-five cases certified from federal courts to the Ohio Supreme Court under Ohio’s certification process from the date of the process’ first approval in 1988 to 2001.<sup>325</sup> She found that “[t]he average time from certification to resolution was 11.96 months, with five weeks being the shortest wait and twenty-five months [being] the longest wait.”<sup>326</sup> To put this in context, Professor Cochran researched how long it took civil cases generally to move from filing to disposition in the Ohio federal district courts; she found that median times for civil cases (filing to disposition) between 1996 and 2001 averaged 11.8 months in the Southern District and 4.78 months in the Northern District.<sup>327</sup> Delay is real, and its burden on the litigants and the system, in terms of both time and expense, cannot be overlooked. Further, if the point of diversity jurisdiction is to avoid perceived bias by the state court, does a process that sends the very parties in the very specific factually developed case to the very state court system we apparently do not trust to treat the matter without bias, risk re-injecting that bias consciously or subconsciously, or at least creating the perception of re-injecting the bias?<sup>328</sup>

The downsides may not be justified by at least one of the rationales offered for certification—respecting the states. Judge Selya points to anecdotal evidence that the state courts do not necessarily find certification a balm to diversity’s federalism friction.<sup>329</sup> He points to the delays by state courts in hearing certificated cases and in rendering decisions, and to the incidence of state courts rejecting the certification.<sup>330</sup> Indeed, in the case that inspired this article, *Berrier v. Simplicity*, the Third Circuit, in concluding that Pennsylvania products liability law was extremely uncertain, certified the question to the

319. See Selya, *supra* note 318, at 689.

320. *Id.* Wood v. City of E. Providence, 811 F.2d 677, 678 (1st Cir. 1987) (six years before question answered); *Cuesnongle*, 835 F.2d at 1489-90 (between two and three years); *Savona v. Prudential Ins. Co.*, 51 F.3d 241, 241 (11th Cir. 1995) (two years); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 604 (9th Cir. 1993) (17 months); *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 61 F.3d 6, 7 (2d Cir. 1995) (14 months); *Kansallis Fin. Ltd. v. Fern*, 421 Mass. 659, 660, 659 N.E.2d 731, 732 (1996) (14 months); and *Toner v. Lederle Lab.*, 828 F.2d 510, 511 (9th Cir. 1987) (13 months).

321. See generally GOLDSCHMIDT, *supra* note 311. See also Shapiro, *supra* note 54 for the details of the survey and its response rates.

322. See generally GOLDSCHMIDT, *supra* note 311, at 1 n.1.

323. *Id.* at 42.

324. See Cochran, *supra* note 309, at 161-62.

325. *Id.*

326. *Id.* at 170.

327. *Id.* at 219.

328. See Nash, *supra* note 55, at 1740-48. Professor Nash also raises this possibility, and gives an example of a case certified to the Texas court that may support the bias concern.

329. See Selya, *supra* note 318, at 681.

330. *Id.*

Pennsylvania Supreme Court.<sup>331</sup> The justices of the Pennsylvania Supreme Court politely, but tersely, declined to enlighten their federal colleagues on the matter.<sup>332</sup>

Goldschmidt, however, found that state court judges responding to his 1994 survey (based on a 37% response rate)<sup>333</sup> were generally satisfied with certification.<sup>334</sup> Further, he looked at cases certified over a five-year period, from 1990-1994, and found that instances of state courts refusing certification were relatively infrequent.<sup>335</sup> Nonetheless, Goldschmidt does report the concerns raised by state court judges who denied certification; such concerns illuminate our consideration of the certification option.<sup>336</sup> For example, state court judges did not want to answer questions already answered by the federal courts (as when the litigants get an answer they do not like and then ask for certification, or certification is granted at the appellate level after a finding at the trial level), they did not find the questions certified were as unclear as the certifying judges perceived, and the certified questions were either too fact-specific or not of such importance or broad application to justify certification.<sup>337</sup> They also raised concern with rendering advisory opinions, implicit because of the procedural posture of the cases.<sup>338</sup> The piecemeal nature of making law through the certification process and the opportunity for litigants to manipulate the system with strategically timed certification requests may also be reasons why state court judges rebuff certification requests, reasons that must be considered in evaluating certification's usefulness.

Another concern relates to what might be termed "parity and respect." In certification, it is up to the federal court to decide whether the state court will be asked for its opinion, arguably putting the state court in a position of perceived servitude—their opinion is only important if their federal colleagues deem it so. Related, the advisory nature of state court opinions, and the reality that the judges are investing time and intellectual energy, are such that the matter is not truly being resolved, but only providing data for another court's use in deciding a case; this also raises concerns. In this regard, some commentators question the legitimacy of the certification process itself (raising concerns about its constitutionality in terms of federal courts conferring their constitutionally created jurisdiction on another court), and with the case and controversy or advisory opinion issue noted above.<sup>339</sup> Certification's warm embrace by the Supreme Court seems to undermine the jurisdictional critique, and arguably undercuts the other concerns. But in fact, these concerns cannot be completely dismissed.

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331. See *Berrier v. Simplicity Mfg. Inc.*, 2008 WL 538912 at \*4 (3d Cir. Jan. 17, 2007) (emphasis added) ("Inasmuch as the question is an important 'social policy determination' . . . that remains unresolved in Pennsylvania, NOW THEREFORE, the . . . question . . . is certified to the Supreme Court of Pennsylvania for disposition according to the rules of that Court.").

332. *Berrier v. Simplicity Mfg., Inc.*, 959 A.2d 900, 901 (Pa. 2008) (emphasis added) ("Petition for Certification of Question of Law is respectfully **DECLINED**. The Motion for Leave to Advise of Supplemental Authority is **DENIED**.").

333. GOLDSCHMIDT, *supra* note 311, at 92.

334. *Id.* at 53.

335. *Id.* at 34-35.

336. *Id.* at 34-39.

337. *Id.*

338. GOLDSCHMIDT, *supra* note 311, at 34-39.

339. See Nash, *supra* note 55, at 1721-48 (raising questions of, inter alia, the constitutionality of certification, the basis of the state court's exercise of jurisdiction, and the advisory nature of opinions rendered).

On a more pragmatic note, the burden on the judicial systems of duplicating at least part of the process in two parallel venues must be considered. At this point, certification is relatively rare—as it should be. But to consider it as the solution whenever a question of state law is unclear, or, as Bradford Clark suggests, to adopt a presumption in favor of certification,<sup>340</sup> could overwhelm the state courts with what might be perceived as duplicative litigation.<sup>341</sup> potentially burying state court judges in an avalanche of questions (not cases) where their only role is to offer what amounts to an advisory opinion on state law for the federal courts to use in deciding cases over which the federal courts have jurisdiction only because the cases were removed from the state court system pursuant to *Erie*'s implicit “federalism-tinged insult.”<sup>342</sup> While this description intentionally casts the matter in a slightly hyperbolic fashion, it remains that such a state of affairs would not foster federalism or contribute to cordial relations between the state and federal courts. Judge Kozinski put it bluntly in a dissent: “When a federal court certifies a case to a state supreme court, it draws from a limited reservoir of comity.”<sup>343</sup> Former Pennsylvania Commonwealth Court Judge Robert Byer added flesh to Judge Kozinski’s observation when he commented on the Third Circuit’s cautious approach to certification, saying “[t]hey don’t want to use it too often. The last thing I think the judges of the U.S. Court of Appeals want to become is the State Supreme Court’s most frequent customer. You’d wear out your welcome real fast.”<sup>344</sup>

Certification should be reserved for only those cases: 1) presenting difficult state-law questions; 2) where there is no precedent, or where the existing precedent is truly inscrutable; 3) or where the precedent is elderly and there is clear evidence that the state court would not adhere to that precedent but there is no clear evidence of what the state court would do instead; 4) and then *only* where such questions have broad application, are not bound up in particularized facts;<sup>345</sup> and 5) finally *only* where the decision will significantly affect the development of important state policies.<sup>346</sup> Justice Douglas’ observation regarding abstention applies similarly to certification: “The situations where a federal court might await decision in a state court or even remand the parties to it should be the exception not the rule.”<sup>347</sup>

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340. See Bradford R. Clark, *supra* note 18, at 1545-56.

341. See Marcus, *supra* note 18, at 1256. See also *McCarthy v. Olin Corp.*, 119 F.3d 148, 153 (2d Cir. 1997) (“Certification should not be used as ‘a device for shifting the burdens of this Court to those whose burdens are at least as great.’”).

342. Marcus, *supra* note 18, at 1256.

343. *Kremen v. Cohen*, 325 F.3d 1035, 1043 (9th Cir. 2003) (Kozinski, J., dissenting).

344. Zach Needles, *Rare Certification Procedure Keeps Federal Courts from Guessing*, LEGAL INTELLIGENCER, July 31, 2012, available at <http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202564702726&slreturn=20130419194510>.

345. Regarding this final limitation, see, for example, *Erie Ins. Group v. Sear Corp.*, 102 F.3d at 892 (holding certification inappropriate in case where outcome of analysis would produce fact bound, particularized decision lacking broad precedential significance).

346. See, e.g., *Kremen*, 325 F.3d at 1044 (Kozinski, J., dissenting) (stating that the federal court has a “duty to use [certification] sparingly and sensibly,” only when “the state supreme court has provided no authoritative guidance, other courts are in serious disarray and the question cries out for a definitive ruling”).

347. *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 228 (1960) (Douglas, J., dissenting). See also Nash, *supra* note 55, at 1748-49 (“[D]espite the many apparent benefits certification has provided during its four decades of use, the procedure raises serious questions of federal jurisdiction that have, to date, not been examined by the courts.”).



X. 'WRITING ON THE WIND,'<sup>348</sup> OR 'STICKING TO PASTE POTS,'<sup>349</sup> 'SUNDAY HATS'<sup>350</sup>  
AND THE ROLE OF 'VENTRILOQUISTS' DUMMIES'<sup>351</sup>

With neither certification nor abstention as ready alternatives the courts are left to ascertain state law, a task that, as noted above, "is not always easy."<sup>352</sup> The Third Circuit observed in *McKenna* that the suggestion that a federal court can simply look and find applicable state law is misleading, "inasmuch as it implies the existence of a readily accessible and easily understood body of state law."<sup>353</sup> On the contrary, the law of a state is frequently "'dynamic rather than static,' and consists of a working body of rules, which find expression in a number of sources."<sup>354</sup> There will be times, perhaps many times, when a question of state law facing a diversity court will fall squarely into a clear state rule (a modern, straightforward statutory provision that plainly controls; a recent, clearly applicable state supreme court precedent; an unambiguous long standing rule of the jurisdiction recently validated). As often, the law will be unclear: a single elderly precedent;<sup>355</sup> an as yet un-interpreted application of a precedent or statute unclear on its face;<sup>356</sup> a precedent that has drawn serious (or overwhelming) criticism by state court judges but has not been overturned;<sup>357</sup> an archaic rule abandoned by forward-looking jurisdictions but one that the state supreme court has not had the opportunity to reconsider.<sup>358</sup> The diversity courts must meet these challenges, for as Justice Frankfurter observed: "The essence of the doctrine of that case [*Erie*] is that the difficulties of

348. See *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581, 583 (5th Cir. 1983). The majority in this case decided to "write on the wind" by adopting emerging legal theories in asbestos litigation. See *id.* at 581-83. The dissent noted that it was possible to correct the issue without "writ[ing] upon the wind" by certifying the issue, recruiting expert opinions, and embracing a new legal theory based on research and justified analysis. See also *id.* at 583-84.

349. See Charles E. Clark, *supra* note 15, at 270 (describing one of six types of judicial opinions as "agglutinative, so called from the shears and the pastepot which are its implements").

350. See Geri Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 308 (1994) ("Nevertheless, even if the federal district court judge dons her Sunday-best Erie predictive hat and her 'sitting-as-a-state-judge' robe, grabs her divining rod and ascertainment ouija board, and gazes intently into her eerily (Erie-ly) un-crystal ball, that determination of state law is subject not to a deferential, but to 'an appropriately respectful,' de novo review by the federal appellate court.").

351. See *Richardson v. Comm'r of Internal Revenue*, 126 F.2d 562, 567 (2d Cir. 1942) (noting that some observers described the practice of discerning state law, forcing federal judges to be "ventriloquist[s'] dumm[ies] to the courts of some particular state.").

352. See *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 208-09 (1956) (Frankfurter, J., concurring). See also *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960) (describing the Court's "principal task" in the proceeding diversity case as a means "to determine what the New York courts would think the California courts would think on an issue about which neither has thought").

353. *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 661 (3d Cir. 1980).

354. *Id.*

355. See generally *Mason v. Am. Emory Wheel Works*, 241 F.2d 906, 906 (1st Cir. 1957).

356. See Nash, *supra* note 55, at 1680 ("[I]n most federal court cases involving issues of state law, no state court has any opportunity to rule upon the state law questions at issue."). Nash cites one commentator who notes that, ironically, the very availability of diversity jurisdiction itself may be the culprit, "siphoning away the opportunity to resolve cases at the state level that would enrich and refine the body of state law to which federal and state judges could refer with confidence." *Id.* at 1680 n.18 (quoting Hogue, *supra* note 71, at 532) (internal quotation marks omitted).

357. See *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 60-61 (3d Cir. 2009).

358. See *Mason v. Am. Emory Wheel Works*, 241 F.2d 906, 908-10 (1st Cir. 1957) *cert. denied*, 355 U.S. 815. Ironically, as Professor Hogue argues, this situation may be exacerbated by the very existence of diversity jurisdiction which may entice parties litigating some of the most interesting and important cases to elect the federal rather than the state forum. Hogue, *supra* note 71, at 532.

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>359</sup>

The Supreme Court has provided some guidance for the diversity courts, beginning of course with *Erie* itself—apply the law of the state.<sup>360</sup> While early precedent was read to restrict federal courts to look only at decisions of the states’ highest courts,<sup>361</sup> later cases, including *Fidelity v. Union Trust* and *West v. AT&T*, clarified that, at least when there is no state supreme court case on point, federal courts have a duty to find state law and in doing so should consult decisions of state intermediate appellate courts.<sup>362</sup> The spate of cases decided in the 1940’s (including *West*,<sup>363</sup> *Fidelity Union*,<sup>364</sup> as well as *Six Companies of California*<sup>365</sup>) seemed to require rigid adherence by diversity courts to lower state court decisions. This jurisprudence, commonly known as the “excess of 311” (referring to the volume of Supreme Court Reporters containing the cases)<sup>366</sup> gave way to a more nuanced understanding; this understanding was first suggested by the Court in *King v. Order of United Commercial Travelers of America* which stated that lower state court decisions did provide persuasive data but did not necessarily bind the diversity courts.<sup>367</sup> Rather, the diversity courts could determine by their own analysis whether reliable evidence demonstrated that state law was different than the trial and intermediate courts had articulated. *Salve Regina College v. Russell* gave greater force to this understanding and further illuminated the duty of the diversity courts.

In *Salve Regina*, the Court rejected the First Circuit’s practice of giving great deference to district court judges’ interpretation of state law,<sup>368</sup> holding that such deference was inconsistent with the required *de novo* appellate scrutiny,<sup>369</sup> and most important for our purposes, holding that too much deference was inconsistent with *Erie* and its stated goals of “discouragement of forum-shopping and avoidance of inequitable administration of the laws.”<sup>370</sup> The Court reasoned that to deny diversity litigants’ full *de novo* review of state law claims would create the very sort of dual system of enforcement of rights that *Erie* found improper.<sup>371</sup> The *Salve Regina* Court emphasized that diversity litigants were entitled to the full range of federal judicial talents, observing that the very

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359. *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 208-09 (1956). *See also Meredith v. City of Winter Haven*, 320 U.S. 228, 235-35 (1943).

360. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). *See also supra* notes 295-97 and accompanying text.

361. *See Glassman, supra* note 24, at 261 (citing *King v. Order of United Commercial Travelers of Am.*, 333 U.S. 153, 161 (1948)).

362. *See Fid. Union Trust Co. v. Field*, 311 U.S. 169, 177-78 (1940). *See also West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236-37 (1940) (“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.”).

363. *See West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236-37 (1940).

364. *See Fid. Union Trust Co.*, 311 U.S. at 177-78.

365. *See Six Companies of California v. Joint Highway Dist. No. 13 of State of CA*, 311 U.S. 180, 188 (1940).

366. *See Glassman, supra* note 24, at 257 (citing *Yonover, supra* note 350, at 308 n.13).

367. 333 U.S. 153, 161, (1948).

368. *Salve Regina College v. Russell*, 499 U.S. 225, 235 (1991).

369. *See id.* at 236.

370. *See id.* at 234.

371. *See id.* at 233-34.

structure of appellate review promotes accuracy in deciding questions of law.<sup>372</sup> “The obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying *Erie* require that appellate courts review the state-law determinations of district courts *de novo*,” applying the full range of their judicial abilities<sup>373</sup> an important principle that informs the question of how activist diversity judges should be.

Beyond this guidance, the Court has—to a large extent—left the district courts and courts of appeals on their own to flesh out how they choose to discern state law. While the district courts and courts of appeals generally recite similar guiding doctrine, they have not achieved consensus in implementing that doctrine.<sup>374</sup> In *McKenna v. Ortho Pharmaceuticals*, the court explained that a diversity court should consult “relevant state precedents, analogous decisions, considered dicta, scholarly works and other reliable data tending convincingly to show how the highest court in the state would decide the issue.”<sup>375</sup> In *Wayne Moving & Storage of New Jersey v. School District of Philadelphia*, a more recent case, the Third Circuit added that the decisions of intermediate state courts should carry significant weight absent any indication that the state’s supreme court would not follow their decision.<sup>376</sup> The First Circuit describes a group of sources that includes analogous decisions of the state’s highest court, decisions of the lower courts, the precedents in other jurisdictions, the collected wisdom in learned treatises, and relevant policy rationales.<sup>377</sup> The Sixth and Eighth Circuits consult “all relevant data,”<sup>378</sup> and the Seventh Circuit adds that when there is no state authority, it will “examine the reasoning of courts in other jurisdictions . . . for whatever guidance” they might provide.<sup>379</sup> Federal

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372. *See id.* at 231-233 (referencing the less hurried pace, the focus on only questions of law, the refining of issues by the parties’ briefs, and the collaborative nature of multi judge panels providing “reflective dialogue and collective judgment”).

373. *Russell*, 499 U.S. at 239.

374. *See Glassman supra* note 24, at 263-67.

375. *See McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 663 (3d Cir. 1980).

376. *See Wayne Moving & Storage of New Jersey, Inc. v. Sch. Dist. of Phila.*, 625 F.3d 148, 154 (3d Cir. 2010); *see also Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 947 (8th Cir. 2012) (“[W]e follow decisions from the intermediate state courts when they are the best evidence of [Minnesota] law.”) (quoting *Cockram v. Genesco*, 680 F.3d 1046, 1050 (8th Cir. 2012) (internal quotation marks omitted)). *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 206 (5th Cir. 2007) (“[A]lthough we will not disregard the decisions of Louisiana’s intermediate court unless we are convinced that the Louisiana Supreme Court would decide otherwise, we are not strictly bound by them.” (citing *Am. Int’l Specialty Lines Ins. Co.*, 352 F.3d 254, 261 (5th Cir. 2007))).

377. *See Andrew Robinson Int’l, Inc. v. Hartford Fire Ins. Co.*, 547 F.3d 48, 51-52 (1st Cir. 2008). The court specifically notes that it intends no hierarchy, but then states that the inquiry “will start” with analogous decisions, and uses the word “then” to connect each source, finishing with “and finally, null any relevant policy rationales,” indicating a very explicit hierarchy. *Id.*

378. *See Ohio Police & Fire Pension Fund v. Standard & Poor’s Fin. Servs., LLC*, 700 F.3d 829, 835 (6th Cir. 2012) (quoting *Beverage Distribs., Inc. v. Miller Brewing Co.*, 690 F.3d 788, 792 (6th Cir. 2012)) (internal quotation marks omitted). *See also Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 937 (8th Cir. 2012) (“[W]e follow decisions from the intermediate state courts when they are the best evidence of [Minnesota] law,” and when necessary “consider analogous decisions, considered dicta, and any other reliable data.” (second alteration in original) (quoting *Cockram v. Genesco, Inc.*, 680 F.3d 1046, 1050 (8th Cir. 2012) and citing *Gage v. HSM Elec. Prot. Servs., Inc.*, 655 F.3d 821, 825 (8th Cir. 2011)); *McKown v. Simon Prop. Group Inc.*, 689 F.3d 1086, 1091 (9th Cir. 2012) (Only state supreme court decisions are binding and absent this, “federal court[s] must predict how the highest state court would decide the issue using intermediate appellate court decisions,” among other sources of authority, ‘as guidance.’”) (quoting *Nelson v. City of Irvine*, 143 F.3d 1196, 1206 (9th Cir. 1998)).

379. *See, e.g., Rain v. Rolls-Royce Corp.*, 626 F.3d 372, 377 (7th Cir. 2010) (quoting *Pisciotta v. Old Nat.*

courts applying Louisiana law must take a slightly different tack because of Louisiana's civil law regime. The court must apply the civilian methodology, which first examines the constitution, codes and statutes as primary sources.<sup>380</sup> Thus, the Fifth Circuit has stated with respect to Louisiana judicial opinions, “[j]urisprudence, even when it rises to the level of *jurisprudence constant*, is a secondary law source.”<sup>381</sup>

There is general agreement that decisions of the highest court of the state provide the strongest precedent, and most reliable evidence for a diversity court addressing a state law issue.<sup>382</sup> However, diversity courts can and often do depart from standing precedent of the highest state court. Courts have expressly held that a diversity judge may depart from previous decisions of the state's highest court when there is evidence this is what the state court would do under the circumstances.<sup>383</sup> In these cases, the diversity courts are predicting that the state's highest court, given the opportunity to decide the case at hand, would depart from its own precedent.

In *Berrier*, this is exactly what the Third Circuit did, although it threaded the needle in a nuanced way. First, it found that the Pennsylvania Supreme Court had not expressly decided the controlling question, that of innocent bystander liability in a products liability case.<sup>384</sup> It distinguished a fairly recent and fairly closely analogous supreme court holding (relied upon by the district court in dismissing the case) as inapplicable because it dealt with intended and unintended users (the court in that case refused to extend products liability coverage to a child who was an unintended user of a disposable lighter) and not an innocent bystander (a child standing near a riding mower and injured when run over by the operator) as in the case before it.<sup>385</sup> From this springboard of an arguably undecided issue, the Third Circuit then predicted that the Pennsylvania Supreme Court would abandon the Restatement (Second) of Torts and would adopt the Restatement (Third) of Torts.<sup>386</sup> Then, applying the Restatement (Third) of Torts, the Third Circuit extended products liability protections to bystanders, and so permitted the case to go forward.<sup>387</sup> In essence, while the court purported to deal only with a narrowly defined unanswered question (the bystander question), by reaching further and predicting Pennsylvania would

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Bancorp, 499 F.3d 629, 635 (7th Cir. 2007) (internal quotation marks omitted)).

380. See *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 206 (5th Cir. 2007) (citing *Am. Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260 (5th Cir. 2003)).

381. See *id.* (quoting *Prytania Park Hotel, Ltd. v. Gen. Star Indem. Co.*, 179 F.3d 169, 175 (5th Cir. 1999) (footnote omitted) (internal quotation marks omitted)).

382. See, e.g., *Nash*, *supra* note 55, at 1679-80.

383. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 851 (1967) (Federal courts “should not slavishly follow” state court opinions but “consider all the data the highest court of state would use.”) (internal citations omitted); *Carlton v. Worcester Ins. Co.*, 923 F.2d 1, 3 n.5 (1st Cir. 1991) (stating that footprints must exist pointing to the conclusion that the state supreme court would overrule precedent); *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 237-38 (6th Cir. 1992) (explaining that there was precedent more than sixty years old, several modern decisions held otherwise in different contexts, and the court had changed its interpretation of the relevant statute); *MindGame, Inc. v. W. Publ'g Co.*, 218 F.3d 652, 655-56 (7th Cir. 2000) (The obligation to follow non-overruled decision of state's highest court is a “matter of practice or presumption, not of rule.” The rule is that diversity court must predict what state court would do.) (internal citations omitted); *AIG Centennial Ins. Co. v. Fraley-Landers*, 450 F.3d 761, 765-67 (8th Cir. 2006) (holding that diversity courts may depart from the decisions of the state's highest court if the cases are dated and have not been followed consistently by other state courts).

384. See *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 40, 45-46 (3d Cir. 2009).

385. See *id.* at 51.

386. See *id.* at 60.

387. See *id.* at 53-54, 60-61, 68.

abandon the Restatement (Second) of Torts and replace it with the Restatement (Third) of Torts, it effectively departed from standing Pennsylvania Supreme Court precedent and adopted a broad new products liability regime. The rationale for taking this step seemed to make good sense in light of the criteria outlined in *McKenna* and similar cases.<sup>388</sup> Pennsylvania law was hopelessly confused and inconsistent in the area. Jurists and scholars had called repeatedly for a major overhaul of Pennsylvania's products liability jurisprudence,<sup>389</sup> and indeed several Justices of the Pennsylvania Supreme Court called for abandoning the Restatement (Second), as interpreted by Pennsylvania, in favor of a new regime.<sup>390</sup> Justice Saylor, among the most outspoken, suggested that continued tinkering with the current products liability jurisprudence under the Restatement (Second) would only compound the confusion, and that the best solution would be to adopt a comprehensive reformulation such as the Restatement (Third) of Torts.<sup>391</sup> Also, at the time *Berrier* was decided, the Pennsylvania Supreme Court had granted allocatur in *Bogush v. I.U. North America* for the express purpose of deciding whether to replace the Restatement (Second) of Torts with the Restatement (Third) of Torts.<sup>392</sup> Thus, the *Berrier* court had strong evidence to support its prediction: general consensus that the current law was dreadfully inadequate and confused, indication in concurring<sup>393</sup> and dissenting<sup>394</sup> opinions of the highest state court that the time was right to change, criticism by commentators of the current law,<sup>395</sup> movement to the Restatement (Third) by other jurisdictions,<sup>396</sup> and the

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388. See *id.* at 46 (quoting *Nationwide Mut. Ins. Co. v. Buffetta*, 230 F.3d 634, 637 (3d Cir. 2000)).

389. See *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1016, 1021 (Pa. 2003) (Saylor, J., concurring). See also Henderson & Twerski, *supra* note 37, at 897 ("Pennsylvania has, by common agreement, developed a unique and, at times, almost unfathomable approach to products litigation."). See also Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 636-39 (1980) (Pennsylvania products liability law "unacceptable and unprincipled"). Much of the confusion resulted from the Pennsylvania court's insistence that negligence concepts had no place in strict products liability law. *Phillips*, 841 A.2d at 1006-07. Yet, as that law evolved, especially with the growing dominance of design defect cases, concepts such as reasonable alternative design, and reasonably foreseeable users that included negligence nuances crept into the analysis. *Id.* (Pennsylvania courts insist that negligence concepts should not be imported into strict liability law but have muddied analysis with the careless use of negligence terms in the strict liability arena.).

390. See *Berrier v. Simplicity Mfg., Inc.*, 959 A.2d 900, 901 (2008) (Saylor, J., joined by Castille, C.J., concurring in a denial of certification). In their concurring opinion, Justice Saylor and Chief Justice Castille advocated resolution of confusion in Pennsylvania products liability law by adopting new approach comprehensively rather than piecemeal. See also *Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co.*, 898 A.2d 590 (Pa. 2006) (Newman, J., dissenting).

391. See *Phillips*, 841 A.2d at 1000, 1016, 1021 (Pa. 2003) (Saylor, J., concurring).

392. See *Bogush v. I.U. N. Am., Inc.*, 942 A.2d 897 (Pa. 2008) ("The issue, rephrased for clarity, is: Whether this Court should apply § 2 of the Restatement (Third) of Torts in place of § 402A of the Restatement (Second) of Torts.>").

393. See *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 53 (Saylor, J., concurring) ("We believe that Justice Saylor's concurring opinion in *Phillips* foreshadows the Pennsylvania Supreme Court's adoption of §§ 1 and 2 of the Third Restatement's definition of a cause of action for strict products liability.") (citing *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1018-22 (Pa. 2003)).

394. See *id.* at 57 (Newman, J., dissenting) ("It is clear from . . . [the dissent of] Justice Newman in *Mineral Products* that there is substantial support on the Court to adopt the Third Restatement's approach to product liability in an appropriate case.") (citing *Pa. Dept. of Gen. Servs.*, 898 A.2d 590 (Pa. 2006)).

395. See *id.* at 59-60 (citing John Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973)).

396. See *id.* at 54. ("The change in the Restatement (Third) of Torts is consistent with the law in many states, including Wisconsin, California, Mississippi, Arizona, Missouri, Michigan, Iowa, Alabama, Utah, and Vermont."). See also *Beaver v. Howard Miller Clock Co., Inc.*, 852 F. Supp. 631, 635 (W.D. Mich. 1994) ("[T]he Michigan Supreme Court has held that a manufacturer of a product owes a legal obligation of due care to a

grant of allocator by the Pennsylvania Supreme Court to decide the question of whether to adopt the Restatement (Third).<sup>397</sup> The Third Circuit's analysis was consistent with the approach described above, although as noted, its action was more activist than first framed by the opinion.

When there is no clear precedent from the state's highest courts, all circuits will look to intermediate state court decisions for guidance, but they give this precedent differing emphasis. Some find on-point decisions of the state's intermediate courts presumptively controlling and follow them absent convincing evidence to the contrary.<sup>398</sup> Others effectively invert the rule, stating that they are not bound by intermediate state court opinions *absent* convincing evidence that these decisions should be followed. These courts explain that the intermediate court decisions are themselves mere prognostications of what the state's highest court would do, similar to the prognostications of the federal diversity courts, and should not be given greater binding effect to a state court precedent than the state courts would.<sup>399</sup> In *C.I.R. v. Bosch's Estate*, the United States Supreme Court gave its imprimatur to the idea that fidelity to *Erie* often will require a diversity court to depart from a state intermediate court precedent.<sup>400</sup> Again, because Louisiana is a civil law jurisdiction, the Fifth Circuit gives the decisions of Louisiana's intermediate courts even less persuasive effect than those of other states' intermediate court decisions.<sup>401</sup>

As noted above, courts seem to agree (in principle at least) that the federal court should look to *all* available relevant data to determine exactly what the state law is,<sup>402</sup> or, important to this article, to predict what a state court would say it is. And that will involve

bystander affected by the use of its product.”); *Lovelace v. Astra Trading Corp.*, 439 F. Supp. 753, 760 (S.D. Miss. 1977) (“The general consensus therefore appears to favor extension of the strict liability doctrine to provide relief to bystanders.”); *Haumersen v. Ford Motor Co.*, 257 N.W.2d 7, 16 (Iowa 1977) (“[W]e now bear out the [8th Circuit] Court of Appeal’s prediction and extend the doctrine of strict liability to the protection of bystanders.”).

397. See *Bugosh*, 942 A.2d at 897. Some might argue that this last bit of evidence cut the other way, and that given the grant of allocator, the Third Circuit should have given the Pennsylvania court the opportunity to act, either by putting the matter on hold and awaiting the decision, or by following the existing precedent and leaving it to the state’s own courts to shape its law. Neither is a good solution. See *supra* notes 302-48 and accompanying text and see *infra* notes 416-35 and accompanying text; *ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Prot. Dist.*, 672 F. 3d 492, 498 (7th Cir. 2012); *Fireman’s Fund Ins. Co. v. N. Pac. Ins. Co.*, 446 F. App’x 909, 912 (9th Cir 2011); *Assicrazioni Generali, S.P.A. v. Neil*, 160 F.3d 997, 1002-04 (4th Cir. 1998). See *McKenna*, 622 F.2d at 662-63.

398. See, e.g., *ADT*, 672 F.3d at 497; *Fireman’s Fund Ins. Co. v. N. Pac. Ins. Co.*, 446 F. App’x 909, 912 (9th Cir. 2011); *Assicrazioni*, 160 F.3d at 1002-04.

399. See *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 662 (3d Cir. 1980).

400. 87 U.S. 456, 465 (1967); see *WRIGHT ET AL.*, *supra* note 312, § 4507 (“The Erie Doctrine—Determining the Content of the Applicable State Law”).

401. See *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 206 (5th Cir. 2007).

402. See *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S. Ct. 179, 183 (1940) (stating that federal court must “ascertain from all the available data what the state law is”); *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 46 (3d Cir. 2009) (“[C]onsider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data”) (quoting *Nationwide Mut. Ins. Co. v. Buffetta*, 230 F.3d 634, 637 (3d Cir. 2000) (internal quotation marks omitted)); *In re Royal Electrottype Corp.*, 485 F.2d 394, 396 (3d Cir. 1973) (“Because the Pennsylvania courts have not addressed themselves to this precise issue we must ascertain the state law from all available data.”); *Stentor Elec. Mfg. Co. v. Klaxon Co.*, 125 F.2d 820, 824 (3d Cir. 1942) (“Both of the parties urge upon the court the ascertainment of the state law from all the available data. We accept that admonition completely and follow it.”); *Gruber v. Owens-Illinois, Inc.*, 899 F.2d 1366, 1368-69 (3d Cir. 1990) (“If the forums state’s highest court has not addressed the issue, the federal court must ascertain from all available data, including the decisional law of the state’s lower courts, restatements of law, law review commentaries, and decisions from other jurisdiction on the ‘majority’ rule, what the state’s highest court would decide if face with the issue.”) (quoting *Grantham & Mann, Inc. v. Am. Safety Prods., Inc.*, 831 F.2d 596, 608 (6th Cir. 1987)) (internal quotation marks omitted).

more than judicial opinions.

Ultimately, the cases suggest no real priority of these lists of sources beyond the obvious supremacy of decisions of the state's highest courts, and some authoritative weight for the state intermediate appellate courts. Nonetheless, it is clear that lower on the list of resources to which diversity courts look for guidance on the content of a state's laws are: relevant precedent from other jurisdictions,<sup>403</sup> the insights of commentators,<sup>404</sup> and policy considerations.<sup>405</sup> Caminker expands the list of data that might be used in predicting how a particular court might decide a question, adding judges' public "declarations of their legal positions in . . . , for example, law review articles, confirmation-hearing testimony, and public speeches."<sup>406</sup> He also suggests that "informal information concerning particular Justices' general ideological commitments" and predictions might also be considered.<sup>407</sup> However, Caminker ranks these sources' authoritative value as extremely low, concluding that they have very little reliable predictive value.<sup>408</sup>

From this we can conclude that Federal judges in diversity cases must decide "what state law is in the traditional way of judges in finding the law."<sup>409</sup> That is, they must use the full toolbox of judicial resources to ascertain the law,<sup>410</sup> giving the various data appropriate weight.

#### XI. PREDICTION: THROUGH THE LOOKING GLASS?

But the question remains, how activist should the diversity courts be? How boldly should they proceed? Many cases and commentators suggest restraint, noting the familiar adage that the diversity court judge's duty is to apply the state law, rather than to prescribe a different rule.<sup>411</sup> Adhering to this rule, some courts, faced with uncertainty as to state law, will follow the norm that federal courts interpreting state laws "should not create or expand" liability.<sup>412</sup> The Third Circuit, though proposing what seems like broad flexibility in predicting state law in *McKenna*, endorsed this constrained approach in *Travelers Indemnity*, stating the rule thus: "we have exercised restraint in accordance with the well-established principle that where 'two competing yet sensible interpretations' of state law

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403. See, e.g., *Gravquick A/S v. Trimble Navigation Int'l Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003); *Gibbs-Alfano v. Burton*, 281 F.3d 12, 19 (2d Cir. 2002); *Hermann Holdings Ltd. v. Lucent Techs, Inc.*, 302 F.3d 552, 558, 560 (5th Cir. 2002); *Green v. J.C. Penney Auto Ins. Co., Inc.*, 806 F.2d 759, 765 (7th Cir. 1986).

404. See *Adams v. Madison Realty & Dev., Inc.*, 853 F.2d 163, 168 (3d Cir. 1988).

405. See *Craig v. FedEx Ground Package Sys., Inc.*, 686 F.3d 423, 429 (7th Cir. 2012); *Berrier*, 563 F.3d 38, 59-60 (3d Cir. 2009); *Gibbs-Alfano*, 281 F.3d at 1221-22. See also *WRIGHT ET AL.*, *supra* note 312, § 4507.

406. See Caminker, *supra* note 46, at 18.

407. See *id.* at 18-19.

408. See *id.* at 46-49 (stating that dispositional rules offer the most reliable predictive data, dicta may sometimes be reliable, and public statements in non judicial contexts and ideological commitments offer the least reliable predictive data).

409. See Charles E. Clark, *supra* note 15, at 291.

410. See, e.g., *CMACO Auto. Sys., Inc. v. Wanxiang Am. Corp.*, 589 F.3d 235, 242 (6th Cir. 2009) (stating that when there is a choice between an interpretation that restricts liability or expands liability, choose the narrower) (quoting *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 577 (2004)); *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1412 (7th Cir. 1994) (stating that when there is a choice between an interpretation that restricts liability or expands liability, choose the narrower).

411. See, e.g., *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940).

412. See, e.g., *Time Warner Entm't-Advance/Newhouse P'ship v. Carteret-Caraven Elec. Membership Corp.*, 506 F. 3d 304, 314-15 (4th Cir. 2007).

exist, ‘we should opt for the interpretation that restricts liability, rather than expands it.’”<sup>413</sup> The court applied this principle despite its conclusion earlier in the case (which was governed by New Jersey law) that “the New Jersey Supreme Court has long been a leader in expanding tort liability.” The seeming inconsistency between the court’s findings regarding New Jersey jurisprudence as progressive and liability-expanding, and its ultimate conclusion demonstrates that a rigid presumption of limiting liability may produce unfair results that do not reflect what the state court would do. Similarly, the glib aphorism “litigants who reject a state forum in order to bring suit in federal court under diversity jurisdiction cannot expect that new trails will be blazed’ through the field of state common law,”<sup>414</sup> also invites an inappropriately restrictive approach. Indeed, in the very case employing that language, the court undercut any rigid presumptive application of its language, adding, “[h]owever, where the course the state court would chart is ‘reasonably clear,’ a federal court should undertake its own prediction and application of state law.”<sup>415</sup> To be sure, federal courts faced with uncertain state law should take a moderate approach to adopting innovative theories. But to assume that taking a moderate approach *always* means restricting rather than expanding liability does not necessarily represent a restrained approach that will achieve accurate prediction. Rather, that assumption may reflect an inherent bias that will misdirect the court’s analysis,<sup>416</sup> as arguably occurred in the Third Circuit’s *Travelers Indemnity* case cited above.

As many judges and commentators note, the task must involve some prediction, but prediction based on a careful analysis of all the reliable evidence. Judge Sloviter, among many others, sums it up, assuming as implicit the necessity of prediction, stating that “a federal court often must exhaustively dissect each piece of evidence thought to cast light on what the highest state court *would* ultimately decide.”<sup>417</sup>

That is to say, diversity courts must exercise a certain level of courage, and must enjoy a certain level of freedom and flexibility. In his analysis of vertical precedent, Caminker examines the propriety of inferior courts using the predictive model to anticipate what higher courts might do<sup>418</sup> and he uses diversity courts as the archetypal example of the effective and appropriate use of the predictive model.<sup>419</sup> Rutherglen argued, “[i]n cases in which the state courts have not spoken, there are no decisions for the federal courts to follow. The next best thing is to follow the decisions that the state courts are *likely to hand down in the future*.”<sup>420</sup> This endorsement of prediction applies as persuasively when

413. *Travelers Indem. Co. v. Dammann & Co., Inc.*, 594 F.3d 238, 253 (3d Cir. 2010) (quoting *Werinski v. Ford Motor Co.*, 286 F.3d 661, 680 (3d Cir. 2002)) (barring party from cross claiming in tort for economic loss).

414. *Minion Inc. v. Burdin*, 929 F. Supp. 521, 526 (D.N.H. 1996) (alteration in original) (quoting *Ryan v. Royal Ins. Co.*, 916 F.2d 731, 744 (1st Cir. 1990)).

415. *Id.* (citing *Nieves v. Univ. of P.R.*, 7 F.3d 270, 275 (1st Cir. 1993)); *Armacost v. Am. Mut. Ins. Co.*, 11 F.3d 267, 269 (1st Cir. 1993).

416. See, e.g., Mark R. Kramer, *The Role of Federal Courts in Changing State Law: The Employment at Will Doctrine in Pennsylvania*, 133 U. PA. L. REV. 227, 257 (1984) (suggesting that is a fallacious view when a federal court decides not to create a new cause of action because it has less of an impact on state law than adopting a new cause of action).

417. See Sloviter, *supra* note 18, at 1676 (emphasis added) (citing HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 142 (1973) (footnote omitted)). See also Selya, *supra* note 318 (referring to “informed prophecy”) (quoting *Moores v. Greenberg*, 834 F.2d 1105, 1112 (1st Cir. 1987)).

418. See Caminker, *supra* note 46, at 8-21.

419. See *id.* at 20-21.

420. Rutherglen, *supra* note 248, at 293 (emphasis added).



existing precedent is elderly or ambiguous.

Fear of making wrong *Erie* guesses, and a simplistic view of *Erie* and the federalism concerns raised above might cause federal courts to be overly cautious—to eschew sophisticated legal analysis; to contain themselves only to restating what has been decided clearly and unambiguously by the state courts regardless of age or persuasiveness of the precedent; or to apply a cramped approach that always limits liability. Such restraint is unfair to the litigants, disrespectful of the federal judiciary and a waste of federal judges’ talents. What is more, such restraint is not only not required by *Erie*, but it would in fact thwart *Erie*, turning the holding on its head.<sup>421</sup> As the Third Circuit reasoned in *McKenna*, “a diversity litigant should not be drawn to the federal forum by the prospect of a more favorable outcome than he could expect in the state courts. But neither should he be penalized for his choice of the federal court by being deprived of the flexibility that a state court could reasonably be expected to show.”<sup>422</sup> Federal judges must be encouraged to draw on all resources in deciding diversity cases, and to be nimble and forward-looking, even in—actually, *especially in*—the tough cases.

*Erie* assumes, in fact relies upon the belief that both federal and state court judges are experts in understanding, interpreting and applying the law, and that parties are able to explain the nuances of state law to a federal judge as effectively as to a state judge.<sup>423</sup> As noted above, the Court made this clear in *Salve Regina* when it rejected the then-practice by the majority of Circuit Courts of Appeals of deferring to district court judges’ determination of state law in diversity cases.<sup>424</sup> The Court held emphatically that such deference was inconsistent with *Erie*.<sup>425</sup> The rationale offered for deference to the district court determinations was an assumption that the district judge was better positioned to determine an issue of state law because district court judges handle more state law issues due to the high volume of diversity cases on their dockets, and because of the “extensive experience that the district judge generally has had as practitioner or judge in the forum State.”<sup>426</sup> The Court added that this practice was contrary to “the obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying *Erie*.”<sup>427</sup> That is, the Circuit Courts of Appeals could not short-cut their obligation to apply their very best legal analysis and all the tools at their disposal to the task of determining whether the district court got it right when declaring state law in diversity cases. This same reasoning applies beyond the context of the scope of appellate review to how federal

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421. See, e.g., *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001) (“The task of a federal court in a diversity action is to approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum.”) (quoting *Gee v. Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir. 1980) (internal quotation marks omitted)). See also, Mark R. Kramer, *The Role of Federal Courts in Changing State Law: The Employment at Will Doctrine in Pennsylvania*, 133 U. PA. L. REV. 227, 232 (1984) (“Federal courts thus seriously misconstrue *Erie* when they conclude that *Erie* prohibits them from exercising independent judicial reasoning. *Erie* rather requires that federal courts use independent reasoning in searching for the rule of substantive law that the state’s highest court would apply.”).

422. *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 663 (3d Cir. 1980) (quoting *Becker v. Interstate Props.*, 569 F.2d 1203, 1206 (3d Cir. 1977)) (internal quotation marks omitted).

423. See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238-39 (1991).

424. See *id.* at 235.

425. See *id.* at 234 (“[A]ppellate deference to the district court’s determination of state law is inconsistent with the principles underlying this Court’s decision in *Erie*.”).

426. See *id.* at 238.

427. See *id.* at 239-40.

judges (district court judges and circuit court of appeals judges) should discharge their *Erie* decision making duty—they must draw on all resources and apply all options available to them for declaring the law because *Erie* demands that litigants have the benefit of everything that would have been available to their colleagues on the state court bench. And this must include the possibility of moving the law forward if their best judgment is that the state court would do so.

As the Ninth Circuit has stated, “[t]he task of a federal court in a diversity action is to approximate state law as closely as possible in order to make sure that the vindication of the state right is *without discrimination because of the federal forum*.”<sup>428</sup> To tie the federal judge’s hands by limiting what she might consider, how she might go about discerning and stating what the law is would subject the parties to an inferior adjudication—discrimination because of the forum. Further, it would also inject the product of what amounts to an unnecessarily handicapped process of judicial deliberation into the fabric of the jurisdiction’s common law,<sup>429</sup> effectively diminishing this reservoir of jurisprudence.

Thus, federal judges must be encouraged to consult a broad library of resources in making *Erie* guesses. They must also be allowed appropriate freedom in articulating what the law is—and this must involve the freedom to predict.

In fact, most courts do assume prediction in describing what the diversity courts must do regarding state law, but they engage in prediction with varying degrees of activism or constraint.<sup>430</sup> Several commentators have analyzed how courts make decisions, how judges should handle precedent and the impact of *stare decisis* in the broader context of judicial decision-making. As noted above, Caminker holds diversity court decision-making up as a model of the appropriate use of prediction.<sup>431</sup> Not all agree. Dorf, for example, counsels restraint, arguing that while there are practical justifications for employing the predictive approach, it undermines important values and may even be unconstitutional.<sup>432</sup> And, those who champion certification, discussed above, also would avoid prediction.<sup>433</sup> But both precedent and logic indicate that Caminker has it right,<sup>434</sup>

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428. *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007) (emphasis added) (citing *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001)).

429. *See Mason v. Am. Emory Wheel Works*, 241 F.2d 906, 910 (1st Cir. 1957).

430. *See Salve Regina*, 499 U.S. at 241; *Blankenship v. USA Truck, Inc.*, 601 F.3d 852, 856 (8th Cir. 2010); *Kunelius v. Town of Stow*, 588 F.3d 1, 9 (1st Cir. 2009); *Bravo v. United States*, 577 F.3d 1324, 1326 (11th Cir. 2009); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 206 (5th Cir. 2007); *Pehle v. Farm Bureau Life Ins. Co., Inc.*, 397 F.3d 897, 901 (10th Cir. 2005); *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 361 (6th Cir. 2001); *Lexington Ins. Co. v. Rugg & Knopp, Inc.*, 165 F.3d 1087, 1090 (7th Cir. 1999); *Wade v. Danek Med., Inc.*, 182 F.3d 281, 286 (4th Cir. 1999); *Bensmiller v. E.I. Dupont de Nemours & Co., State of La.*, 47 F.3d 79, 82 (2d Cir. 1995); *Packard v. Provident Nat’l Bank*, 994 F.2d 1039, 1046-49 (3d Cir. 1993); *Wilson v. Good Humor Corp.*, 757 F.2d 1293, 1309 (D.C. Cir. 1985); *Takahashi v. Loomis Armored Car Serv.*, 625 F.2d 314, 316 (9th Cir. 1980).

431. *See Caminker*, *supra* note 46, at 34.

432. *See, e.g., Michael C. Dorf, Prediction and the Rule of Law*, 42 UCLA L. REV. 651 (1995). Dorf describes three models of decision making: execution, the court simply executes the law as it is found; elaboration, the court must explain its determination of the law using precedent, policy and other sources; prediction, the court uses data to predict what either higher level or in *Erie* cases the state court would do. *Id.* In fact, his rejection of the predictive approach may be significantly influenced by his conception of it as more heavily involving “gaming” what particular jurists might do than either Caminker suggests or the more activist *Erie* cases employ.

433. *See, e.g., supra* notes 322 and 341 and accompanying text.

434. *See, e.g., Comm’r v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *Teague v. Bakker*, 35 F.3d 978, 991 (4th Cir. 1994); *Sloviter*, *supra* note 18.

and presumably, that the Third Circuit probably had it right *initially* in *Berrier* (although it may have gone too far and could have left its decision at including innocent bystanders as intended users). A nimble, though careful, predictive approach respects federalism more than a cramped overly restrictive approach. A federal court sitting in diversity should not rewrite state law simply because that court thinks its rule is better, but as Caminker argues, a robust proxy approach “ensures greater deference” to state court autonomy than the more constrained “precedent model” does.<sup>435</sup>

So, if prediction, even activist prediction, is appropriate, and if the Third Circuit was not out of line in its *Berrier* decision, where does the mischief lie? Perhaps it lies not as much with how federal courts determine state law in making *Erie* guesses, but rather with how the federal courts respond when it becomes apparent that they have made a wrong *Erie* guess. To put it in the context of *Berrier*, the Third Circuit may not have been out of line when it predicted that the Pennsylvania Supreme Court would adopt the Restatement (Third) of Torts.<sup>436</sup> Reliable indicators pointed to that conclusion. It read the tea leaves as best it could, but in the end, appears to have gotten it wrong. This will happen from time to time when diversity courts must wrestle with difficult questions of state law. No, the Third Circuit should not be faulted for *Berrier*, but rather for *Covell* and its stubborn refusal, ostensibly required by horizontal stare decisis, to recognize that it may have gotten it wrong, or at least acted too soon, when evidence indicated that the Pennsylvania Supreme Court was not ready to move on, to untangle its admittedly inconsistent and arguably incomprehensible products liability jurisprudence. The mischief lies with the Rule of the Circuit doctrine.

## XII. RULE OF THE CIRCUIT IN DIVERSITY CASES: A FOOLISH CONSISTENCY?<sup>437</sup>

When one panel of a circuit has decided a question, subsequent panels are generally bound by that decision, an application of horizontal stare decisis.<sup>438</sup> All circuits follow this rule, though with slight variations,<sup>439</sup> and they apply it to diversity cases as well

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435. See Caminker, *supra* note 46, at 34, 74 (“The proxy model’s half-century pedigree in the *Erie* doctrine lends at least nontrivial, and I think significant, credibility to the claim that prediction carefully performed, is a coherent and workable approach to judicial decision making.”).

436. See *Durkot v. Tesco Equip., LLC*, 654 F. Supp. 2d 295, 300 (E.D. Pa. 2009) (referring to the Third Circuit opinion in *Berrier* as “well reasoned” and noting that its prediction not yet materializing is not a criticism of its expertise and careful examination of state law).

437. See RALPH WALDO EMERSON, *Self Reliance*, in *ESSAYS: FIRST SERIES* 7 (1841) (“A foolish consistency is the hobgoblin of little minds.”) The quote is often misstated to omit the word “foolish,” key to Emerson’s meaning. For our purposes, consistency (stare decisis, reliable precedent) is a good thing, but foolish consistency is not.

438. See Caminker, *supra* note 46, at 55 n.194 (internal citations omitted). Vertical stare decisis refers to an inferior court’s (for example a district court) obligation to apply the precedent of a superior court (for example a circuit court of appeals). *Id.* Vertical precedent also plays an important role in wrong *Erie* guesses as will be discussed below, as district courts must determine how strongly they are bound by state court predictions of the court of appeals in their circuit. See Colin E. Wrabley, *Applying Federal Courts of Appeals’ Precedent: Contrasting Approaches to Applying Court of Appeals’ Federal Law Holdings and Erie State Law Predictions*, 3 SETON HALL CIR. REV. 1, 5 (2006) (providing a comprehensive survey and analysis of federal circuit courts of appeals’ and district court treatment of prior circuit panel *Erie* decisions).

439. See, e.g., *United States v. Rodriguez*, 311 F.3d 435, 438-39 (1st Cir. 2002) (stating horizontal stare decisis binds newly-formed panel to original panel’s decision); *Samuels v. Mann*, 13 F.3d 522, 526 (2d Cir. 1993) (stating the court will not overrule prior decision of a panel of Circuit absent a change in law by higher authority or by en banc proceeding); *Covell v. Bell Sports, Inc.*, 651 F.3d 357, 363-64 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1541 (2012) (stating the panel is bound by, and lacks authority to overrule, a published decision of a prior

(sometimes even more strongly).<sup>440</sup> For example, consider the Fifth Circuit’s declaration of a quite rigid rule of the circuit applied in a diversity case: “Once a panel of this Court has settled on the state law to be applied in a diversity case, the precedent should be followed by other panels without regard to any alleged existing confusion in state law, absent a subsequent state court decision or statutory amendment which makes this Court’s decision *clearly wrong*.”<sup>441</sup> Virtually all circuits state that only the circuit sitting *en banc* can overrule a panel’s decision,<sup>442</sup> and all circuits follow Federal Rule of Appellate Procedure 35(a) finding that *en banc* hearings are disfavored.<sup>443</sup> Rehearing *en banc* is apparently even more unlikely when only a state law issue is presented.<sup>444</sup>

As noted, while all circuits purport to apply this rule (as indeed they must) they vary in how sticky a prior panel’s *Erie* decision will be. For example, the Fourth, Seventh and Tenth Circuits appear to apply an informal process to overturn a prior panel’s decision. The new panel circulates its proposed new ruling to all members of the court, and if there are no objections, and no vote to hear the case *en banc*, the new panel can overturn the precedent.<sup>445</sup> Other circuits enforce the rule of *stare decisis* more rigidly. For example, the First and Second Circuits have held that only a clear change in state law (in diversity cases) or an *en banc* panel of the circuit can overturn a prior panel’s decision.<sup>446</sup> *Stare decisis* and the rule of horizontal precedent control. The Third Circuit falls into this sticky precedent group, stating in its Internal Operating Procedures (IOP) that “the holding of a panel in a precedential opinion is binding on subsequent panels,” and that “*en banc* consideration is required” to overrule a precedential opinion.<sup>447</sup> *Covell* applied this IOP in refusing to reconsider *Berrier’s* prediction of Pennsylvania law, stating “a panel of this court is bound by, and lacks authority to overrule, a published decision of a prior panel,”

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panel absent persuasive intervening authority); *United States v. Chong*, 285 F.3d 343, 346 (4th Cir. 2002) (“[A] panel of this court cannot overrule, explicitly or implicitly, the precedent set by a prior panel of this court. Only the Supreme Court or this court sitting *en banc* can.”); *Wilson v. Taylor*, 658 F.2d 1021, 1035 (5th Cir. 1981) (stating that the panel cannot ignore the precedent of prior panels, even if there is perceived error, absent intervening *en banc* or Supreme Court ruling); *Valentine v. Francis*, 270 F.3d 1032, 1035 (6th Cir. 2001) (“Reported panel opinions are binding on subsequent panels.”) (quoting 6th Cir. R. 206(c)) (internal quotation marks omitted); *McClain v. Retail Food Emp’rs Joint Pension Plan*, 413 F.3d 582, 586 (7th Cir. 2005) (“[*Stare decisis* require[s] courts to] give considerable weight to prior decisions of this court unless . . . overruled or undermined by the decisions of a higher court, or other supervening developments.”) (quoting *Haas v. Abrahamson*, 910 F.2d 384, 393 (7th Cir. 1990)) (internal quotation marks omitted); *United States v. Stallings*, 301 F.3d 919, 923 (8th Cir. 2002) (“[O]nly the court *en banc* can overrule an earlier panel decision.”); *Roundy v. Comm’r*, 122 F.3d 835, 837 (9th Cir. 1997) (“A three-judge panel is bound by a prior judgment of this court unless case is taken *en banc*.”); *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (stating the court cannot overrule a prior panel); *Scott v. Prudential Secs., Inc.*, 141 F.3d 1007, 1015 n.16 (11th Cir. 1998) (stating that only when the court is sitting *en banc* can it overrule a previous panel decision).

440. See *Wrabley*, *supra* note 438, at 4-12.

441. *Lee v. Frozen Food Exp., Inc.*, 592 F.2d 271, 272 (5th Cir. 1979) (emphasis added). The rule is typically found in the circuits’ Internal Operating Procedures, as well as being elaborated in case law.

442. See *Wrabley*, *supra* note 438, at 4-12.

443. See, e.g., *id.* (discussing current trends in state jurisprudence).

444. *Id.*

445. See, e.g., *Bell v. United States*, 521 F.2d 713, 715 n.3 (4th Cir. 1975); *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009); *United States v. Meyers*, 200 F. 3d 715, 721, n.3 (10th Cir. 2000); *TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F3d 495, n.2 (10th Cir. 2011). The Seventh Circuit includes this process in its Internal Operating Procedures: 7th C.R. 40(e). (7th Cir. I.O.P. 40(e)).

446. See *United States v. Guzman*, 419 F.3d 27, 31 (1st Cir. 2005) (stating that the court is “firmly bound” and that a new panel is “constrained by prior panel decisions directly (or even closely) on point.”); *Samuels v. Mann*, 13 F.3d 522, 526 (2d Cir. 1993) (“[W]e will not overrule a prior decision of a panel . . . absent a change in the law by higher authority or by way of an *en banc* proceeding of this Court.”).

447. See 3d Cir. I.O.P. 9.1 (2015), available at [http://www2.ca3.uscourts.gov/legacyfiles/2015\\_IOPs.pdf](http://www2.ca3.uscourts.gov/legacyfiles/2015_IOPs.pdf).

and that reconsideration should be undertaken when intervening authority from the state's highest court indicates such reconsideration is called for.<sup>448</sup>

To be sure, *stare decisis* advances important practical, social, and jurisprudential values. It ensures public respect for and faith in the judicial system (the same facts under the same rules yield the same results).<sup>449</sup> It provides notice and predictability for those seeking to conform primary conduct.<sup>450</sup> It enhances judicial economy (once a court has invested time, energy and resources to decide a case, the efforts need not be repeated).<sup>451</sup> And it creates legitimacy for the process because of the impersonal character it imparts.<sup>452</sup> But, as the Supreme Court noted in *Planned Parenthood*, “[t]he obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit.”<sup>453</sup> Most obviously, where it becomes apparent that the precedent involved “misunderstood or misapplied or where the former determination is evidently contrary to reason” it should not apply to prevent reconsideration.<sup>454</sup>

In the context of the wrong *Erie* guess, the confluence of the rule that only the court en banc can overrule a prior panel's interpretation of state law, and the fact that en banc hearings are disfavored calcifies a circuit court's state law determination. Ironically, as noted above, some circuits stipulate that the en banc rehearing necessary to overturn a prior panel's decision is even less likely to be granted if the only issue is one of state law.<sup>455</sup> This gets it exactly wrong. *Stare decisis* should have more power when a federal court is interpreting federal law for the very reason that when the court speaks in this role, it does so as an organ of the very entity that has been empowered to create the law. One need not fully embrace positivist legal theory to conclude that when a federal court interprets federal law, it is in fact making law, and, that it is authorized to do so as, along with Congress, one of the two organs empowered to make federal law to understand this. In contrast, when a federal court interprets state law in a diversity case, it is, instead describing what it has ascertained the law is. Even when it interprets and predicts, its analysis and articulation must be understood as *describing* not *proscribing*. When a federal court describes what it ascertains the law of a state to be, its conclusion does not become state law, at least not in the same way a state court's articulation of its law does.<sup>456</sup> Thus,

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448. See *Covell v. Bell Sports, Inc.*, 651 F.3d 357, 364 (3d Cir. 2011) (quoting *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 858 (3d Cir. 1996)) (internal quotation marks omitted).

449. See, e.g., Jordan Wilder Connors, *Treating Like Subdecisions Alike: The Scope of Stare Decisis As Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 687-88 (2008).

450. See *id.*; Bergman, *supra* note 16, at 982; Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U L. REV. 570, 587-88 (2001).

451. See, e.g., *id.*; Bergman, *supra* note 16, at 982; Fallon, *supra* note 450 at 587-88.

452. See Caminker, *supra* note 46, at 65-66 (“[L]egal decisions . . . [are] grounded in something more objective than the personal predilections of individual judges” evidenced by the fact that a new case involving different parties does not result in application of different law.).

453. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

454. See Edward D. Re, *Stare Decisis*, Federal Judicial Center Education and Training Series (Seminar, 1975).

455. See *supra* notes 439-40, 443 and 445 and accompanying text.

456. Michael Dorf makes this point in the context of federal courts predicting what the US Supreme court will do: “When a federal appeals court judge predicts that the Supreme Court will likely renounce some existing precedent, for all courts outside the judge's circuit, the prediction does not actually change the law: Only the Supreme Court can do that. Even if the appellate judge accurately predicts the Supreme Court's inclination to change the law, the Court will still have to take the case to do so.” See Michael Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 677 (1995).

Justice Brandeis' chestnut that "[s]tare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right,"<sup>457</sup> does not apply with the same force when a federal court is describing state law as it does when the court is describing (or making) federal law. If the federal court gets its interpretation of a federal law wrong, Congress or the Supreme Court can directly correct it. But if a federal court gets a question of state law wrong, the state court can only indirectly "correct" the court and then only if presented the opportunity in another case raising similar facts.

Cases serve two functions: settling a particular matter among specific parties, and establishing precedent by which similar cases will be decided. And while stability is not unimportant when a federal court is interpreting and applying state law, the fact that the court is not making that law shifts the balance between getting it right and getting it settled toward a greater interest in getting it right. This is not to say that stare decisis has no role in diversity cases. It would not do for the federal courts to flutter about like a paper cup in the wind. But rather, it is to say that a rule that makes federal court predictions of state law even stickier than federal court determinations of federal law gets it backwards. Instead, federal courts should be more nimble in their willingness to modify their articulations of state law, especially when these articulations are predictions. Rather than enforcing a rule that requires en banc consideration, and then makes that en banc consideration harder to invoke where the courts have interpreted state law, the federal courts should be more open to considering and acting on data indicating a particular panel's determination of state law was incorrect.

What data should suffice? Jed Bergman offers a three-part proposal employing an evidentiary construct that is useful to consider.<sup>458</sup> He posits that a party may challenge a prior panel decision by producing "substantial evidence that the state's highest court would reach a different result."<sup>459</sup> Under Bergman's proposal, the default position would be that the prior panel decision holds, and this is important. Diversity courts would not have to do a full analysis every time a prior panel decision is on point, but only where a party can persuade the court with "substantial evidence" that the precedent is wrong,<sup>460</sup> preserving the judicial economy goal of stare decisis.

Bergman defines substantial evidence using an *Erie*-based rationale, as that which shows that "the likelihood of a different result is sufficient to induce forum shopping or to

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457. *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 131 S. Ct. 746, 766 (2011) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)). Brandeis first penned this observation in his dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

458. See Bergman, *supra* note 16, at 1008. Bergman notes that *Salve Regina* emphatically found that federal courts determining questions of state law were making findings of law and not fact. See *id.* at 1004 (citing *Salve Regina Coll. v. Russell*, 499 U.S. 225, 239 n.5 (1991)). But Bergman draws on Lawson's work on legal interpretation, which argues that interpretation of questions of law would benefit from evidentiary-based standards of proof to fashion his rule. See *id.* at 1005 (citing Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 862-82 (1992)). To be clear, following *Salve Regina*, the matter must be treated by the court as a question of law, submitted through briefs not witnesses, and considered by the court as it would as it would any question of law.

459. See Bergman, *supra* note 16, at 1008. Despite his evidentiary paradigm, Bergman would permit the court to take judicial notice of a change in state law if through incompetence, inadvertence or collusion the parties do not bring it forward, but he expresses confidence that the adversary system will make such instances rare. See *id.* at 1011.

460. See *id.* at 1009-10.

produce inequitable administration of state law.”<sup>461</sup> While relying in the first instance on the parties to raise the issue, Bergman would allow in certain instances, the court *sua sponte* to take judicial notice of evidence that state law has changed or that the controlling precedent got state law wrong.<sup>462</sup> Once the court determines that there is substantial evidence of a wrong *Erie* guess, the prior panel decision would lose its binding force, and the court would engage in a full *Erie* analysis considering all the available data.<sup>463</sup> In essence, Bergman proposes that once the federal court determines there is substantial evidence that the state court would reach a result different from the prior panel’s holding, the court would approach the issue as an unanswered question of state law, applying the same analytical approach it would had there been no prior decision.<sup>464</sup>

Returning to the *Berrier/Covell* line of cases as our context, was there “substantial evidence” that would satisfy Bergman’s standard that the Third Circuit’s prediction announced in *Berrier*,<sup>465</sup> confirmed in *Covell*,<sup>466</sup> and implicitly confirmed again in *Sikkelee*<sup>467</sup> was wrong? As noted above, the Third Circuit’s opinion in *Berrier* relied on several pieces of data to predict that Pennsylvania would adopt the Restatement (Third): The undisputed fact that Pennsylvania’s products liability jurisprudence was unfathomable and in disrepair,<sup>468</sup> and the related fact that the Pennsylvania Supreme Court (as well as respected commentators) candidly agreed with this grim assessment;<sup>469</sup> the Pennsylvania Supreme Court’s grant of allocatur in *Bogush*, for the stated purpose of determining whether Pennsylvania should adopt Section 2 of the Restatement (Third) of Torts (an important bit of information the court acknowledged, although as noted, it did not explicitly rely upon),<sup>470</sup> and the court’s “count” that at least four justices seemed poised to jettison Pennsylvania’s “no negligence concepts in strict liability” approach as unworkable and confusing and adopt the blended Restatement (Third) approach.<sup>471</sup> But,

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461. *See id.* at 1010-11.

462. *See id.* at 1011. Bergman’s formulation strikes the right balance. To the extent the difference in law has a real impact, competent counsel can be relied upon to raise the issue, especially if the protocol and requirements for departing from a prior panel decision are clear. Further, putting the burden on the parties relieves the court of having to do a full *Erie* analysis for every case, serving the stare decisis goal of judicial economy. But the important federalism issues raised by wrong *Erie* guesses counsel the wisdom of permitting the court to raise the question *sua sponte*.

463. *See Bergman, supra* note 16, at 1008.

464. *See id.* at 1012.

465. *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38 (3d Cir. 2009).

466. 651 F.3d 357 (3d Cir. 2011).

467. *Sikkelee v. Precision Airmotive Corp.*, 12-8081, 2012 WL 5077571 (3d Cir. Oct. 17, 2012) (in non-precedential opinion denying interlocutory appeal, court reasoned that Pennsylvania Supreme Court has not issued definitive on which Restatement applies, and therefore court continues to follow *Covell* and *Berrier* precedent).

468. *See Lynn ex rel. Lynn v. Yamaha Golf-Car Co.*, 894 F. Supp. 2d 606, 625 (W.D. Pa. 2012) and sources cited.

469. *Schmidt v. Boardman*, 11 A.3d 924, 940 (Pa. 2011) (citing James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 897 (1998)). *See also Beard v. Johnson and Johnson, Inc.*, 41 A.3d 823, 836 (Pa. 2012) (recognizing the “continuing state of disrepair in the area of Pennsylvania strict-liability design defect law”); *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003).

470. *Berrier*, 563 F.3d at 56 n.27.

471. *Id.* at 56 n.28 (“[F]our of the current seven Justices have voiced support for adopting the Third Restatement.”).

by the time *Covell*,<sup>472</sup> and later *Sikkelee*<sup>473</sup> (both cases seeking reversal of *Berrier*) came before the Third Circuit, the landscape had changed in ways that demonstrated persuasively that the Third Circuit had gotten it wrong, or at a minimum, “the formation of a consensus [to adopt the Restatement (Third)] had not yet crystallized”<sup>474</sup> among the Justices of the Pennsylvania Supreme Court.

First, after extensive briefing<sup>475</sup> and extensive oral argument,<sup>476</sup> the Pennsylvania Supreme Court dismissed the appeal in *Bugosh* as improvidently granted.<sup>477</sup> The Pennsylvania Supreme Court has cautioned courts not to read too much into dismissal of an appeal as improvidently granted, explaining that “the effect is as though this Court never granted allowance of appeal,” and that therefore the order of the Superior Court stands “as a decision of that court.”<sup>478</sup> *Covell* cites this very language and relies on it to eschew relying on the dismissal of the appeal in *Bugosh* as an indication that its prediction in *Berrier* should be amended.<sup>479</sup> From this it makes an analytical leap to conclude that “one could just as reasonably conclude that the dismissal here (in *Bugosh*) indicates the Court’s approval of *Berrier* as much as it indicates its approval of Section 402A.”<sup>480</sup> This reasoning is unpersuasive for several reasons. First, and most important, to the extent the Third Circuit looked to the grant of allocatur in *Bugosh* as indicating the Pennsylvania Supreme Court was poised to adopt the Restatement (Third), the subsequent dismissal indicates that the court was not so poised. The language in *Tilghman*<sup>481</sup> cautioned against using such summary decisions as precedential in terms of legal analysis and reasoning. To that end, the other case cited by *Covell* for this proposition notes specifically that denial of appeal or dismissal of appeal as improvidently granted should not be read as indicating the Supreme Court’s approval of the Superior Court’s reason, but only that the result stands.<sup>482</sup> But what the dismissal of appeal in *Bogush* communicated was not legal reasoning or analysis. Rather, the dismissal signaled quite clearly an important fact: the Pennsylvania Court was *not* about to jettison the Restatement (Second) of Torts in favor of the Restatement (Third) of Torts—it had just taken affirmative action to step back from an otherwise ripe opportunity to do so. To paraphrase *Tilghman*, therefore, the decision of the Superior Court stood—and the Superior Court in *Bugosh* applied the Restatement (Second) of Torts. It stood, to be sure, as a decision of that intermediate court, not binding on the diversity courts with the same authority as a decision of the state supreme court, but it stood as evidence of the law of Pennsylvania. But more important, the case provided

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472. *Covell v. Bell Sports, Inc.*, 651 F.3d 357, 357 (3d Cir. 2011.)

473. 12-8081, 2012 WL 5077571 (3d Cir. Oct. 17, 2012).

474. *Carpenter v. Shu-Bee’s, Inc.*, Civil Action No. 10-0734, 2012 WL 2740896, \*2 (E.D. Pa. July 9, 2012) (finding *Covell* not binding in light Pennsylvania case law and applying Restatement (Second)).

475. Filings included several rounds of briefs from the parties as well as several amicus briefs. *Bugosh v. I.U. N. Am., Inc.*, 971 A.2d 1228 (Pa. 2009) (No. 7 WAP 2008), 2008 WL 6011311 (mem.).

476. *See Sikkelee v. Precision Airmotive Corp.*, 12-8081, 2012 WL 5077571 (3d Cir. Oct. 17, 2012).

477. *Bugosh v. I.U. N. Am., Inc.*, 971 A.2d 1228 (Pa. 2009).

478. *Commonwealth v. Tilghman*, 673 A.2d 898, 904 (Pa. 1996).

479. *Covell v. Bell Sports, Inc.*, 651 F.3d 357, 364 (3d Cir. 2011).

480. *Id.*

481. The Supreme Court used *Tilghman* to clarify the precedential value of certain of its per curiam orders. The case on appeal involved the precedential effect of an order affirming a Superior Court decision, but the Supreme Court noted confusion among members of the bar regarding both per curiam affirmances, and dismissals of grants of allocatur as improvidently granted. *Tilghman*, 673 A.2d at 902-03.

482. *Salazar v. Allstate Ins. Co.*, 702 A.2d 1038, 1043 (Pa. 1997).



factual evidence, as distinct from legal analysis or reasoning, that the Supreme Court had considered changing that law, and then had affirmatively determined to let the current products liability law stand. Thus, an important piece of data underlying the *Berrier* decision was shown to be erroneous (whether erroneous at the time *Berrier* was decided, or only later does not matter much). To conclude from the dismissal of the appeal in *Bugosh* that the Pennsylvania Supreme Court was not about to adopt the Restatement (Third) of Torts would not violate *Tilghman's* mandate, and indeed, it represents a perfectly logical discernment of important facts.

But there was more evidence to persuade the Third Circuit to step back from *Berrier*. Just before the Third Circuit's *Covell* decision, the Pennsylvania Supreme Court decided *Schmidt v. Boardman*. In the part of the *Boardman* opinion that all justices joined, Justice Saylor invoked *Berrier* specifically stating that “[n]otwithstanding the Third Circuit’s prediction, however, the present status quo in Pennsylvania entails the continued application of Section 402A of the Restatement Second.”<sup>483</sup> Justice Saylor’s opinion did reiterate his (and other Justices’) criticisms of current state of products liability law in Pennsylvania, but despite this criticism, he noted that the appeal in the case was not granted to answer the overarching question of jettisoning the Restatement (Second) of Torts but rather (to Justice Saylor’s dismay) to tinker with the current regime.<sup>484</sup> *Boardman* thus offers further evidence that Pennsylvania was not ready to make the change predicted in *Berrier* a conclusion reached by several federal district courts.<sup>485</sup> Regardless of the fact that so many thought the Restatement (Third) of Torts was the better choice, it was *not* the choice of the Pennsylvania Supreme Court—at least not at this point. The Third Circuit was well aware of *Boardman* when it decided *Covell*. The court cited *Boardman*, but only for Justice Saylor’s frustrated observation in *dicta*, that the no-negligence-in-strict-liability dogma was confusing.<sup>486</sup>

Throughout this time, Pennsylvania’s intermediate and trial courts unfailingly applied the Restatement (Second) of Torts.<sup>487</sup> This probably does not constitute strong evidence one way or the other on whether *Berrier* was wrongly decided since the lower courts are bound by the vertical precedent to apply the law as articulated by the Supreme Court. In fact, the opportunity was there for the intermediate courts to take a stab at initiating adoption of the Restatement (Third) of Torts. As Caminker explains in the context of intermediate federal courts, there are times when a court whose job is to state what the law is, may depart from precedent announced by a higher-level court.<sup>488</sup> Most relevant in this context is the concept of “anticipatory overruling” which Caminker

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483. *Schmidt v. Boardman Co.*, 11 A.3d 924, 941 (Pa. 2011) (applying Restatement (Second) of Torts in context of product line doctrine and exceptions).

484. *See id.*

485. *See, e.g.,* Sikkelee v. Precision Airmotive Corp., 876 F. Supp. 2d 479, 489-90 (M.D. Pa. 2012), *appeal denied*, No. 12-8081, 2012 WL 4953074 (3d Cir. Sept. 14, 2012), *reconsideration denied*, No. 4:07-CV-00886, 2013 WL 2393005 (M.D. Pa. June 3, 2013), *reconsideration denied*, No. 4:07-CV-00886, 2013 WL 3456953 (M.D. Pa. July 9, 2013) (court finding that *Beard* provided indication *Berrier* prediction wrong because “Pennsylvania Supreme Court expressly took notice of ‘the continuing state of disrepair in the arena of Pennsylvania strict-liability’ law and nonetheless declined to take the opportunity to replace the Restatement Second with the Restatement Third”) (internal citation omitted).

486. *Covell v. Bell Sports*, 651 F.3d 357, 361 (3d Cir. 2011).

487. *See* cases cited *supra* note 8.

488. Caminker, *supra* note 46, at 19.

describes as involving a court faced with a controlling precedent in circumstances where there is strong evidence that the higher court would likely overrule the precedent if given the chance.<sup>489</sup> A court following what Caminker calls the proxy model might decide not to follow the precedent, and anticipate that the higher court faced with the facts would overrule it. But Pennsylvania's intermediate courts appear conservative in their approach to vertical precedent.<sup>490</sup> Thus, the fact that these courts did not seize the opportunity to engage in anticipatory overruling, may provide at best tepid evidence that *Berrier* should be reconsidered. But, in light of other evidence, it is significant.

Similarly, mere passage of time without more likely will not qualify as persuasive evidence, especially where the particular issue involved is not one that comes up for review by the state supreme court frequently. But passage of time, especially where the matter involved is frequently litigated (as is the case with products liability suits in Pennsylvania), should put a thumb on the scale. When *Covell* was decided, only two years had elapsed; by the time the Third Circuit rebuffed the request to step back from *Berrier* in *Sikkellee*, three years had passed. At some point the fact that the Pennsylvania court has not acted in the way predicted, despite ripe opportunities to do so, should have caused the predicting court to reconsider.

District courts within the Third Circuit were split on which Restatement to apply, with some making a strong case that they were not bound by *Berrier* in light of persuasive evidence that Pennsylvania was not poised to adopt the Restatement.<sup>491</sup> From a strict vertical precedent perspective, the district courts should abide by the Third Circuit's most recent pronouncement on Pennsylvania law absent a contrary decision from the state supreme court, or subsequent decisions from the state appellate courts indicating that the Court of Appeals had erred.<sup>492</sup> Applying this standard, a good number of district courts found that there was indeed evidence that *Berrier* got Pennsylvania law wrong. Should the reasoning of these district courts influence the Third Circuit? Some, including for a time a good number of Circuit Courts of Appeals, have argued that district court judges bring special insight to the question of determining state law in *Erie* cases.<sup>493</sup> The argument reasons that their role as trial court judges places them closer to the day to day application of law, and the fact that district court judges often served on state court benches gives them special expertise.<sup>494</sup> As noted above, the Supreme Court unequivocally dismissed an approach that would give district court interpretations a presumption of being correct. The Court reasoned that this violated the letter and the spirit of *Erie* in *Salve Regina*, concluding that *Erie* required *de novo* review of the state law question as a question of law, and supporting this rationale by noting that courts of appeals had the time to more

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489. *Id.* at 19-20.

490. *See, e.g.*, *Estate of Hicks v. Dana Cos., LLC*, 984 A.2d 943, 976 (Pa. 2009) and cases cited therein (holding that, even in light of evidence that several justices support adopting Restatement (Third) of Torts, intermediate court does not have authority to overrule the Supreme Court).

491. *See, e.g.*, *Thompson v. Med-Mizer, Inc.*, 10-CV-2058, 2011 WL 1085621 (E.D. Pa. Mar. 21, 2011); *Punch v. Dollar Tree Stores, Inc.*, No. 12-154, 2013 WL 1421514 (W.D. Pa. Jan. 24, 2013) report and recommendation adopted, No. 1:12-CV-154-SJM-SPB, 2013 WL 1788063 (W.D. Pa. Apr. 8, 2013) (citing split within Western District); *see also* cases cited *supra* note 48.

492. *Largoza v. Gen. Elec. Co.*, 538 F. Supp. 1164, 1166 (E.D. Pa. 1982) (citing *Doane v. Travelers Ins. Co.*, 266 F. Supp. 504, 405 (E.D. Pa.1966)).

493. *See, e.g.*, Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 913-14 (1989).

494. *Id.* at 905.

carefully consider the legal issues, and were structurally more suited to do so.<sup>495</sup> But this should not be read to dismiss the value of district courts' insights completely. So, while the district courts do not get special respect in these matters, certainly a strong case can be made that the sharp division among the district courts in the *Berrier/Covell* line of cases should have at least given the Circuit Court of Appeals reason to reconsider its prediction. Taken together, there was strong evidence that should have indicated that the Third Circuit's prediction was wrong, and the court should have taken the opportunity presented by *Covell*, or at least the later *Sikkelee* case, to reconsider.

### XIII. CONCLUSION

At a time when diversity cases make up a significant portion of the federal court docket, the question of how federal courts discern and apply state law affects not only the outcome of cases and so the lives of individual litigants, but also the shape of the law itself, and the delicate relationship among the several states and the federal government. Several important conclusions emerge: *Erie* was constitutionally compelled, and the *Erie* doctrine protects the crucial balance of authority struck by the constitution between the federal government and the several states. While there is controversy, diversity jurisdiction is understood to have been created to prevent perceived prejudice against outsiders that might manifest in state courts. This perceived fear of prejudice in the state court creates implicit federalism friction between the federal and the state courts that should be minimized as much as possible. Because they sit as "neutral" versions of their state court counterparts, federal district courts sitting in diversity must decide cases as their state court counterparts would, absent the possibility of home court bias. To do this effectively, federal diversity courts must use all the judicial resources at their disposal, and must be activist in discerning what state law is. This will at times require the federal diversity courts to take a leap and predict how a state court might resolve a legal question, and this may occur because the law is undecided, is unclear or is elderly. Federal courts making these predictions will at times make wrong *Erie* guesses, despite good faith efforts and all the resources at their disposal. When these wrong *Erie* guesses result in two different legal rules being applied to similarly situated litigants in the same state, *Erie*'s fundamental principle is violated, and serious federalism issues arise. While *stare decisis* is important, and federal courts should not change their minds capriciously, *stare decisis* must be understood as it applies specifically in this context. The approach of some circuits that holds that en banc hearing is required to overturn a prior panel's decision, and that en banc hearing is unlikely to be granted if the only issue is the Circuit Court's determination of a question of state law gets it exactly backwards. Rather, the Circuit Courts should be much more sensitive to the possibility that their prediction of state law was mistaken. In these matters, it is in fact more important that the law be settled right than just be settled. Therefore, Circuit Courts must be just as activist and just as willing to read the tea leaves and discern whether there are indications, short of an opinion by the state supreme court calling the federal court out, that they got it wrong. Bergman's evidence-based paradigm provides a useful template for considering whether a diversity court made a wrong *Erie* guess. Evidence such as was

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495. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231-33 (1991).

present in the *Berrier/Covell* line of cases should be sufficient to cause the Circuit Court of Appeals to reconsider its opinion and to modify its prediction. Such an approach applies *Erie's* simple rule in a way that minimizes federalism friction, respects the states, and respects the judges in diversity jurisdiction cases.