Predicated Predictions: How Federal Judges Predict Changes in State Law

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Erie v. Tompkins *requires federal courts to apply state substantive law in diversity suits. In determining the content of the relevant state law, federal judges tend to rely on decisions made by the highest court of the relevant state. Yet decisions subsequent to* Erie *required federal judges to do more than mechanically apply prior state law decisions; rather, these judges predict how the highest court of the state would rule on the legal issue at that time, thus reducing the possibility of divergent outcomes due to forum. This rule results in the occasional federal court prediction that, if faced with a given legal issue, a state's highest court would deviate from its previous decisions.*

The purpose of this Note is to collect and analyze those cases in which federal judges predict deviations from established state law. This Note compiles and analyzes each case in which a federal court has predicted a change in state law and follows up with the subsequent state high court decision that either verified or rejected that prediction. This Note then categorizes and tallies the various analytical methods used by federal judges in making their decisions, with a table of cases and their utilized methods collected in Appendix I. First, this Note reviews the mid-century Supreme Court decisions that led to the modern predictive method and demonstrates how each federal Circuit Court utilizes that method. Next, this Note discusses problems with the predictive method addressed by scholarship and illustrated with examples from the collected cases. Finally, this Note analyzes the cases in which federal courts predict deviations from established state law and suggests that to improve the verification rate of their predictions of change, federal courts should predict such a divergence only when capable of making certain kinds of arguments.

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I. INTRODUCTION

Since *Erie v. Tompkins*,[1] federal judges sitting in diversity jurisdiction must apply substantive state law.[2] For federal courts, applying state law means acting as a state court would. *Erie* itself stated that the "law of the state" was the law either "declared by its Legislature in a statute or by its highest court in a decision. . . ."[3] But which decisions?

The Supreme Court first directed the federal courts to determine state law by examining decisions of any state court, not just those of the high court.[4] Under what was known as the *Field* doctrine, federal courts were compelled to determine state law from any state decision on point, no matter the level of court.[5] Eventually, as discussed subsequently, the Court settled on a method by which the federal court first looks to the state high court and only then to the appellate courts if the original search fails to decide the issue.[6] Yet the cases collected herein[7] demonstrate that even an apparently on-point state high court decision may provide insufficient evidence to reveal how a state high court would decide a case if, for some reason, a federal judge believes the state high court would deviate from precedent.

In these cases, federal judges need not apply state law decisions mechanically but rather should predict what the highest court of the state would do if faced with the issue before the federal court.[8] These predictions, as well as those that are required when state law has not yet been articulated on a subject by a state high court, are sometimes known as "*Erie* guesses."[9] While in many instances "prediction" in this predictive method is really only the application of recent high court opinion, Professor Laura E. Little has described three types of cases where prediction gets more

1. Erie R.R. Co. v. Tomkins, 304 U.S. 64 (1938).
2. *Id.* at 78, 90.
3. *Id.* at 78.
4. *See* 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4507 (3d ed. 2019).
5. *Id.* In *Fidelity Union Trust Co. v. Field*, the doctrine's namesake case, the Supreme Court reversed a Third Circuit judgment as at odds with a Chancery Court of New Jersey opinion. 311 U.S. 169, 178–80 (1940).
6. WRIGHT & MILLER, *supra* note 4 ("[I]f the forum state's highest court has not ruled on a particular issue, the decisions of the state's intermediate appellate court or courts constitute the next best indicia of what state law is . . . ."); *see also infra* Appendix I.
7. *See infra* Appendix I.
8. *See infra* Part II.
9. *See, e.g.*, Martinez v. Rodriquez, 410 F.2d 729, 730 (5th Cir. 1969).

complicated[10]: 1) when no state law exists, 2) when state law is in the process of changing, and 3) when state precedent seems outdated or otherwise no longer applicable.[11] These latter two types of cases complicate the life of a federal judge and result in the occasional federal prediction that, if faced with a given legal issue, a state high court will deviate from its previous decisions and effectively change the law. If a federal court must apply the law as the highest state court would, it must also change the law when that court would. This Note uses the term "deviating *Erie* guess" to refer to situations in which federal judges predict a state law outcome contrary to a prior state high court opinion. This Note refers to that prior state high court opinion from which a deviating *Erie* guess deviates as simply "state precedent."

Following a deviating *Erie* guess by a federal court, a state high court might take on a case presenting the same legal issue. These subsequent cases either reject or verify the federal court decision by coming out the same way or differently. This Note uses the terms "rejected" and "verified" rather than "correct" or "incorrect" to refer to the status of deviating *Erie* guesses because of informational and temporal problems with using the terms "correct" and "incorrect" created by determining the content of state law on the basis of actual cases that come before the court. Conceptually, a subsequent state high court decision might not necessarily show that a federal court's determination of state law was correct or incorrect at the time it was made. Subsequent developments in between the federal and state holdings, legal or otherwise, may lead a state high court to reject a federal prediction even if that same state court would have ruled just as the federal court did at the time of the federal case. This possibility increases as more time elapses between the two cases. Thus, rather than focusing on whether a federal decision was correct at the time it was made (a question that is in most cases impossible to answer),[12] this Note instead examines whether a subsequent state high court opinion

10. Laura E. Little, Erie*'s Unintended Consequence: Federal Courts Creating State Law*, 52 AKRON L. REV. 275, 277 (2018).

11. *Id.*

12. In some instances, state high courts directly reference the relevant federal court opinion and declare it was correct at the time it was made. This is extremely strong evidence that the state high court would have held the same way at the time the federal case was decided, but it is still possible that hindsight is altering the state high court's analysis. *See, e.g.*, Miss. State Highway Comm'n v. Gilich, 609 So. 2d 367, 375 (Miss. 1992) ("[T]he Fifth Circuit called the latter [state high court] holding into question. . . . We agree.") (citing United States v. Harrison Cnty., 399 F.2d 485, 491 (5th Cir. 1968)).

has verified the decision such that the state law is now as the federal court predicted.

This Note collects deviating *Erie* guesses and the subsequent state high court opinions verifying or rejecting these guesses in order to determine which rationales for a deviating *Erie* guess are most likely to support a verified *Erie* guess. This Note argues that not all analytical methods applied by federal judges to predict changes in state law are equal. By focusing its analysis on the most successful methods, the federal court system may be able to decrease the number of rejected deviating *Erie* guesses, bringing federal and state outcomes closer together for similar cases. Of course, to utilize a specific method of argument, certain factual circumstances must be present. For example, it is not possible for a federal court to argue that a recent state court decision is very old or that a widely cited opinion is no longer influential.

Part II of this Note reviews the mid-century Supreme Court decisions that led to the modern predictive method before examining how each federal circuit court has articulated that method when predicting changes to state law. Part III surveys the problems that the predictive model presents. Part IV presents a newly generated and comprehensive set of ninety-seven deviating *Erie* guesses and examines whether subsequent state high court decisions have verified or rejected these predictions. Part IV next catalogs the various analytical methods employed by federal courts in making these predictive decisions. It suggests that federal judges might improve the verification rate of their deviating *Erie* guesses by making such predictions only when certain analytical methods are available and by then utilizing those methods in their opinions. These methods are empirically shown to be the most associated with verified predictions.

II. "ALL AVAILABLE DATA": DEVELOPING THE PREDICTIVE METHOD

This Part lays out the doctrinal path that led to the federal courts' implementation of the current predictive method. The United States Supreme Court first retreated from the cases directing strict adherence[13] to intermediate and lower court opinions in

13. *See* Fidelity Union Tr. Co. v. Field, 311 U.S. 169, 177–78 (1940) ("An intermediate state court in declaring and applying the state law is acting as an organ of the State and its

King v. Order of United Commercial Travelers of America.[14] *King* held for the first time that an on-point state court opinion was "not controlling"[15] because, in that instance, the on-point case was unpublished and the case would have "little weight as precedent[ ] in South Carolina's own courts."[16] The Court looked to whether requiring federal courts to follow all lower state court opinions "would promote uniformity in the application of South Carolina law[,]" such that the same case would be decided in the same way in both federal and state courts.[17] This uniformity aim was a step toward the eventual articulation of what is now known as the "twin aims" of *Erie*, which the Court subsequently laid out as "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[18] These twin aims demand that state court and federal court outcomes be the same, as articulated by *King*.

As the Court was refining the federal decisional method, legal scholars discussed this new role for the federal courts and its impact on the problem of disparate outcomes in different forums. In particular, Professor Arthur Corbin and Judge Charles Clark argued[19] against a rigid application of lower court holdings and instead sought for the federal court to "use its judicial brains, not a pair of scissors and a paste pot,"[20] when determining how a state court would rule. This is how state high court would act, and so to do otherwise is potentially to allow litigation to vary based on whether it was brought in state or federal court.[21] Such a variance is the necessary condition for forum shopping.[22]

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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.").

14. 333 U.S. 153 (1948); *see also* WRIGHT & MILLER, *supra* note 4.

15. *King*, 333 U.S. at 161.

16. *Id.* at 160.

17. *Id.* at 159.

18. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

19. *See* Arthur L. Corbin, *The Laws of the Several States*, 50 YALE L.J. 762 (1941); Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267 (1946) ("C. Clark"); *see also* Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 697 (1995).

20. Corbin, *supra* note 19, at 775; *see also* C. Clark, *supra* note 19, at 291 ("Why should we abdicate our judicial functions and even prostitute our intellectual capacities to discover not state law, but the particular views a state judge may have uttered many years ago . . . ?").

21. *See* Corbin, *supra* note 19, at 774.

22. Forum shopping occurs when "a litigant[ ] attempt[s] 'to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.'" Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990) (citing *Forum Shopping*, BLACK'S LAW DICTIONARY (5th ed. 1979)).

The critical case that opened the door[23] for federal pronouncements that differed from the last state high court word on the subject was 1956's *Bernhardt v. Polygraphic Co. of America*,[24] in which the United States Supreme Court upheld a district court determination of Vermont law[25] based on a 1910 Supreme Court of Vermont precedent.[26] In so doing, the Court noted that both parties agreed that "no fracture in the rules announced in those cases has appeared in subsequent rulings or dicta, and that no legislative movement is under way in Vermont to change the result of those cases."[27] The Court further supported its decision to adhere to the old precedent by stating that, "there appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development. . . ."[28] These statements would be unnecessary were federal courts required to follow state precedent in all circumstances. More influentially, Justice Frankfurter's concurrence opened the possibility that the Court of Appeals below could have decided the case by applying law *other* than that stated in the 1910 decision if subsequent developments or the facts of the case had convinced the Court of Appeals that the Vermont Supreme Court would no longer follow its old decision.[29]

The idea that a federal court could deviate from state precedent in certain circumstances gained momentum through *Commissioner v. Estate of Bosch*'s[30] determination that state appellate decisions other than those of the state high court were not binding on the federal courts in the same way that they would be upon a state trial court.[31] In that case, the United States Supreme Court called a state's highest court the "best authority on its own law[,]" noted that "under some conditions, federal authority may not be bound

23. As discussed, the case opened the door through dicta and reasoning, not its direct holding. Bernhardt v. Polygraphic Co. of America, 350 U.S 198, 204–205 (1956).
24. 350 U.S. 198 (1956).
25. *Id.* at 204–05.
26. Mead v. Owen, 74 A. 1058 (Vt. 1910).
27. *Bernhardt*, 350 U.S. at 204.
28. *Id.* at 205.
29. *Id.* at 209–12 (Frankfurter, J., concurring). Justice Frankfurter described in particular the persuasiveness that legislative changes and trends, even in other states, might have for convincing a federal court that a state court would deviate from its precedents.
30. 387 U.S. 456 (1967).
31. *Id.* at 465.

even by an intermediate state appellate court ruling[,]" and proclaimed:

> [I]f there be no decision by [the state's highest] court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.[32]

The question is then which level of state court is the federal court effectively sitting as. *Estate of Bosch*'s determination that a state's intermediate appellate courts' opinions might not be binding shows that the federal court must be sitting as the state's highest court — as each circuit court would later articulate in its own terms.[33] If state intermediate appellate court opinions are not binding, the federal court cannot be sitting as a state trial court — that are bound by intermediate appellate decisions — nor as a state intermediate appellate court — that are bound by intermediate appellate decisions under the doctrine of *stare decisis*. Thus, in effect, the federal court sits as the state's highest court.

That the federal courts sit as if state high courts is the version of the predictive model that the federal courts of appeals have adopted over time, though in various forms and with various specific applications. Particularly in deviating *Erie* guesses, judges seem keen to emphasize that, since they are sitting as the state's highest court, they must decide a case as that court would — including by changing the law if they believe the state's highest court would do so.[34] In articulating the grounds for their ability to deviate from state precedent in these deviating *Erie* guesses, the circuit courts present a variety of similar formulations.[35] Each of the

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32. *Id.* (citing *Bernhardt*, 350 U.S. 198).

33. *See* Dorf, *supra* note 19, at 705; Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after* Erie, 145 U. PA. L. REV. 1459, 1495 (1997) [hereinafter "B. Clark"]; Doris DelTosto Brogan, *Less Mischief, Not None: Respecting Federalism, Respecting States and Respecting Judges in Diversity Jurisdiction Cases*, 51 TULSA L. REV. 39 (2015).

34. *See infra* Appendix I.

35. First Circuit: "A decision may become so overloaded with illogical exceptions that by erosion of time it may lose its persuasive or binding force even in the inferior courts of the same jurisdiction." Mason v. Am. Emery Wheel Works, 241 F.2d 906, 909 (1st Cir. 1957), *cert. denied*, 355 U.S. 815 (1957).

Second Circuit: "[W]e, in determining the state law that we are to apply, cannot permit ourselves to be confined by state court decisional approaches if we have sound grounds to believe that the highest state court would in a case like ours adopt a different approach than

the approaches in prior cases." Calvert v. Katy Taxi, Inc., 413 F.2d 841, 846 (2d Cir. 1969) (citations omitted).

Third Circuit: "We may not rest on 'blind adherence to state precedents without evaluating the decisions in light of other relevant data as to what the state law is.'" West v. Lincoln Benefit Life Co., 509 F.3d 160, 164 (3d Cir. 2007) (quoting McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 663 (3d Cir. 1980)). "Opinions from inferior . . . courts are not controlling in our analysis, but they are entitled to significant weight when there is no indication that the [state] Supreme Court would rule otherwise." *Id.* (citation omitted).

Fourth Circuit: "While the venerability of a rule coupled with long lack of opportunity to apply it certainly does not Per se draw its continued viability into question, neither does it compel any assumption that because not reexamined in the interval its continued applicability is presumptively established. The task of a court seeking to determine present applicability after so long an hiatus is more difficult. Particularly where, as here, the only applications have been isolated incidents . . . a searching court is entitled to doubt continued viability if the general course of development during the interval has been against the isolated precedents." Miller v. Premier Corp., 608 F.2d 973, 985 (4th Cir. 1979) (citing Fahs v. Martin, 224 F.2d 387, 398 (5th Cir. 1955); C. Clark, *supra* note 19, at 292–93).

Fifth Circuit: "Our goal, sitting as an *Erie* court, is to rule the way the [state] Supreme Court would rule on the issue presented." Hanson Prod. Co. v. Americas Ins., 108 F.3d 627, 629 (5th Cir. 1997) (citation omitted).

Sixth Circuit: "When and how state law applies to a particular case is a matter on which the state supreme court has the last word. We only anticipate how the state's supreme court would rule on an issue of state law when the law of the state is unsettled. To perform such a task, we look to the decisions of the state's intermediate courts unless we are convinced the state supreme court would decide the issue differently." Taylor Steel, Inc. v. Keaton, 417 F.3d 598, 608 (6th Cir. 2005) (citations and internal quotation marks omitted).

Seventh Circuit: "[F]ederal courts ordinarily take a nonoverruled decision of the highest court of the state whose law governs a controversy . . . to be conclusive on the law of the state. But this is a matter of practice or presumption, not of rule. The rule is that in a case in federal court in which state law provides the rule of decision, the federal court must predict how the state's highest court would decide the case, and decide it the same way. . . . Since state courts like federal courts do occasionally overrule their decisions, there will be occasional, though rare, instances in which the best prediction of what the state's highest court will do is that it will *not* follow its previous decision." MindGames, Inc. v. W. Pub. Co., 218 F.3d 652, 655–56 (7th Cir. 2000) (citations omitted) (emphasis in original).

Eighth Circuit: "When a state's law is ambiguous or uncertain, 'we look to "relevant state precedent, analogous decisions, considered dicta, and any other reliable data" to determine how the Supreme Court of [state] would construe [state] law.'" Lyons v. Conagra Foods Packaged Foods, LLC, 899 F.3d 567, 583 (8th Cir. 2018) (quoting Ashley Cnty. v. Pfizer, Inc., 552 F.3d 659, 665 (8th Cir. 2009)); *see* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 851 (2d Cir. 1967) ("[W]hen a federal court must determine state law, it should not slavishly follow lower or even upper court decisions but ought to consider all the data the highest court of the state would use." (citing Corbin, *supra* note 19)). *But see* J-McDaniel Const. Co., Inc. v. Mid-Cont'l Cas. Co., 761 F.3d 916, 919 (8th Cir. 2014) ("[W]e are not at liberty to disregard the binding law of the state, nor may we substitute our judgment for that of the [state] Supreme Court.").

Ninth Circuit: "Although we are generally bound by state court interpretations of state law, if we are convinced by 'persuasive data that the highest court of the state would decide otherwise,' we can make our own determination." N.H. Ins. v. Vieira, 930 F.2d 696, 701 (9th Cir. 1991) (quoting West v. Am. Tel. & Tel. Co., 311 U.S. 223, 237 (1940)).

Tenth Circuit: "'An accurate forecast of [a state's] law, as it would be expressed by its highest court, requires an examination of all relevant sources of that state's law in order to isolate those factors that would inform its decision. . . . It is important to note, however, that our prediction "cannot be the product of a mere recitation of previously decided cases.' In determining state law, a federal tribunal should be careful to avoid the 'danger' of giving

circuits that regularly deals with issues of state law has found that in certain cases, the state's highest court would reach a decision contrary to one of its previous decisions.[36]

While the Supreme Court has directed the federal courts to look to "all the available data" when making *Erie* guesses of any sort,[37] the actual data that federal judges examine to carry out this task vary as the formulations above might indicate.[38] For example, as Professor Doris Brogan has demonstrated, different circuits state the rule for deciding state law in normal diversity cases differently.[39] Each rule is essentially a variation on the "all the available data" statement with its own particular focus.[40] For instance, the Sixth and Eighth Circuits state simply that they look to "all relevant data[,]" while the Third Circuit more specifically lists the materials it will consult.[41] Professor Michael C. Dorf has noted that in some instances federal judges have even examined the decisions of specific judges on the highest state court to cobble together the appropriate opinion from similar holdings or dicta produced by those judges.[42]

While the use of all available data to predict high court opinions might better deter forum shopping and inequitable administration of the law in theory, subsequent state high court decisions have verified deviating *Erie* guesses in less than 50% of cases.[43] Data from past predictions provides an opportunity to determine which methods of prediction are most reliable by looking to verification rates of cases using those methods.[44] Conforming deviating *Erie*

'a state court decision a more binding effect than would a court of that state under similar circumstances.'" Rock Island Improvement Co. v. Helmerich & Payne, Inc., 698 F.2d 1075, 1079 (10th Cir. 1983) (quoting *McKenna*, 622 F.2d at 662) (brackets and ellipsis in original).

Eleventh Circuit: "[W]e must determine which state's substantive law the [state] Supreme Court would choose to govern interpretation of the Associated policy, as we are 'bound to decide the case the way it appears the state's highest court would.'" Shapiro v. Associated Int'l Ins., 899 F.2d 1116, 1118 (11th Cir. 1990) (quoting Towne Realty, Inc. v. Safeco Ins. of Am., 854 F.2d 1264, 1269 n.5 (11th Cir. 1988).

36. *See infra* Appendix I.

37. *West*, 311 U.S. at 237.

38. *See* Dorf, *supra* note 19, at 705; B. Clark, *supra* note 33, at 1495–502; Brogan, *supra* note 33, at 81–83; *supra* note 35.

39. Brogan, *supra* note 33, at 81–82.

40. *West*, 311 U.S. at 237.

41. Brogan, *supra* note 33, at 81–82 (citing Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs., LLC, 700 F.3d 829, 835 (6th Cir. 2012)).

42. Dorf, *supra* note 19, at 702; *see also infra* Appendix I.

43. *See infra* Parts IV.D, IV.E.

44. High verification rates might indicate one of two situations. The first is the straightforward conclusion that the actual use of the method in a federal opinion was persuasive to the state high court in making its subsequent determination. Alternatively,

guesses to the methodological approaches that have more likely led to verification in the past should help to increase the verification rate of these predictions, either by generating predictions that are based on the most persuasive analytical methods or by restricting deviating *Erie* guesses to those situations in which the most persuasive methods are available.

III. PROBLEMS WITH PREDICTION

Though the predictive method has the theoretical benefit of harmonizing outcomes in federal and state forums, it suffers from several drawbacks. This Part discusses the shortcomings of the predictive method with reference to both legal scholarship and specific cases from the dataset.

Professor Bradford Clark argues that the predictive model raises constitutional concerns.[45] Clark's argument rests on the claim that *Erie* is, at heart, a constitutional decision with its basis in judicial federalism.[46] In Clark's reading, the *Erie* decision was both a complete rejection of judicial positivism and an embrace of the idea that the federal courts are constitutionally unable to create state law through any means, since the Constitution grants power only to state entities to displace state law.[47] This reading elevates the practical issue of creating disparate forums to one of constitutional importance. If a federal court applies the law in a way other than it is applied by the state courts, the federal court has engaged in lawmaking in violation of the Constitution, according to Clark.[48] Clark identifies this as a crucial difference between

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methods of argument are available to federal judges only in specific factual circumstances. For example, a federal court cannot argue that a state court opinion is very old and thus unlikely to be followed if the opinion is not in fact very old.

A high verification rate might therefore indicate instead that the sort of factual circumstance that allows for a judge to employ a particular method is itself a circumstance in which the state high court is more likely to retreat from a previous decision. To return to the previous example, it may be the case that state high courts are more likely to deviate from their prior opinions if those opinions are very old — regardless of whether or not a federal judge makes such a prediction. Put differently, refraining from the use of a particular analytical method may simply indicate that the factual situations underlying that method were not "available data." The distinction is in whether it is the argument itself that is persuasive or the underlying factual circumstance that makes it possible to make the argument.

45. B. Clark, *supra* note 33, at 1495–96.

46. *Id.* at 1478.

47. *Id.* at 1482.

48. *Id.* at 1485–86.

the powers of the state and federal courts; while state courts may make state common law, federal courts may not.[49]

Professor Michael Dorf argues that a particular version of the predictive model in which judges look to the past decisions of particular state justices to make their predictions undermines the rule of law.[50] He identifies several instances where federal courts have conducted this analysis.[51] Dorf's main concern is that under this personally predictive method, the impersonal aspect of the law is undermined and observers may come to see the law as merely the personal preferences of judges.[52]

Most importantly, federal judges sometimes make subsequently rejected deviating *Erie* guesses.[53] Professor Doris Del-Tosto Brogan has examined one particularly problematic example in depth.[54] In *Berrier v. Simplicity Manufacturing*,[55] the Third Circuit predicted that the Pennsylvania Supreme Court would adopt the Restatement Third of Torts and therefore applied the law as articulated by that Restatement, even though the Pennsylvania Supreme Court had previously applied the Restatement Second.[56] When the Pennsylvania Supreme Court was subsequently given the opportunity to adopt the Restatement Third in both 2009 and 2011 in cases applying the Restatement Second, it did not do so; eventually explicitly declining to do so in 2014.[57] Yet from *Berrier* until the Pennsylvania Supreme Court's 2014 decision, the Third Circuit continued to apply its own interpretation of Pennsylvania law.[58]

The problem of rejected *Erie* guesses is also present where there is no state law on a topic, or where a federal court follows precedent that a state court would not. Professor Brogan presents *DeWeerth v. Baldinger*[59] as an example of a federal court deciding a case

49. *Id.* at 1501.
50. Dorf, *supra* note 19, at 681–89.
51. *See id.* at 702–03; *see also infra* notes 118–120 and Appendix I column M (indicating cases in which federal courts have looked to the identify of members on the state high court in order to predict how that court would rule).
52. Dorf, *supra* note 19, at 689.
53. *See infra* Parts IV.D, IV.E.
54. *See* Brogan, *supra* note 33 (referring to the *Berrier* line).
55. 563 F.3d 38, 60 (3d Cir. 2009).
56. *Id.*
57. *Id.*; *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); Tincher v. Omega Flex, Inc. 104 A.3d 328 (Pa. 2014).
58. Brogan, *supra* note 33, at 40–41.
59. 836 F.2d 103 (2d Cir. 1987).

without state law precedent.[60] In that case the Second Circuit predicted, in the absence of controlling precedent, that the New York Court of Appeals would apply a due diligence standard for tolling the statute of limitations to reclaim a stolen painting.[61] Subsequently, the New York Court of Appeals contradicted this holding by rejecting such a standard; thus, had the action been brought in state court, the outcome would have ultimately been different for DeWeerth.[62] Once this new holding was announced, the original plaintiff brought an action to overturn the Second Circuit's opinion on the basis that it was an incorrect interpretation of the state law as it stood at the time of the first federal opinion.[63] The Second Circuit rejected this effort in the interest of finality,[64] showing the permanence of an *Erie* guess, even one that is later rejected.

Other scholars and judges have collected some of these rejected guesses, partially demonstrating the prevalence of prediction errors.[65] Professor Gregory L. Acquavia, in his discussion of certification[66] in the Third Circuit, points to a number of these cases and notes that "[c]aselaw and scholarship are replete with instances where federal courts sitting in diversity are later overruled by state high courts."[67] Judge Dolores K. Sloviter of the Third Circuit collected a number of such cases as well in her broader discussion of diversity jurisdiction.[68] She found that "state courts have found fault with a not insignificant number of past '*Erie* guesses' made by the Third Circuit and our district courts[ ]"[69] as well as courts in every other circuit.[70]

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60. Brogan, *supra* note 33, at 46.

61. *DeWeerth*, 836 F.2d at 110.

62. Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 317 (1991); *see also* DeWeerth v. Baldinger, 38 F.3d 1266, 1270 (2d Cir. 1994).

63. *DeWeerth*, 38 F.3d at 1270.

64. *Id.* at 1272–73 ("In our view, *Erie* simply does not stand for the proposition that a plaintiff is entitled to reopen a federal court case that has been closed for several years in order to gain the benefit of a newly-announced decision of a state court. . . . [T]he fact that federal courts must follow state law when deciding a diversity case does not mean that a subsequent change in the law of the state will provide grounds for relief. . . ." (citations omitted)).

65. *See, e.g.*, 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, 379 (2010).

66. *Id.* at 381.

67. *Id.* at 380 n.26 (citations omitted).

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

69. *Id.* at 1679.

70. *Id.* at 1680; *see also infra* Appendix I.

But even when the state high court ultimately verifies a deviating *Erie* guess, each prediction creates a period of disparity between the state law as expressed by the highest state court and the state law as understood by the federal court, a disparity that forum shoppers may exploit. This disparity can be compounded when other federal courts rely on the first federal court's opinion to justify their own deviating *Erie* guess. For example, the First Circuit, in the 1957 case of *Mason v. American Emory Wheel Works*,[71] predicted that Mississippi would depart from the old common law privity requirement in manufacturer liability suits when the right case presented itself.[72] Citing this decision, the Fifth Circuit ultimately reached the same conclusion in *Grey v. Hayes-Sammons Chemical Co.*[73] Both rulings were ultimately vindicated by the Mississippi Supreme Court in the subsequent *State Stove Manufacturing Co. v. Hodges*[74] in 1966.

At least in theory, until *Hodges*, a litigant in Mississippi might have chosen a forum in which to litigate his action on the basis of the disparate rule if he believed that the state court would not follow the federal prediction.[75] This is the very forum shopping that *Erie* sought to avoid.[76] It is also contrary to the statement of Justice Holmes, cited in *Erie* itself, that "[t]he authority and only authority [on state law] is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."[77] From 1957 to 1966, the last word on the subject of the privity requirement in Mississippi was a federal court. That word differed from the state high court's past utterance.

Some examples from the dataset suffice to demonstrate the potential problem of forum shopping. In *Garris v. Schwartz*,[78] the Seventh Circuit held that the Illinois Supreme Court would prevent plaintiff from recovering the costs of litigation from defendant

71. 241 F.2d 906 (1st Cir. 1957), *cert. denied*, 355 U.S. 815 (1957).
72. *Id.* at 909–10.
73. 310 F.2d 291, 296 (5th Cir. 1962).
74. 189 So. 2d 113 (Miss. 1966).
75. *See* B. Clark, *supra* note 33, at 1514–16 (discussing this line of cases).
76. *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (twin aims of *Erie* are "discouragement of forum-shopping and avoidance of inequitable administration of the laws."); Corbin, *supra* note 19; C. Clark, *supra* note 19; Dorf, *supra* note 19.
77. 304 U.S. 64, 79 (1938) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) (Holmes, J., dissenting)) (internal quotation marks omitted).
78. 551 F.2d 156 (7th Cir. 1977).

that she incurred litigating against a third party when that litigation was necessitated by defendant's conduct.[79] The Seventh Circuit interpreted language in *Ritter v. Ritter*[80] to indicate that, to the contrary, litigation costs in this situation might be recovered, but proceeded anyway.[81] Assuming that the lower courts of Illinois would follow the previous indication made by the Illinois Supreme Court and not this federal decision,[82] a litigant seeking to recover attorney's fees in litigation he was forced to enter because of the defendant's actions would file in state court, where the Circuit court opinion would not stand in his way. This is paradigmatic forum shopping.

Similarly, in *Tristar Cosmetics, Ltd. v. Westinghouse Broadcasting Co., Inc.*,[83] an Eastern District of Pennsylvania judge predicted that Pennsylvania would do away with the "new business rule" expressed in cases such as *Pines Plaza Bowling, Inc. v. Rossview, Inc.*[84] that prevented new businesses from recovering lost profits as a component of damages.[85] The Pennsylvania Supreme Court has yet to rule on a new business case since that 1992 decision. Hence, a new business plaintiff seeking to avoid the new business rule would prefer to bring her case in federal court in the Eastern District. Plaintiff-favorable predictions, then, can encourage similar cases to be brought in now plaintiff-friendly federal court.

Forum shopping is a potential problem in both verified and rejected deviating *Erie* guesses as well, not just in undetermined ones. For rejected deviating *Erie* guesses, this is fairly easy to see. For example, Florida plaintiffs with choice of law issues in their contracts case had the potential to have those issues resolved

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79. *Id.* at 159.
80. 46 N.E.2d 41 (Ill. 1943).
81. *Garris*, 551 F.2d at 158.
82. This assumption is not, strictly speaking, correct. As evidenced by the collected cases, many federal courts base their predictions on subsequent lower state court opinions that indicate a change in direction from the state's highest court. In fact, 33% of the cases collected here relied partially on this analytical method. The fact that a lower state court might deviate from the last word of the state's high court would seem to mitigate the possibility of forum shopping to the extent that it means that state and federal courts are aligned on the issue, but a litigant might still choose the state court if it thinks the original rule from the highest court is correct and will ultimately bear out — whether at the lower court or on appeal.
83. No. 91-4111, 1992 WL 57771 (E.D. Pa. Mar. 18, 1992).
84. 394 Pa. 124 (1958).
85. *Tristar*, 1992 WL 57771, at *2.

under a rule other than the *lex loci contractus*[86] rule previously articulated by the Florida Supreme Court for the sixteen years between the Eleventh Circuit's opinion in *Shapiro v. Associated International Insurance Co.*[87] (applying the different "significant relationship test" for choice of law determinations) and the Florida Supreme Court's contradictory opinion in *State Farm Mutual Automobile Insurance Co. v. Roach*[88] (continuing to apply *lex loci contractus*). For twenty-five years the same issue existed in Alabama after the Northern District of Alabama's decision in *Ideal Structures Corp. v. Levine Huntsville Development Corp.*[89] until the Alabama Supreme Court reaffirmed its commitment to *lex loci* in *Cherry, Bekaert & Holland v. Brown*.[90]

Even cases of verified prediction present problems of this sort because of the length of time it can take a state high court to redress an issue. It took the Vermont Supreme Court twenty-five years to confirm the move away from the *lex loci* framework in *Amiot v. Ames*, [91] as predicted by the Court in *LeBlanc v. Stuart.*[92] In the interim, a plaintiff could try his luck in state court to get the old rule if it benefitted him.

The actual likelihood of disparate law and accompanying openings for forum shopping depends on the case and body of law being ruled upon by the federal court. In some instances, specific issues may arise so infrequently that there is no real impact of disparate interpretations of state law by federal and state courts. If an issue does not arise at all between the time of a deviating Erie guess and a subsequent state high court decision, the only parties at risk of an incorrect outcome, revealed by potential later rejection, are those appearing before the predicting federal court. For these reasons, if there has been a long time between a state precedent and a deviating *Erie* guess, as well as a long time between the guess and the state high court's evaluation of it, then cases dealing with the relevant issue are likely infrequent and forum shopping is not

86. The law of the place of the contract.

87. 899 F.2d 1116, 1119 (11th Cir. 1990). This example and the following one both assume that subsequent federal court decisions would follow the cited federal decisions.

88. 945 So. 2d 1160, 1167–69 (Fla. 2006).

89. 251 F. Supp 3, 7–8 (N.D. Ala. 1966).

90. 582 So. 2d 502, 506 (Ala. 1991).

91. 693 A.2d 675, 677–79 (Vt. 1997).

92. 342 F. Supp. 773, 774–76 (D. Vt. 1972) ("The trend of the recent decisions of the Supreme Court of Vermont has been strongly influenced by the Restatement of the Law on this subject. The court is persuaded that this course of the law should govern the disposition of the defendant's motion.").

such a serious problem.[93] On the opposite end of the spectrum, multiple parties might have cases resolved contrary to state law, such as in the line of cases where the Third Circuit applied a newer restatement version than the Pennsylvania Supreme Court for a number of years, even after the Pennsylvania Supreme Court had an opportunity to adopt the newer version.[94] In such a situation, the risk of forum shopping is much more severe due to a clear difference in applied law.

IV. ANALYSIS

A. COMPILING THE DATASET

The author attempted to collect all deviating *Erie* guesses. He searched Westlaw using terms such as "Supreme Court would overrule" or "Supreme Court would not follow" with every name variation of the state high courts as well as the terms "high court" or "highest court." He then considered each case cited in the relevant section of each case that resulted from the search. This method was also applied to some cases that did not predict deviations from current law, but included language which might be cited in a case that did predict such a deviation. This new set of cases was then reviewed for new potential search terms by examining the ways in which judges discussed prediction. Those new terms were then used in searches, thus continuing the original process. The author applied this method recursively until he no longer discovered new cases. The author utilized the Westlaw Key Number system and reviewed the headnotes of every case in headnotes 170B 3101-3104.[95] It should be noted that the set contains cases from each circuit,[96] mitigating the chance that a significant set of

93. For example, the Fourth Circuit examined South Carolina's choice of law rule for "usury cases with multi-state connections" and declined to apply a seventy-eight-year-old precedent. Miller v. Premier Corp., 608 F.2d 973, 985 (4th Cir. 1979). In the forty-one years since that decision, the Supreme Court of South Carolina has not needed to address the issue. It is therefore at least comparatively likely that this sort of dispute arises only very infrequently, which would mean that even if forum shopping were possible, there would not be litigants to forum shop.

94. *See supra* notes and accompanying text 55–58 (discussing these cases).

95. Those headnotes are Federal Courts: State or Federal Laws as Rules of Decision; Erie Doctrine: Unsettled or Undecided Questions: In general, conflicting and obsolete decision; change of law, anticipating or predicting state decisions, sources of authority; assumptions permissible.

96. This Note omits the differences between the state courts and the congressionally-controlled D.C. courts because the D.C. federal courts have chosen to conduct their analysis

cases were left out because they belong to an overlooked precedential line. Table 1A shows the number of total cases broken down by court level. Table 1B shows the number of total cases broken down by decade since *Erie*.

TABLE 1A: CASES PER COURT LEVEL

Court Level	Number of Cases
Total Circuit Court Cases	43
Total District Court Cases	54
Total Cases	97

of local law as if *Erie* applied. *See* Lee v. Flintkote Co., 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) (citations omitted). As only three cases in the dataset come from courts in the D.C. Circuit, and conveniently the three cases consist of one rejected, one verified, and one undetermined prediction, this choice should have only a negligible impact on the overall analysis.

TABLE 1B: CASES PER DECADE

Decade	Number of Cases
1940–1949	2
1950–1959	6
1960–1969	8
1970–1979	22
1980–1989	25
1990–1999	16
2000–2009	8
2010–2019	10
Total	97

In collecting these cases, the author made a number of exclusions to focus on examining how federal judges decide to depart from state law. The dataset includes only the first instance where a given federal circuit or district court predicts a deviation for a given state precedent. Those cases where later federal decisions have followed earlier federal decisions before a new state decision has clarified the law have been excluded. However, if a district court has deviated from prior state opinions and a circuit court follows in a subsequent case, the author included both the circuit and district cases. Cases where federal judges characterize perhaps relevant state opinions as dicta or not controlling because of a factual disparity are also excluded since, in those cases, the federal court is not deciding to depart from state precedent. Admittedly, in some cases it is difficult to determine whether a federal court is distinguishing state opinions or departing from controlling precedent; in these cases, the author used his best judgment.

Ultimately, for each case, the author then reviewed state high court decisions to determine which one of three possible outcomes had occurred: a subsequent state high court case had verified the federal case by arriving at the same conclusion, had rejected it by arriving at the opposite conclusion, or no state high court case had decided the same issue, leaving the federal prediction undetermined.

B. ILLUSTRATING ANALYTICAL DIFFICULTIES

Looking to some of the cases collected in the presented dataset can reveal the difficulties inherent in analyzing deviating *Erie* guesses. Each type of prediction — verified, rejected and undetermined — reveals the intricacies and difficulties of the prediction process. Federal courts do not make any *Erie* guesses lightly, and, given the United States Supreme Court's emphasis on state high court precedent as the surest ground for *Erie* guesses, federal courts should guess a deviation from those precedents with still greater trepidation.[97]

Delay can make it difficult to determine whether a verified *Erie* prediction is actually the decision that the state high court would have made at the time of the prediction. In some cases, verification comes quickly. For example, *Channel 20, Inc. v. World Wide Towers Services, Inc.*[98] predicted that the Texas Supreme Court would depart from its precedent in *Watkins v. Junker*.[99] *Cavnar v. Quality Control Parking, Inc.*[100] verified that prediction in the same year.[101] But verified decisions do not always predict changes that are right around the bend. Verified predictions waited on average 7.96 years for verification,[102] with some finding success in the same year[103] and others taking over twenty years.[104] This lag between prediction and verification or rejection also may reduce the extent to which the verification or rejection was made based on agreement or disagreement with the deviating federal court's arguments. Subsequent events may alter a state high court's thinking so that a prediction that would have been rejected or verified at the time it was given is treated differently by the time the state high court faces a similar case. Additionally, statutory change may affect the state high court's resolution of an issue.[105]

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97. *See* Comm'r v. Estate of Bosch, 387 U.S. 456, 465 (1967); *supra* Part II.
98. 607 F. Supp. 551, 561–64 (S.D. Tex. 1985).
99. 40 S.W. 11 (Tex. 1897).
100. 696 S.W.2d 549 (Tex. 1985).
101. *Id.* at 554.
102. This is strikingly similar to the average wait time for a prediction to be rejected, 8.04 years. The average wait time for all cases, counting undetermined cases as waiting until the current year, is 14.43 years. *See infra* Table 2B.
103. *See infra* Appendix I.
104. *Id.*
105. These temporal issues also mean that a prediction being verified or rejected means only that it has been verified or rejected by the most immediately-following state high court opinion, not for all time. A state high court might reject a federal court's prediction in one case and then alter its decision in a subsequent case. It still makes sense to analyze only

Verification also occurs for reasons other than those predicted by federal courts. In 1973, the Northern District of Ohio in *Glinsey v. Baltimore & Ohio Railroad Co.* predicted that contributory negligence would no longer bar actions arising from certain statutes that required the use of train whistles or other signals at railroad crossings.[106] On review, the Sixth Circuit rejected the prediction, holding that the removal of the contributory negligence doctrine would "discard a century of case law that has weaved contributory negligence into the tapestry of Ohio railroad accident law."[107] Ultimately the Supreme Court of Ohio verified the district court's prediction, but not for the reasons the district court provided in *Glinsey*. Instead, ten years after *Glinsey*, the Supreme Court of Ohio removed contributory negligence from the state's law entirely, replacing it with the doctrine of comparative negligence.[108] During those ten years, the Supreme Court of Ohio never heard a case involving the same statutes as in *Glinsey*.[109] Indeed, there is some reason to think that, as a matter of *contemporaneous* Ohio law, the Sixth Circuit was right to reject the district court's *Glinsey* opinion. It took the introduction of a statutory mandate for the Supreme Court of Ohio to move away from contributory negligence.[110] It is impossible to know how the Ohio Supreme Court would have decided the issue had it been presented prior to the statute's adoption.

Similarly, in *Aguilar v. Flores*,[111] the Northern District of Iowa held that the Iowa Supreme Court would not apply a certain statute based on previous opinions by specific justices — now making up the majority of the court — indicating that the statute was either unconstitutional or "unwise," and thus unlikely to be applied as widely as it might otherwise be.[112] The Eighth Circuit disagreed

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the most immediate state high court case when determining if a prediction is verified or rejected since that state opinion sheds the most light on what the state high court would have done at the time of the federal case.

106. 356 F. Supp. 984, 987 (N.D. Ohio 1973).

107. Glinsey v. Balt. & Ohio R.R. Co., 495 F.2d 565, 569 (6th Cir. 1974).

108. Wilfong v. Batdorf, 451 N.E.2d 1185, 1189 (Ohio 1983).

109. The author searched for all cases citing the statutes and uncovered none in the relevant time period in the Supreme Court of Ohio. Additionally, the cases most immediately prior to *Wilfong* in the Court of Appeals of Ohio which deal with the relevant statutes do not cite to any relevant Supreme Court of Ohio cases decided after *Glinsey*. *See* Durr v. Balt. & Ohio R.R. Co., No. 393, 1980 WL 350976 (Ohio Ct. App. Feb. 25, 1980); Sandrock v. Norfolk & W. R.R., C.A. No. OT-82-4, 1982 WL 6483 (Ohio. Ct. App. June 25, 1982).

110. *Wilfong*, 451 N.E.2d at 1188.

111. 408 F. Supp. 966 (N.D. Iowa 1976).

112. *Id.* at 968.

on appeal and applied the statute.[113] Four years after the district court opinion, the Iowa Supreme Court faced a case involving the statute and chose not to apply it, holding the statute unconstitutional.[114] This was not the exact result the federal court had predicted, as the Iowa Supreme Court went further than expected. Neither the Northern District of Iowa nor the Eighth Circuit were fully correct.

Finally, and most frustratingly for this Note's analysis, some predictions will never be tested in a state high court. For example, in *United States v. Covington Independent Tobacco Warehouse*,[115] the Eastern District of Kentucky predicted that the Kentucky high court would change its interpretation of a state statute.[116] The statute was repealed three years later, depriving the Kentucky high court of any chance to reinterpret it.[117] Or, in *Murphree v. Raybestos-Manhattan, Inc.*,[118] the Sixth Circuit predicted that the Tennessee Supreme Court would no longer use the vested rights doctrine to defeat a statute retroactively applying the discovery rule to a past harm for purposes of triggering the statute of limitations.[119] The issue was rendered inconsequential by the wholesale embrace of the discovery rule for all actions in the subsequent *Foster v. Harris*.[120] These cases highlight the limitations of this sort of analysis in determining the accuracy of *Erie* guesses.

C. GROUPING JUDICIAL METHODS OF ANALYSIS

Judges rely on various analytical methods to make their predictions, and sometimes rely on many — as many as seven, as reflected in the collected cases[121] — in the same case. These methods can be grouped together into three categories.[122] The first group includes those methods that analyze the state high court precedent

113. Aguilar v. Flores, 549 F.2d 1161, 1163 (8th Cir. 1977).
114. Bierkamp v. Rogers, 293 N.W.2d 577, 585 (Iowa 1980).
115. 152 F. Supp. 612 (E.D. Ky. 1957).
116. *Id.* at 615–16 (considering Abernathy & Long v. Wheeler, Mills & Co., 17 S.W. 858 (Ky. 1891).
117. KY. STAT. tit. XXXII, § 382.630 (repealed 1960).
118. 696 F.2d 459 (6th Cir. 1982).
119. *Id.* at 462–63.
120. 633 S.W.2d 304, 305 (Tenn. 1982).
121. *See infra* Table 7.
122. The case citations in the following notes provide examples of cases which employ the discussed methods. Appendix I, *infra*, also shows which methods were employed by the federal court in each of the compiled cases.

and find it problematic. Included in this set of methods are policy arguments showing that the old rule leads to worse outcomes than a different, predicted rule;[123] arguments that the state's highest court's most recent word was itself a deviation from a previous, better rule;[124] arguments that the state precedent was a close vote with a strong dissent, indicating a high chance of change if the same issue, or even a slight variation on the same problem, is revisited;[125] arguments that the old rule is simply outdated;[126] and even arguments that the prior case was simply wrongly decided at the time and upon reflection, the high court is likely to overrule.[127]

The second group of methods covers developments within the state's common law on other issues that seem to indicate that the old case is no longer in line with the high court's thinking. These methods comprise examining subsequent holdings from the state high court at odds with the spirit of the rule;[128] examining dicta from the state high court that a previous doctrine or case is suspect or should no longer be followed;[129] examining lower court opinions that have not been addressed by the state high court but that are opposed to its most recent holding;[130] examining the fact that the previous case is no longer cited;[131] examining a change in the case

123. *See, e.g.*, Miller v. Premier Corp., 608 F.2d 973 (4th Cir. 1979); Sheeler v. Trans-Chem, Inc., 520 F. Supp. 117 (D. Wyo. 1981); Saloomey v. Jeppesen & Co., 707 F.2d 671 (2d Cir. 1983).

124. *See, e.g.*, Warner v. Gregory, 415 F.2d 1345 (7th Cir. 1969); Ramirez v. IBP, Inc., 913 F. Supp. 1421 (D. Kan. 1995).

125. Rock Island Improvement Co. v. Helmerich & Payne, Inc., 698 F.2d 1075 (10th Cir. 1983).

126. *See, e.g.*, Indianapolis Airport Auth. v. Am. Airlines, Inc., 733 F.2d 1262 (7th Cir. 1984); *In re* Ryan, 70 B.R. 509 (D. Mass. 1987); Shapiro v. Associated Int'l Ins., 899 F.2d 1116 (11th Cir. 1990).

127. This last method is, understandably, used less often than many of the others. *See infra* Appendix I; *see also* United States v. Harrison Cnty., 399 F.2d 485 (5th Cir. 1968); M.A.S., Inc., v. Van Curler Broad. Corp., 357 F. Supp. 686 (D.D.C. 1973). This makes a good deal of sense since a federal court predicting a change in state law based only on what it thinks the *right* version of state law looks contra to *Erie*. *See supra* Part II.

128. *See, e.g.*, Sisemore v. U.S. News & World Report, Inc., 662 F. Supp. 1529 (D. Ala. 1987); Agristor Fin. Corp. v. Van Sickle, 967 F.2d 233 (6th Cir. 1992); Scotts Afr. Union Methodist Protestant Church v. Conf. of Afr. Union First Colored Methodist Protestant Church, 98 F.3d 78 (3d Cir. 1996).

129. *See, e.g.*, Rettinger v. Am. Can Co., 574 F. Supp. 306 (M.D. Pa. 1983); Jeffries v. Potomac Dev. Corp., 822 F.2d 87 (D.C. Cir. 1987); de la Mata v. Am. Life Ins., 771 F. Supp. 1375 (D. Del. 1991).

130. *See, e.g.*, Ryan v. Glenn, 489 F.2d 110 (5th Cir. 1974); Garris v. Schwartz, 551 F.2d 156 (7th Cir. 1977); Melville v. Am. Home Assurance Co., 584 F.2d 1306 (3d Cir. 1978).

131. *See, e.g.*, Ideal Structures Corp. v. Levine Huntsville Dev. Corp., 251 F. Supp. 3 (N.D. Ala. 1966); Royal Bank of Canada v. Trentham Corp., 491 F. Supp. 404 (S.D. Tex. 1980); Perry v. O'Donnell, 749 F.2d 1346 (9th Cir. 1984).

law upon which the previous state high court opinion was built;[132] or examining the development of relevant but not directly on-point precedent where the lack of precedent was the reason for a previous decision.[133]

The third group consists of external sources that might also indicate that a state's common law is no longer sound. Analytical methods relying on these external sources examine uniform or near uniform changes in the law elsewhere;[134] a change in the relevant restatement;[135] a change in the statutory scheme that shaped the common law;[136] or a change condemned in legal scholarship.[137] Finally, there are a few cases that simply analyze the previous decisions of specific justices on the state's high court in order to cobble together a majority opinion on the matter before the federal court.[138]

D. GENERAL VERIFICATION RATES

The first question is simple: how successful are federal judges when making deviating *Erie* guesses? The answer depends in part on how one treats cases where predictions have not yet been verified or rejected. From one perspective, federal judges have been quite successful, predicting a change in state law from the state's highest court forty-six times that was later verified, compared with

132. *See, e.g.*, United States v. Covington Indep. Tobacco Warehouse Co., 152 F. Supp. 612 (E.D. Ky. 1957); Warner v. Gregory, 415 F.2d 1345 (7th Cir. 1969); Galella v. Onassis, 353 F. Supp. 196 (S.D.N.Y. 1972).

133. *See* Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978).

134. *See, e.g.*, Mason v. Am. Emery Wheel Works, 241 F.2d 906 (1st Cir. 1957); Erdman Co. v. Phoenix Land & Acquisition, LLC, Nos. 2:10–CV–2045, 2:11–CV–2067, 2013 WL 3776805 (W.D. Ark. July 18, 2013); Aana v. Pioneer Hi-Bred Int'l, Inc., Nos. 12–00231 LEK–BMK, 12–00665 LEK–BMK, 2015 WL 181764 (D. Haw. Jan. 14, 2015).

135. *See, e.g.*, LeBlanc v. Stuart, 342 F. Supp. 773 (D. Vt. 1972); *In re* Air Crash Disaster at Boston, 399 F. Supp. 1106 (D. Mass. 1975); *Melville*, 584 F.2d 1306.

136. *See, e.g.*, N.H. Ins. v. Vieira, 930 F.2d 696 (9th Cir. 1991); Elliot Megdal & Assocs. v. Haw. Planing Mill, Ltd., 814 F. Supp. 898 (D. Haw. 1993); Weitz Co. LLC v. MacKenzie House, LLC, 665 F.3d 970 (8th Cir. 2012).

137. *See, e.g.*, Royal Bank of Canada v. Trentham Corp., 491 F. Supp. 404 (S.D. Tex. 1980); Snyder v. Hampton Indus., Inc., 521 F. Supp. 130 (D. Md. 1981); Perry v. O'Donnell, 749 F.2d 1346 (9th Cir. 1984).

138. This group of methods lines up pretty well, though not exactly, with the list of indicators given in *Bernhardt* of things which might give the court pause as to the correct statement of state law in a diversity case: "confusion in the [state] decisions, . . . developing line of authorities that casts a shadow over the established ones, . . . dicta, doubts or ambiguities in the opinions of the [state] judges on the question, . . . legislative development that promises to undermine the judicial rule." Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 205 (1956).

twenty-one rejected predictions and thirty undetermined.[139] If one assumes that the undetermined predictions will come out eventually in roughly the same ratio as the determined predictions, that leaves federal judges with about a 69% verification rate.

TABLE 2A: DEVIATING *ERIE* GUESS VERIFICATIONS AND REJECTIONS

Description	Number of Cases
Total Verified	46
Total Rejected	21
Total Undetermined	30
Total Cases	97

TABLE 2B: AVERAGE TIME BEFORE NEXT STATE HIGH COURT DETERMINATION

Description	Years
Average Time Before Verification	7.96
Average Time Before Rejection	8.05
Average Wait Time (Treating Undetermined Cases as Pending)	14.43

Because the salient issue is whether the state and federal statements on state law have been harmonized such that forum shopping is not possible, it makes more sense to group undetermined predictions with rejected predictions rather than verified ones. While both rejected and verified cases have periods of time where federal and state pronouncements of state law differ, there is reason to believe that in verified predictions, the potential harm of forum shopping is mitigated during this period. This is because, at least in theory, parties that choose state court for the original state law interpretation should eventually benefit from the new changed interpretation after appeal to the state's highest court.

The very fact that the state high court verified a federal prediction in a subsequent case lends credibility to the assumption that such an appeal is possible and would lead to similar outcomes in

139. *See infra* Appendix I.

state and federal court. After all, the state high court eventually *did* view the issue as one important enough to hear on appeal and then *did* adopt the content of the federal prediction. Grouping rejected and undetermined predictions also allows the analysis to focus on what methods of prediction are most likely to lead to verification by the state high court. Certainly, the lack of any response from a state court stings less than a direct contradiction, but the goal of an *Erie* guess is to get the law right and ensure that outcomes in state and federal court are the same,[140] not simply to avoid contradiction by the state high court. Undetermined predictions also raise the specter of forum shopping because, by definition, these cases involve a disparity between what the last word on a matter is in federal and state court. If undetermined cases are instead treated as rejected predictions, the verification rate drops to 47%.[141]

The main problem exposed by this collection of cases is the number of clearly rejected predictions. In each of the twenty-one instances of rejected deviating *Erie* guesses, it is possible[142] that a case was adjudicated under a different law than what was truly the law of the state. For some like Professor Bradford Clark, this is an issue of constitutional importance.[143]

The solution is not to stop making deviating *Erie* guesses but rather to confine these guesses to certain situations and support them only with certain analytical methods. An approach where federal courts refuse to predict changes in law, even when faced with evidence that the state's highest court would make those changes, risks applying the incorrect law to the case before the court, as evidenced by the verified predictions. The next subpart discusses how judges can improve their verification rates for deviating *Erie* guesses by sticking to those methods with the highest verification rates.

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140. It is possible that federal courts consider how frequently an issue arises when determining whether or not to make a prediction and choose not to make deviating *Erie* guesses when issues arise infrequently due to uncertainty about when a state court can next verify or reject that guess. Unfortunately, because the dataset only collects *Erie* guesses that deviate from past State opinions, determinations that a federal prediction should *not* deviate are not captured here and so nothing definitive may be said about them.

141. *See infra* Appendix I.

142. Possible and not certain only because temporal issues make it impossible to know how a state court would have ruled at the point in time of the federal case, even if a subsequent state decision disagrees with the federal one.

143. B. Clark, *supra* note 33, at 1494.

E. IMPROVING PREDICTIONS

This subpart examines the frequency and verification rate of different analytical methods that judges employ in making deviating *Erie* guesses to argue that judges should only use the most successful of these methods in order to improve their verification rates.[144] Of these various methods, the most common justification for a deviating *Erie* guess is that the law has uniformly — or nearly uniformly — changed elsewhere. 40% of the cases in total utilized this method, representing thirty-nine cases in all.[145] Of these thirty-nine, 49% were verified.[146] While the most common justification is a universal change elsewhere, the method with the highest verification rate is a determination that the original state precedent is very old.[147] 57% of predictions made on this basis were verified.[148] Close behind in successful verification are predictions based on a change in the underlying statutory scheme, with 56% verified.[149] But these other two methods were also used less frequently, in merely 24% and 16% of the total predictions and in 28% and 20% of the total verified predictions respectively.[150]

144. Given the paucity of relevant cases, even in this dataset, it is not possible to present a clean list of methods that should be employed. A new case with a verified prediction has the potential to fairly substantially alter the verification rates presented here. Instead, all that can be said is that, given the current data, some methods are better than others. This Part does not present a simple decisional rule for use in cases of potential deviating *Erie* guesses.

145. *See infra* Appendix I.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

TABLE 3: MOST COMMON AND MOST SUCCESSFUL METHODS

Method	Verification Rate	Use Rate	Share of Verified Predictions
Uniform Change	49%	40%	41%
Old Precedent	57%	24%	28%
Statute Change	56%	16%	20%

When a uniform change is paired with certain other predictive methods, its verification rate increases significantly. When paired with a subsequent high court opinion hinting at a change in direction, the fact that a previous opinion or doctrine is very old, or dicta of the high court, the verification rate of the method increases to 67%,[151] 67%,[152] and 55%,[153] respectively. However, if a uniform change in the law is paired with a policy argument from the federal court, the verification rate decreases from 49%[154] to 45%.[155]

TABLE 4: VERIFICATION RATE OF THE UNIFORM CHANGE METHOD AND COMMON PAIRINGS

Method(s)	Verification Rate
Uniform Change	49%
Uniform Change + Subsequent High Court	67%
Uniform Change + Old Precedent	67%
Uniform Change + Dicta of High Court	55%
Uniform Change + Policy Argument	45%

Next most commonly used to justify a prediction of change are subsequent state high court holdings at odds with the spirit of a

151. *See infra* Table 4.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* This may reflect that, in this setting, policy arguments are designed to bring a state into agreement with the other states that have moved forward with a predicted change, which may contradict the idiosyncratic reasons that a state may have for preserving different common law principles than its sister states.

previous state high court holding without directly overruling that older case.[156] These cases were cited in 39% of all predictions, with a 55% verification rate.[157] This verification rate actually decreased to 53.3% and 50% when paired with lower court opinions and high court dicta, respectively.[158] Unsurprisingly, and reinforcing the view of the predictive method[159] in which only a state high court opinion is binding on the federal court system, a state high court holding is surer footing for the prediction of a change than a state lower court opinion or state high court dicta, both of which successful less than half the time.[160] These high court opinions are also referred to in more verified opinions than any other method.[161]

156. These cases are referred to throughout as "subsequent high court" cases and refer specifically to cases in between an original state high court opinion and the deviating *Erie* guess that departs from it. For example, in Calvert v. Katy Taxi, Inc., 413 F.2d 841, 847 (2d Cir. 1969) the Second Circuit predicted a deviation away from the New York Court of Appeals' previous endorsement of the two equal inferences rule which prevented plaintiffs from establishing a prima facie case of negligence in a car accident just by proving that the accident occurred. That deviation was premised in part on an assessment that opinions following the most recent application of the two equal inferences rule by the New York Court of Appeals evinced a move towards "more legal flexibility on what is negligence" than the previous strict rules had provided though those later opinions had not addressed the two equal inferences rule in particular. *Id.*

157. *See infra* Appendix I.

158. *See infra* Table 5.

159. *See supra* Part II.

160. *See infra* Appendix I. The relevant verification rates are 44% and 48% respectively. *Id.*

161. *Id.*

TABLE 5: COMMON LAW DEVELOPMENT METHODS

Method	Verification Rate	Use Rate	Share of Verified Predictions
Subsequent High Court	55%	39%	46%
Lower Court Opinion	44%	33%	30%
High Court Dicta	48%	32%	33%
Subsequent High Court + Lower Court	53%	15%	8%
Subsequent High Court + High Court Dicta	50%	12%	13%

The overall verification rate is likely the best metric to determine which methods are safest for a federal judge to rely upon. This metric can be considered in two ways: it either reflects the persuasiveness of federal judges' arguments to state high courts or the likelihood that state high courts will come to the same judgment as the federal court when presented with the same facts.[162] This metric is less useful for infrequently used methods. For example, both an examination of specific justices on the state high court and a determination that a case was a departure from a previous rule have a 50% verification rate among the cases gathered, but each was only used twice.[163] This might explain why the verification rates were higher than more promising-sounding strategies, such as using state high court dicta.

162. This is not to say that all methods are available in every case, which is also something that a federal court may consider. For example, a federal court that thinks the correct state law prediction departs from a precedent that is only a year old would be unable to take advantage of the analytical method that discusses the age of the prior state opinion as a reason for departure; even though that method is the single most successful one. Saying that a federal court should utilize a specific successful method therefore means both that it should be more comfortable making deviating *Erie* guesses and then should actually utilize that method in its opinion. This Part refers to "methods" as shorthand both for the methods themselves and the underlying factual situations making them possible.

163. *See infra* Appendix I.

Only three of these individual methods have a greater verification rate than flipping a coin: relying on subsequent high court holdings, a change in the underlying statutory scheme, or the fact that an underlying opinion or doctrine is very old.[164] Certain pairings offered more success. The table below shows the verification rate for each pair of methods that occurs in more than 10% of cases.[165] This provides a better sense of which analytical methods, when combined, are most likely to lead to accurate predictions.[166]

TABLE 6: VERIFICATION RATES FOR MOST COMMON METHODOLOGICAL PAIRINGS

Pairing	Verification Rate
Uniform Change + Subsequent High Court	67%
Uniform Change + Old Doctrine/Opinion	67%
Uniform Change + Dicta of High Court	55%
Subsequent High Court + Lower Court	53%
Subsequent High Court + Dicta of High Court	50%
Dicta of High Court + Lower Court	50%
Uniform Change + Policy	45%

Increasing the number of arguments or analyses involved in a prediction does not increase its verification rate. Ranging from one to seven, the number of analytical methods used actually had a very slight negative correlation of -.052 with the prediction's verification rate.[167] As Table 7 shows, the relationship is quite noisy. The data therefore does not say much about the "correct" number of arguments or analyses a judge should make if she wants to ensure her prediction's verification.

164. *Id.*
165. *Id.*
166. For example, a situation where a prior case is very old and has been departed from in all other states or a situation where a rule has been departed from in all other states and the lower state court opinions have begun following suit.
167. *See infra* Table 7.

TABLE 7: VERIFICATION RATE BY NUMBER OF METHODS

Number of Methods Used	Number of Cases	Verification Rate
1	17	53%
2	30	37%
3	22	59%
4	13	54%
5	6	17%
6	7	57%
7	2	50%

These results demonstrate that only a fairly limited set of methods are more likely to lead to a verified prediction than others. If federal judges focus on these methods, then the federal court system as a whole should be able to increase its verified prediction rate. If these methods are unavailable due to the state of the law and facts of the case, then prediction is unlikely to be verified; and the federal court is likely safest following the state precedent.

The most important individual methods, as indicated above, are analyses of subsequent state high court holdings as at odds with the spirit of the prior stated rule, recognition that the original state high court opinion was very old, and recognition of a change in the state statutory scheme between the original state decision and the current federal one. Federal courts should focus their predictions of change on situations where one of these three criteria are present, since each has a verification rate greater than the overall verification rate of 47%. Similarly, a uniform change in state law together with either subsequent state high court holdings at odds with the previous rule or a very old original rule increases verification rates even further.[168] The following table includes all singular methods used in 20% or more of cases and combined methods

168. *Id.* Other pairings can result in lower verification rates than unpaired single methods. For example, pairing a uniform change with a policy assessment results in a lower verification rate than uniform change alone as seen in Table 8. Or, the subsequent state high court holding method has a 55% verification rate on its own which decreases to 50% when paired with an analysis of dicta of the highest state court.

with a verification rate greater than or equal to 50%[169] (where each individual method in the pair occurs in at least 20% of cases) for ease of consultation.[170]

169. This is an arbitrary cut off used to make the table manageable. As previously stated, the data can only say that one method or set of methods is better than another. *See supra* note 144. 50% was chosen to acknowledge that these are inherently difficult cases and there are presumably many times more cases where federal courts predict no change in state law and are correct to do so.

170. Some of these pairings occur together only infrequently so their success rates are more likely to change as new cases are decided than for individual methods or pairings which occur more often.

TABLE 8: MOST SUCCESSFUL COMMON METHODS

Method	Verification Rate
Subsequent High Court + Old Doctrine/Opinion	70%
Uniform Change + Subsequent High Court	67%
Uniform Change + Old Doctrine/Opinion	67%
Dicta of High Court + Policy	67%
Subsequent High Court + Policy	60%
Dicta of High Court + Old Doctrine/Opinion	60%
Old Doctrine/Opinion	57%
Old Doctrine/Opinion + Underlying Case Law Changed	57%
Subsequent High Court	55%
Uniform Change + Dicta of High Court	55%
Subsequent High Court + Lower Court	53%
Subsequent High Court + Dicta of High Court	50%
Dicta of High Court + Lower Court	50%
Uniform Change + Underlying Case Law Changed	50%
Subsequent High Court + Underlying Case Law Changed	50%
Policy + Underlying Case Law Changed	50%
Uniform Change	49%
High Court Dicta	48%
Policy	45%
Lower State Court	44%
Underlying Case Law Changed	42%

V. CONCLUSION

Prediction is not perfect. But this Note suggests ways to make it more accurate. Not all indicators that a state opinion is ready to be overruled are of equal weight, nor does any one indicator predict sure success. Presumably, the set of cases examined here are those

where federal judges thought change in state law most likely. It is therefore all the more concerning that these predictions are verified less than half the time. By focusing on the most successful methods of reasoning, and moving away from state precedent only when facts and law admit those methods of reasoning, federal courts can improve their verification rate for deviating *Erie* guesses.[171]

171. And, hopefully, the dataset compiled here can be useful for future scholarship seeking to uncover other interesting features of deviating *Erie* guesses.