1969

Federal Interpretation of State Law--An Argument for Expanded Scope of Inquiry

Minn. L. Rev. Editorial Board

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/2943

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Federal Interpretation of State Law—
An Argument for Expanded Scope of Inquiry

I. INTRODUCTION

In 1938 the Supreme Court, in *Erie Railroad Company v. Tompkins*, held that federal courts exercising diversity of citizenship jurisdiction must apply state rather than federal decisional law to questions of a "substantive" character. In so doing, the decision raised the question of how a federal judge is to ascertain and apply state decisional law, a question which has provoked considerable comment from the courts and the academic community. Analytically the federal court's duty, as defined in *Erie*, is somewhat unique. Normally, American judges, both state and federal, are given considerable leeway in declaring the appropriate rule of law to apply to the particular question presented. Consequently, traditional notions of the proper method of judicial decision-making, at least common law notions, have developed within this flexible framework and have

1. 304 U.S. 64 (1938).
4. Although it was once thought that judges only "found" and applied the law, it is now generally recognized that they also necessarily exercise a quasi-legislative function in the process of decision-making. E.g., J. Hurst, *The Growth of American Law* 185 (1950).
5. It might be argued that in cases involving statutory interpretation the judge is looking to another institution in order to determine the law. However, at least in the cases since *Erie*, as will be explained below, the role of the judge in ascertaining state law has been more sharply limited than his role in interpreting statutes.
reflected the needs and conditions of a process in which the power to hear a case conferred the power to declare and apply the law of the forum. Examples other than diversity cases exist of courts asserting subject-matter jurisdiction which is not co-extensive with their power to declare the law of the forum in which they sit—most notably state cases involving choice of law rules and federal cases in which there is federal subject-matter jurisdiction. However, the effect of this anomalous circumstance on the role of the federal judge has been most significant in diversity of citizenship litigation, perhaps because of the relatively greater volume of litigation.

The question raised by *Erie* is peculiar to a dual and jurisdictionally overlapping judicial system within a federal form of government. By virtue of the constitutional limitations on the power of the federal government, the states exercise substantially exclusive authority in adjusting the interests of persons within their boundaries. In the adjustment of these interests the states have promulgated, through their legislatures, executives, and courts, distinctive bodies of law to be applied to all persons within the constitutional reach of their authority. To a certain extent these bodies of law vary among the several states, reflecting the different needs, customs, and philosophies of the societies to which they apply. Not only are such disparities permissible in a federal system, but they provide, according to some scholars, a healthy diversification of approaches to the adjustment of conflicting interests of persons within our society. It is within this framework of federalism, in which

---

7. See, e.g., Commissioner v. Bosch, 387 U.S. 456 (1967); National Bank v. General Mills Inc., 283 F.2d 574 (8th Cir. 1960). For a discussion of the Supreme Court’s application of *Erie* reasoning to a federal question case see Comment, 52 Minn. L. Rev. 776 (1968).
9. U.S. Const. amend. X.
10. For a general discussion of the role of states in adjusting the interests of their own citizens within our federal form of government see Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1955) [hereinafter cited as Hart].
11. Hart at 492-93. One of the best examples of this disparity is the various divorce laws of the states. The distinctions which exist between divorce statutes may be said to reflect the attitudes of the particular people to which they apply. Another less notorious divergence between the laws of the various states is found in judicial rules defining proximate cause.
each state has developed a unique body of decisional law, that the instant problem—the role of the federal judge in diversity of citizenship cases—arises. Consequently, any analysis of how a federal judge is to ascertain and apply state law must necessarily refer to basic, although often ill-defined, principles of federalism.

The purpose of this Note is to develop a standard of decision-making to guide the federal judge in ascertaining state law, to isolate factors to be considered in applying such a standard, and to analyze the result of such application. Particular emphasis will be placed on an examination of factors presently thought to be outside the proper scope of judicial consideration and on an evaluation of the usefulness of these factors and the possibility of permitting their consideration by federal judges deciding diversity of citizenship cases.

For nearly 100 years before *Erie, Swift v. Tyson* provided the authoritative definition of the federal judge's role in diversity of citizenship cases in which no relevant state statutory law existed. In determining what law applied to the question whether a bona fide purchaser of a bill of exchange could recover from the original transferor, the Court was required to interpret section 34 of the Federal Judiciary Act of 1789. The Court in *Swift* read the act as requiring the federal courts to follow state statutory law and state decisional law of a peculiarly local character, but in matters of a commercial nature (e.g., a bill of exchange) to find the rule of law "in the general principles and doctrines of commercial jurisprudence." This holding directly rejected defendant's argument that the Judiciary Act required applica-

---

14. ... that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise recognize or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States in cases where they apply. The Act as amended, 28 U.S.C. § 1652 (1964), is substantially the same.
FEDERAL INTERPRETATION

A century of diversity decisions expanded the original rule, until a general federal common law had developed which applied to all diversity cases. Since state common law was not always similar to federal common law, the activity of persons within a particular state was regulated by two frequently conflicting bodies of law; which body would apply in a particular case depended solely on whether both litigants were citizens of the same state. The effect of the extension of the Swift rule is amply illustrated by a case where a Kentucky corporation reincorporated in another state to establish diversity of citizenship, and thereby take advantage of the more favorable federal common law.

It was against this background that the Supreme Court decided Erie Railroad Company v. Tompkins. In reversing the lower court decision, which had been based on federal common law, the Court found the Swift interpretation of the Rules of Decision Act to be an unconstitutional assumption by the federal courts of powers not delegated to the federal government by the Constitution. In addition to noting the historical inaccuracy of the Swift interpretation, the Erie Court articulated two independent policies which are basic to the decision. First, and most important, it stated that the mere presence of jurisdiction over the parties does not confer on the federal courts constitutional authority to declare substantive law to be applied within the states. Second, the Court felt that equal justice

18. Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928); see Holmes' dissent, id. at 532-34.
19. 304 U.S. 64 (1938). While walking down a railroad right-of-way, Tompkins was struck and injured by an object projecting from one of Erie's trains. Under federal common law, Tompkins was a licensee and the railroad was held to a reasonable man standard of care, while under the law of Pennsylvania he was a trespasser and the railroad's duty toward him was quite minimal. The lower federal courts, applying the Swift rule, and hence federal law, found Tompkins to be a licensee and permitted recovery.
20. According to the Court, the Act's authors intended the words "laws of the states" to include state decisional law. The Court also recognized that the Swift decision had failed to promote a uniform common law throughout the nation. As a result, forum shopping had been encouraged and equal protection of the law within a state denied. However, the court did not regard either of these grounds as sufficient to justify overruling Swift. Instead, it grounded its decision on the unconstitutionality of the Swift interpretation.
21. The validity of this argument has been questioned by legal
required, to the extent possible, application of the same law to all persons regardless of their citizenship, and neutralization of the advantage of forum shopping.\textsuperscript{22} Thus, with respect to diversity of citizenship cases, the general federal common law was abolished and replaced by the anomaly of vesting jurisdiction in a court while requiring it to apply the law of a different sovereign.\textsuperscript{23}

Subsequent applications of the \textit{Erie} rule\textsuperscript{24} have referred to and refined these grounds despite disagreement among legal scholars as to their relative validity.\textsuperscript{25} The \textit{Erie} opinion itself scholars. Several commentators contend that the constitutional argument is dictum since it was not necessary for the decision. Clark at 278; Vestal, \textit{supra} note 3, at 254. Others argue that the Constitution grants Congress power to enable the federal courts to declare substantive law in all cases in which they have jurisdiction. Clark at 278-79; Currie, \textit{Change of Venue and the Conflict of Laws}, 22 U. Chi. L. Rev. 405, 469 (1955). For a recent discussion of these criticisms and a defense of the \textit{Erie} decision see Friendly, \textit{In Praise of Erie and of the New Federal Common Law}, 19 Recomp 64 (1964) [hereinafter referred to as Friendly].

\textsuperscript{22} Erie R.R. v. Tompkins, 304 U.S. at 74-78.

\textsuperscript{23} Id. at 78. The Court there stated:

\textit{Except 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. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or “general,” be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.}

\textsuperscript{24} See, e.g., Hanna v. Plummer, 383 U.S. 460 (1965); Byrd v. Blue Ridge Elec. Co-op., 356 U.S. 528 (1958); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938). Recent cases have re-evaluated prior interpretations of \textit{Erie}. In Byrd v. Blue Ridge Elec. Co-op., \textit{supra}, the Court, in re-examining the outcome-determinative test of \textit{Guaranty Trust}, had cause to reflect on the policies underlying \textit{Erie}. A more flexible application of the policy of uniformity within the state was advanced when the Court found that countervailing federal interests must be recognized and balanced against the policies enunciated in \textit{Erie}. Further, in Hanna v. Plummer, \textit{supra}, the Federal Rules themselves were found to constitute a significant if not conclusive federal interest. Therefore, in the case of a direct conflict between state and federal procedural rules, intra-state uniformity was subordinated to the federal interest of procedural uniformity in the federal courts.

See note 102 \textit{infra}, and accompanying text for a discussion of the relevance of this new flexibility to the instant question of how a federal judge is to ascertain state law once it is found to be applicable.

\textsuperscript{25} See authority cited note 3 \textit{infra}.
shed little light on the problem of ascertaining unclear state law, and for good reason;\textsuperscript{26} the question was not presented. Nonetheless, in analyzing the proper role of the federal judge with respect to state law in 1968, \textit{Erie} provides the policies and ground rules from which standards of judicial conduct may be devised.

The notion that federal courts must ascertain state law is itself somewhat misleading since it implies the existence of a body of law which is readily accessible and easily understood. On the contrary, the state law is dynamic rather than static and finds expression in many media, including statutes, decisions, and administrative rulings.\textsuperscript{27} Furthermore, the very act of deciding a case may be more than a mere application of the law; it may also serve a declaratory function by restating, adding to, or modifying the pre-existing "body of law." It is this multi-sourced, dynamic body called state law which \textit{Erie} requires the federal judge to ascertain.

\section{ORTHODOX METHODS OF ASCERTAINING \textbf{STATE LAW}}

Over the past 30 years, the Supreme Court, lower federal courts, and legal writers have attempted to formulate a method of judicial decision-making which would satisfy the requirements of \textit{Erie}. It should be noted at the outset that in those few instances where the state's highest court had made a recent ruling on an "all-fours" fact situation, the federal courts have had little difficulty in applying the \textit{Erie} rule.\textsuperscript{28} The problem of ascertainment arises only when the highest court has not spoken, either recently or at all, on the question in issue. The inquiry then becomes whether the federal judge may make an independent decision on the basis of what he deems to be the right rule, or whether he must examine other sources of state law in order to ascertain what the law of the state would be if the issue were before the state's highest court.\textsuperscript{29}

\textsuperscript{26} Compare Friendly, \textit{supra} note 21, at 76, with Vestal, \textit{supra} note 21, at 253.

\textsuperscript{27} The Supreme Court has recognized this fact in several decisions. See, e.g., Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 205 (1956); King v. Order of United Commercial Travelers, 333 U.S. 153, 158 (1948).

\textsuperscript{28} Query how much of a restriction this places upon the federal judge who wishes to make an independent decision and reads recent, closely analogous cases narrowly in order to arrive at the conclusion that the highest court has not spoken authoritatively on the question presented.

\textsuperscript{29} In a discussion of the alternatives available to the federal
A. GUIDANCE FROM THE SUPREME COURT

The Supreme Court has yet to express a definite opinion on how the federal judge should ascertain state law when the highest state court has not spoken to the precise question in issue. Nevertheless, a series of cases exist in which the ascertainment question was either directly or collaterally raised and from which it is possible to discern the development of a Court attitude toward the proper role of the federal judge.

The development of this attitude began during the 1940 term when the Court handed down four decisions\(^8\) indicating an extremely rigid position—or so they were taken by legal scholars of the day\(^9\)—toward the role of the federal judge with respect to one source of state law—lower state court decisions. One opinion, *Fidelity Union Trust Company v. Field*,\(^{32}\) from which the others seem to follow *a fortiori*, held that a federal judge is bound by the decision of a state trial court of state-wide jurisdiction, absent a ruling by the highest court of the state or other convincing evidence of state law. The principal argument in opposition to the decision was that litigants in federal court would judge, a recent writer isolated three different attitudes among the lower federal courts. (1) Some courts have exercised an entirely independent judgment whenever feasible; (2) others have chosen to exercise an independent judgment in light of intra-state evidence of the law of the state (apparently this means that the federal court while examining the same data that the state court employs assigns its own values to it); (3) lately some federal courts have attempted to predict how the state court would decide the case. INDIANA at 555. See also Harnett & Thornton, *supra*, note 3, at 779-83.


31. See Clark at 292; Corbin at 766-70. The criticism by the above authors of the *Fidelity* rule seems overly harsh in light of the language of the cases. In the *Fidelity* case the rule was stated as follows:

> An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is should be followed by a federal court in deciding a state question.

*Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78 (1940) (emphasis added). Certainly this statement of the judge's duty is sufficiently broad to permit a more liberal interpretation of the 1940 cases than either Clark or Corbin seem willing to admit. Of course, and perhaps this is the point both authors were making, the Court made little attempt to discuss any "other convincing evidence," and thus lower state court decisions were given nearly conclusive effect.

32. 311 U.S. 169 (1940).
receive a lower quality of justice than those in state court. This seemed to follow from the fact that other state courts were not bound by decisions of such courts and as a result could dispute the correctness of the lower state court's decision. In 1948, the Court apparently mellowed in its reverence for lower state courts by finding that a federal court was not bound by a decision of a South Carolina Common Pleas Court. In distinguishing Fidelity, the Supreme Court emphasized the peculiar character of the Common Pleas Court, noting that it was not a court of record, that its territorial jurisdiction included only a small part of the state, and that its opinions were afforded little weight by other South Carolina courts of coordinate jurisdiction.

The Court had another opportunity to speak to the ascertain¬
tainment question in 1956. In issue was the binding effect under Vermont law of a clause purporting to make an arbitration ruling final between the parties. In reversing the court of appeals, the Supreme Court reaffirmed the Erie policy of diminishing the effects of the accident of diversity. More important, the Court indicated, in dicta, evidence which it considered relevant to the question of state law when the most recent Vermont case in point was nearly 50 years old. Suggested evidence included confusion in recent Vermont decisions, developing lines of authority which discredit established authority, dicta, doubts or ambiguities in the opinions of Vermont judges on the question at issue, and legislative development tending to undermine the judicial rule.

On the basis of this series of cases it is possible to discern a threefold attitude on the part of the Court. First, it is quite clear that the federal judge must ascertain and apply state law regardless of his personal belief as to its rightness. Second, the Court recognizes that state law arises from many sources and the federal judge must be cognizant of all such sources in making his determination. Finally, and to a very limited extent, the Court has attempted to establish the relative weight to be given each source.

33. Corbin at 775.
34. Id.
37. Id. at 205.
B. Development Within the Lower Federal Courts

Within the general attitudes defined by the above cases, the lower federal courts have worked out standards of decision-making to be used in ascertaining state law. In recent years the circuits have been tending toward a standard which requires the federal judge, in ascertaining state law where no authoritative decision by the state's highest court exists, to examine all relevant data and decide the issue the same way as the state's highest court would—a method of judicial decision-making which will be referred to as the prediction formula.

A line of cases in the Eighth Circuit illustrates the development of this standard. The major early case, Yoder v. Nu-Enamel Corporation, in which the Eighth Circuit faced the ascertainment problem seemed to adumbrate espousal of the prediction formula. The court was faced with the substantive problem of applying the Nebraska "long-arm" statute to a foreign corporation. In the course of its opinion it said that "[t]he responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it." The court further suggested that it must give regard to all available persuasive data including "... compelling inferences or logical implications from other related adjudications..." As applied to the issues before it, the court felt the above standard required application of the most recent decision of the state's highest court in case of conflicting state authority. Where no decision on the precise issue existed, the court was not free to decide the case on the basis of logical impulse or outside authority, but was compelled to look to prior state decisions from which analogies and implications could be drawn. The court thus examined an older decision to support its conclusion that discontinuance of business within the state terminated the agency in the state auditor for service of process. Although language in the case suggests a new approach to the ascertainment question that would pay meticulous heed to every nuance of state law, substantial qualifications are apparent on closer examination. The only data examined were some rather equivocal statements in an old state decision. No reference was

41. See generally INDIANA at 555, 565.
42. See cases cited note 61 infra.
43. INDIANA at 550.
44. Yoder v. Nu-Enamel Corp., 117 F.2d 488 (8th Cir. 1941).
45. Id. at 489.
46. Id.
made to legislative policy or to the attitude of the state court toward the relevant statute. Furthermore, the court disclaimed any obligation to make a "prediction" of how the Nebraska Supreme Court would presently decide the issue, arguing that such activity was outside the proper sphere of judicial conduct. In addition, the case was decided during the reign of the Fidelity Union Trust Company v. Field rule, and in fact the court cited one of the cases from the Fidelity series in its opinion. The Yoder case, however, does recognize the multiplicity of data which comprises the law of the state and, in characterizing the state law as the "legal mind of the state," seems to recognize that philosophies of state courts as well as express holdings may be relevant in ascertaining state law.

Subsequent cases in the Eighth Circuit accepted the Fidelity rule then in vogue. Where a prior state court decision existed, the federal court was bound to follow it, regardless of the level of the state court and even if there were no convincing evidence that the state's highest court would follow the decision. As applied in Fidelity, the rule appeared to some scholars to strip the federal judge of his judicial expertise and to prevent the litigant in federal court from receiving the same quality of justice as that offered in state court. The Eighth Circuit, however, while accepting the Fidelity rule, seemed to apply it with a different attitude. More emphasis was placed on the qualification that the lower state court decision was binding only in the absence of other "convincing evidence." Indeed, several of these earlier cases made a genuine effort to examine other evidence and balance its persuasive value against that of the lower court decision.

III. THE PREDICTION METHOD

Even in these early cases there were indications that the Eighth Circuit was formulating a rule of ascertainment which

47. Id. at 490.
48. 311 U.S. 169 (1940).
49. The court cited West v. American Tel. & Tel. Co., 311 U.S. 223 (1940); see 117 F.2d at 489.
50. 117 F.2d at 489.
51. E.g., Federal Deposit Ins. Corp. v. George-Howard, 153 F.2d 591 (8th Cir. 1946); Order of United Commercial Travelers v. Meinsen, 131 F.2d 176 (8th Cir. 1942).
52. Corbin at 775.
54. See, e.g., Order of United Commercial Travelers v. Meinsen, 131 F.2d 176 (8th Cir. 1943) (state statute declaring public policy was considered convincing evidence).
required the federal judge, in examining all relevant data available, to predict or forecast how the state's highest court would decide the issue if the precise problem were before it. More recent cases have quite clearly stated that the duty of the federal judge, in the absence of explicit authority from the state's highest court, is to predict. Illustrative of this principle is the case of Brooten v. Cudahy Packing Company. In answering a question of first impression concerning application of the Minnesota dramshop act the court said the problem was "... one of endeavoring to determine what the Supreme Court of Minnesota would declare the Minnesota law to be were this case before it." More recently a district court said it could not "... choose the rule which it would adopt for itself, if free to do so, but must choose the rule which it believes the state court, from all that is known about its methods of reaching decisions, is likely in the future to adopt."

Such a standard squares with that advocated by legal writers and accepted by a majority of the other circuits. In addition, this standard, while not expressly adopted by the Supreme Court, incorporates those policies which the Court has stated to be fundamental to the Erie rule. Although inadequate data may still cause erroneous predictions by federal courts, the differences between the two jurisdictions will be less

56. See Order of United Commercial Travelers v. Meinsen, 131 F.2d 176, 181 (8th Cir. 1942); Yoder v. Nu-Enamel Corp., 117 F.2d 488 (8th Cir. 1941).
58. 291 F.2d 284 (8th Cir. 1961).
59. Id. at 288.
62. Royal Indem. Co. v. Clingan, 364 F.2d 154 (6th Cir. 1966); Union Bank & Trust Co. v. First Nat'l Bank & Trust Co., 362 F.2d 311 (5th Cir. 1966); Graves v. Associated Transport Inc., 344 F.2d 894 (4th Cir. 1965); Tavernier v. Weyerhaeuser Co., 309 F.2d 87 (9th Cir. 1962); Hartness v. Aldens, Inc., 301 F.2d 228 (7th Cir. 1962); Gerr v. Emrick, 283 F.2d 293 (3d Cir. 1960), cert. denied, 365 U.S. 817 (1961); Cooper v. American Airlines Inc., 149 F.2d 355 (2d Cir. 1945).
63. See notes 21 & 22 supra, and accompanying text.
frequent than those that would occur if the federal judge, in
the absence of direct state authority, could make an independent
decision. As a result, equal intrastate application of the law re-
gardless of diversity of citizenship is promoted, and forum shop-
ping is correspondingly discouraged. Furthermore, the constitu-
tional underpinnings of *Erie* are satisfied by the *prediction
formula*. While federal judges are formulating a law to be ap-
plied within the boundaries of the states, they are doing so
only in the absence of state judicial action and in so doing are
recognizing and forwarding those unique policies, customs, and
philosophies of the state, the maintenance of which is protected
by the Constitution.\(^6\)

The accuracy of prediction of state court decisions by the
federal judge depends on his ability to emulate the judicial de-
cision-making process of the state court. This, in turn, seems to
require an examination of all sources of state law and meth-
chodologies of decision-making, in order to isolate those factors
peculiar to the particular state’s judicial process which ma-
terially affect the outcome of litigation within the state. Anal-
ysis of diversity cases shows that the above process is presently
occurring to a considerable extent. It may, however, be legiti-
mately asked whether the present process implements the *pre-
diction formula* to the extent possible or desirable.

A. CURRENT APPLICATION OF THE PREDICTION FORMULA

Obviously the first source a federal court must look to is
the decisional law of the state’s highest court.\(^6\)\(^4\) As presently
stated the *prediction formula* is applied only in the absence of
state precedent. Consequently, if a holding of the state’s highest
court is in point no prediction should be necessary. Two de-
cisions qualify this conclusion. The Supreme Court itself in *Bern-
hardt v. Polygraphic Company of America*\(^5\) suggested in dicta
that in certain circumstances other indicia of state law may be
more persuasive than a 45 year old holding. The First Circuit
found such circumstances to exist in ascertaining the law of

\(^6\) Hart at 10.

\(^4\) West v. American Tel. & Tel. Co., 211 U.S. 223, 236 (1910):

\ldots the highest court of the state is the final arbiter of what is
state law. When it has spoken, its pronouncement is to be ac-
cepted by federal courts as defining state law unless it has
later given clear and persuasive indication that its pronounce-
ment will be modified, limited or restricted.

\(^5\) 350 U.S. 198 (1956). See also language cited supra note 64,
which implies that other data may override a prior high court decision.
Mississippi with respect to negligence and privity of contract.\(^6\) A 1928 decision of the Mississippi Supreme Court was disregarded in light of its inconsistency with more recent decisions in other jurisdictions with which the Mississippi Supreme Court had expressed agreement. Since the purpose of the *prediction formula* is to ascertain the law of the state as it would be expressed by the highest state court, these decisions which anticipate the overruling of older discredited state supreme court decisions are clearly correct.

In the absence of a decision by the state's highest court, other data must be examined in order to isolate those factors which comprise the state rule of decision. The following examples from the Eighth Circuit serve to illustrate the use of collateral data in predicting the law of a state. Considered dicta by the state's highest court is often an accurate barometer of trends in state law, and accordingly has been examined in numerous cases by federal judges.\(^6\)\(^7\) While cases on all-fours from the highest state court are quite obviously the most important indicia of state law, tangentially analogous cases are also useful. Such cases have been referred to in order to discern the attitude of the state court toward a particular area of the law, to find canons of construction to be applied to certain contracts or statutes, or to glean what the state deems to be the important policies to be promoted in particular areas of the law.\(^6\)\(^8\) Although not given the same significance as before 1948,\(^6\)\(^9\) decisions of lower state courts as well as federal district courts have been referred to by Eighth Circuit courts.\(^7\)\(^0\) Several federal judges have observed a state's reliance on a treatise,\(^6\)\(^1\) a Restatement,\(^7\)\(^2\) or a legal encyclopedia\(^7\)\(^3\) to settle cases of first

---

69. This follows from the change in attitude by the Supreme Court as illustrated by King v. Order of United Commercial Travelers, 333 U.S. 153 (1948).
70. Tuner v. Alton Banking & Trust Co., 181 F.2d 899 (8th Cir. 1950).
impression. Law review articles, particularly those of schools within the state whose law is to be predicted, have also been used. One of the sources of state law most frequently referred to is decisions from other jurisdictions on which the state in question tends to rely in resolving new issues.

The above is not intended as an exhaustive list of data to which federal judges have referred or should refer in predicting state law. Other data peculiar to a particular state's jurisprudence can fit within the broad policy of duplicating the state's mode of judicial decision-making. By experience with and careful analysis of the state judicial process, judge and counsel should be able to isolate and make use of other factors which are material to the decision of cases in the state's highest court.

B. CRITICISM AND POSSIBLE EXPANSION OF THE APPLICATION OF THE PREDICTION FORMULA

While the Eighth Circuit has subscribed to the prediction formula as the proper means of ascertaining state law and has examined various characteristics of the state judicial process in implementing it, close analysis of several cases raises questions as to the accuracy of prediction on the basis of data presently used. Fundamental to an examination of collateral data in the absence of an authoritative decision by the highest state court is the requirement that the data be the same as that which the state court itself would rely upon.

Numerous decisions are noteworthy for their assumption of the obligation to predict state judicial behavior and their examination of collateral data, without offering evidence that the state court would be persuaded by the same evidence. One exam-

aff'd., 323 F.2d 420 (8th Cir. 1963) (CORPUS JURIS SECUNDUM referred to as data of state law)
76. See Harnett & Thornton, supra note 60; INDIANA at 554.
77. See cases cited notes 67-75 supra.
78. E.g., St. Paul Fire & Marine Ins. Co. v. Northern Grain Co., 365 F.2d 361 (8th Cir. 1966); Schultz & Lindsay Const. Co. v. Erickson, 352 F.2d 425 (8th Cir. 1965); Weisser v. Otter Tail Power Co., 318 F.2d
ple of this approach is *Weisser v. Otter Tail Power Company*, where the federal court was required to predict how North Dakota would resolve the question of a utility company's duty to maintain electrical lines. The court consulted several other jurisdictions without inquiring whether North Dakota's highest court was prone to follow any particular jurisdiction when faced with similar questions of first impression. While an examination of a particular state's proclivity toward relying on extra-jurisdictional authority may not always be possible or fruitful, the frequent reliance by federal courts on extra-jurisdictional authority without evidence that the state would so rely raises suspicions as to the accuracy of their predictions. In a more recent decision, the circuit judge admitted making an independent judgment on the question at issue but rationalized his conduct by stating that the decision agreed with the district court opinion which extensively examined the state law.

The method of decision-making described is strikingly similar to the type of independent judgment which the prediction formula repudiated. This is not to suggest that it is easy to determine the extent to which a given state relies on certain data, or that preferences for a particular extraterritorial law always exist. The prediction formula is perhaps more difficult to administer than the independent judicial process. It can, however, be applied in a careful and well reasoned opinion. A failure to analyze the particular state's attitude toward the data relied upon suggests that the federal judge is making the decision according to what he, rather than the state court, deems to be correct.

The very statement that federal trial courts, in the absence of an authoritative decision by the state's highest court, must predict how that court would decide the issue at bar suggests that many factors not previously discussed may be relevant.

---

79. 318 F.2d 375 (8th Cir. 1963).
81. "... it is easier to make good law than successfully to predict how it will be made." *Wright, Federal Courts and the Nature and Quality of the State Law*, 13 WAYNE L. REV. 317, 322 (1967).
83. For example, many state Supreme Courts discourage dissenting
Courts are composed of men whose personalities, backgrounds, and philosophies cannot be entirely divorced from their work. Additionally, the high courts of states are institutions which have their own peculiar idiosyncrasies and customs. Recent writers have recognized that such factors are necessarily reflected in judicial decisions. Perhaps of more consequence, lawyers who work with these men and institutions have learned to "study" the past behavior of judges and courts in order to counsel clients better. Professor Llewellyn, among others, has suggested that a proper understanding of stare decisis requires an appreciation for and knowledge of judicial and court personalities. The question therefore arises whether and to what extent these and similar factors should be employed by federal judges in predicting state law. Two considerations are apparent at the outset. First, if the Constitution, as interpreted in Erie, requires the same outcome in federal as in state court regardless of the accident of diversity, it would seem that every possible element should be examined in order to achieve an accurate prediction of state law. Second, if state appellate lawyers successfully employ such factors to predict the decisions of state courts, and federal judges do not, there is an opportunity for forum shopping on the part of the resourceful counsel. Previous discussions of the role of the federal judge in ascertaining state law have either ignored the personalities of state judges and courts or have dismissed them as inappropriate considerations.

Several examples of data not previously examined by federal courts will serve to illustrate the potential expansion of the role of the federal judge in predicting state law. Dicta in state opinions for the sake of harmony and public appearance. Such a policy certainly has an effect on the authority of opinions in which several members of the court privately disagreed, but felt unable openly to register the extent of or reason for their dissatisfaction. Such an opinion, while apparently expressing a broad rule of law, may represent the thinking of a bare majority of the court. In states where this occurs the opinions of the court should be handled with caution. See Pomerantz v. Clark, 101 F. Supp. 341 (D. Mass. 1951) (Wyzanski, J.).


85. Llewellyn, supra note 84.

86. One alternative to the federal court searching for state law under these circumstances is to seek the state court's advice. The Florida Supreme Court has provided for such a procedure by permitting the federal court to certify questions of state law to it. Fla. Stat. Ann. Rule 4.61 (1967).

87. See Harnett & Thornton, supra note 60; Note, supra note 60.

88. Indiana at 554.
court opinions is frequently employed by federal courts in as-
certaining state law. Ordinary its use is valid. But consider
a state supreme court which discourages dissents and whose
opinions therefore contain considerable dicta which normally
would be expressed in, or qualified by, dissent. Certainly such
a practice will affect the validity of dicta in that particular state
as a barometer of the judicial climate. No case has been found,
however, which discussed the existence of this practice and its
relationship to the validity of dicta as a source of state law. On
the other hand, state trial lawyers are undoubtedly aware of
such a characteristic and modify their own predictions of state
law accordingly.

A further example of datum rarely employed by federal
courts is the philosophy of the court as a whole. Judge Wyzanski
of the federal district court in Massachusetts, in determining
whether under certain circumstances a derivative suit could be
maintained by a stockholder, examined the philosophy of the
Massachusetts Supreme Judicial Court as an institution. He
discovered from this examination a conservative attitude toward
the creation of new causes of action and a skepticism toward
the effectiveness of suits by minority stockholders. He there-
fore concluded that the Massachusetts court would not find a
cause of action in favor of the minority stockholder in the form
of a derivative suit. Care should be exercised in personifying an
institution such as a court, whose membership and attitudes
change. However, where an attitude toward a particular area
of the law has developed within a given court, its relevance to
the prediction of state law may be considerable. This seems
especially true in cases where other indicia of state law are in-
conclusive as to the way the issue would be decided by the
state's highest court.

89. See note 67 supra, and accompanying text.
examining this philosophy, Wyzanski said:
   The emphasis is on precedent and adherence to the older
   ways, not on creating new causes of action or encouraging the
   use of novel judicial remedies that have sprung up in less con-
   servative communities.
   In the state court there is also an evident if not declared
   skepticism about the effectiveness of minority stockholders' suits. . . .
   Id. at 346.
91. The Eighth Circuit seems to have looked to judicial attitude in
Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964), a case where all
other data was equivocal. The court found that the Missouri Supreme
Court applied strict liability only when "social justice" so required.
Closely associated with the indicia discussed above are the political, religious, moral, and social attitudes of individual judges of state courts. Lawyers, in weighing the wisdom of taking an appeal and the utility of various types of arguments, are conscious of such factors. Furthermore, studies show that these attitudes often reveal how a judge will decide a particular question of law. Once again, however, there is no mention, either in opinions or legal writings, of the use and relevance of this data in the prediction of state law.

The above discussion is only a partial enumeration of additional data presently overtly ignored by federal courts in predicting state law. Experienced appellate lawyers, legal scholars, and behavioral scientists are capable of listing other indicia which they consider relevant to the process of decision-making in state courts.

Three further questions must be answered in evaluating the role such additional data should play in the prediction of state law: (1) Can such data be effectively employed by federal judges? (2) Is it presently being covertly or unconsciously relied upon by federal judges? (3) To what extent should it be employed in judicial decision-making by federal judges in diversity of citizenship cases?

In answering the first question, it must be conceded that the reliability of many of these factors is subject to doubt, particularly those which explain judicial conduct on the basis of the judge's background and personality. Only recently have studies been conducted to try to determine their relevance to judicial decision-making. Certainly the federal judge cannot be expected to employ data the validity of which is suspect according to present legal or scientific experience. Additionally, the use of such data is hindered by the difficulty of presenting it to the court. Much of this difficulty may be due to lawyers' reluctance to stray from accepted notions of "proper" judicial conduct, and the occasionally personal nature of the data. The availability and use of scientific studies which verify the relevance of such data to the judicial process may partially remedy this problem. Difficulty of proof may also discourage the use of such data, perhaps justifiably so. However, even this problem may

---

93. See note 92 supra.
94. Id.
be overcome. Where the validity of particular information is reinforced by the experience of the legal community, the federal judge—frequently a former state lawyer—will probably be aware of it. The present policy in the courts of appeals is to defer to the federal district court judges’ determinations of state law precisely because of their close connection to state legal systems. Continuance and expansion of this policy of deference might well increase the reliance of upper federal courts on much of the collateral data previously mentioned, since the responsibility for decision would be in the hands of those who are closest to such data.

The second question—whether such data is presently being covertly employed—is, of course, difficult to answer. The frequently close relationship between the federal district judge and the state’s highest court, discussed above, leads one to suspect that at least some of the data employed by lawyers of the state in their predictions is available to federal judges. The extent of its impact is another question. By failing to discuss such evidence in their opinions, federal judges are able more easily to ignore it and base their decisions on what they feel to be the correct rule of law.

Lastly, to what extent, if at all, should the federal courts employ such data? As was noted earlier, the two grounds enunciated by the Erie opinion, and developed and reaffirmed by subsequent cases, seem to require the federal judge to predict state law as accurately as possible and avoid unnecessary independent decisions. However, countervailing considerations may place limitations on the extent to which such policies need be effectuated by the federal judge. The question whether such data could be used accurately has already been discussed. But certainly the problem of accuracy raises not only a “could” question but also a “should” question. The use of data, whose relevance to the state decision-making process has not been proved by either scientific or judicial experience, seems inconsistent with our legal system’s belief that decisions should be based on carefully tested fact rather than conjecture. Moreover, the use of such data will quite probably place additional de-

95. But see Note, Unclear State Law in the Federal Courts: Appellate Deference on Review, 48 Minn. L. Rev. 747 (1964). The author suggests that the policy of deference by federal appellate judges to district court judges on questions of state law denies the diversity litigant the same opportunity he would have in a state appellate court.

96. See text accompanying notes 21 & 22 supra.

97. See cases cited note 24 supra.
mands on the time and energy of the federal judge and may give undue advantage to the litigant who can afford exhaustive studies of the state decision-making process. Finally, there is the consideration raised many times before, that the judge will be stripped of his right and obligation to exercise his own faculties in deciding a case. In the past, this argument was answered by reference to the overriding need for intra-state uniformity. However, recent cases in which the Supreme Court has been required to determine whether a state rule of law was substantive or procedural have recognized that because of the very nature of federalism, federal as well as state interests must be afforded due regard. While the question of ascertainment presumes that state rather than federal law is to be applied, legitimate federal interests such as administrative efficiency, may be relevant in deciding the extent to which the state judicial process must be examined by the federal judge.

IV. CONCLUSION

While legitimate doubts exist as to the necessity of diversity of citizenship jurisdiction and the wisdom of the Erie rule, both remain entrenched in our law. This being so, the federal judge faces the problem of ascertaining and applying state law, a problem which becomes particularly difficult when there is no recent authoritative declaration from the state's highest court on the legal point in issue.

The prediction formula for guiding the federal judge seems to forward those policies best which underlie the rule enunciated in Erie. In applying the prediction formula the question is raised as to the extent to which the state judicial process must be scrutinized in order to predict state law. While identity of result between state and federal litigation is to be strived for, the neces-
sary degree of scrutiny of the state legal process, in order to achieve near-absolute identity, may be neither possible nor desirable. Nonetheless, improvements can be made in applying the formula which will ensure a more accurate prediction. First, in examining collateral sources of state law, more care should be taken to recognize subtleties of the state judicial process which affect the outcome of litigation before the state's highest court. Second, the federal judge should remember that the weight to be afforded such collateral data is to be measured by the state standard, not the federal standard. Third, in those areas of the law where both intraterritorial and extraterritorial authority is conflicting or equivocal, the philosophy of the state court and the judges who compose it should be recognized as legitimate data to be employed in predicting how that court would decide the issue. Such an attitudinal or philosophical examination need not, and probably cannot, assume the proportions of a psychological analysis. But those characteristics of the state judicial process recognized and employed by state appellate lawyers in deciding the wisdom of appeal should not be overlooked by federal judges. Furthermore, regardless of the actual use of such additional data, recognition by federal judges of their existence and relevance should result in an approach to the problem of ascertaining state law which conforms more closely to the dictates of Erie.