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Prediction and the Rule of Law

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PREDICTION AND THE RULE OF LAW

Michael C. Dorf*

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INTRODUCTION

The United States Supreme Court Rules provide that the Court will only grant a petition for rehearing on a previously denied petition for writ of certiorari if the petitioner can show that a substantial change in circumstances justifying review has occurred since the denial of certiorari.\(^1\) Shortly after Clarence Thomas was confirmed as an Associate Justice, the Court received several pro se petitions for rehearing containing an interesting argument. According to these petitions, Justice Thomas' confirmation was a substantial change within the meaning of the Rule.\(^2\)

Not surprisingly, the argument did not find favor with the Justices. To grant a rehearing petition solely on the basis of a new Justice's appointment would appear curious, even unseemly. It would announce that the individual predilections and preferences of the human beings who serve as Justices make a difference in the outcome of litigation, thereby undermining the rule of law.\(^3\) Hence, new Justices typically do not even vote on petitions for rehearing based on a petition originally filed before the new Justice's joining the Court.\(^4\)

Yet in the post-Realist age, no one doubts that judge-made law often has a personal quality. The argument that a new Justice's appointment constitutes a changed circumstance is neither illogical nor empirically false. It would not have taken an especially astute Court-watcher to predict that Clarence Thomas would cast his votes as a Justice in a pattern different from that followed by Thurgood Marshall; nor was there much doubt that the differences would occasionally affect the disposition of a petition for

\(^{1}\) SUP. CT. R. 44.2 (grounds set forth in rehearing petition "must be limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented"). See also ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 624-25 (7th ed. 1993) (discussing grounds that satisfy the Rule).

\(^{2}\) Although the Supreme Court saves petitions for rehearing, they are not readily searchable. I served as a law clerk at the Court during October Term, 1991, and recall seeing at least three petitions making the argument described in the text. The Court receives petitions for rehearing making this kind of argument each time a new Justice is appointed. Telephone Interview with Francis Lorson, Chief Deputy Clerk, United States Supreme Court (May 26, 1994).

\(^{3}\) See, e.g., Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.").

certiorari or rehearing. What then, was the error of the pro se petitioners? Were their petitions denied simply because they had the audacity to speak the truth about the emperor's new clothes?

I suspect that all but the most dedicated realists would acknowledge that the pro se petitioners made a categorical error. Analysis of judicial personality may be a useful tool by which lawyers and others attempt to predict how a case will be resolved, but it hardly constitutes a legitimate tool for a judge to use in resolving the case.\(^5\) In other words, however accurate legal realism's descriptive power, it fails as a prescriptive theory.

Nevertheless, the view of law underlying the pro se petitioners' argument has an impressive pedigree. This view, which I shall call the "prediction model," reflects an attitude that may be summed up by Holmes's aphorism that law consists of "[t]he prophecies of what the courts will do in fact, and nothing more pretentious."\(^6\)

While Holmes and his followers intended the prediction model to serve primarily as a tool for lawyers, one scholar has recently proposed a prediction-based jurisprudence to be used by judges.\(^7\) Indeed, judges already purport to use the prediction model in some areas of American law. Most commonly, it exerts its influence in those cases in which a federal court must resolve a novel question of state law, one arising in a diversity case, or falling within the federal court's supplemental jurisdiction in a

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5. See Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 95 (1991) ("[A]lthough practicing lawyers may be wise to look not to what courts say, but what they do, as a means of predicting the outcome of a case, this is hardly an acceptable method for a judge to use in deciding a case.").

6. Oliver W. Holmes, The Path of the Law, in Collected Legal Papers 167, 173 (1920); see also K.N. Llewellyn, The Bramble Bush: Some Lectures on Law and Its Study 3 (1930) ("What these officials do about disputes is, to my mind, the law itself."); Joseph W. Bingham, What Is the Law?, 11 Mich. L. Rev. 1, 15 (1912) ("As lawyers we endeavor to forecast potential legal consequences of particular causal facts . . ."); Jerome Frank, Are Judges Human? Part Two: As Through a Class Darkly, 80 U. Pa. L. Rev. 233, 236 (1931) ("For the rights and duties of his clients under any legal document a lawyer drafts or on which he gives advice are nothing more and nothing less than what may in the future be decided by some court in a lawsuit involving those rights."). Perry Dane identifies Bingham and, to a lesser extent, John Chipman Gray, as the most prominent proponents of the prediction model of law, which Dane terms the "Decision-Based" view. See Perry Dane, Vested Rights, "Vestedness," and Choice of Law, 96 Yale L.J. 1191, 1236 (1987). For convenience, I shall refer to Holmes as the originator of the model; cf. id. at 1236 n.167 ("Whether Holmes really belongs in the Decision-Based camp, aside from his role as semi-mythical precursor, is an important question about which I express no views.").

7. See Evan Caminker, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking, 73 Tex. L. Rev. 1 (1994); see also Earl M. Maltz, The Concept of the Doctrine of the Court in Constitutional Law, 16 Ga. L. Rev. 357, 399 (1982) (discussing lower courts' obligation to "replicate the result that would be reached if the Supreme Court were faced with the same set of facts and allegations").
federal question case. Under these circumstances, the federal court must attempt to predict how the state's highest court would resolve the question if faced with it. There are other explicitly prediction-based legal tests as well.

This Article examines the arguments for and against judges, as opposed to lawyers, using the prediction approach in cases in which they must resolve an issue with respect to which they lack final authority. In Part I, I set forth the legal realist argument for a prediction-based model of law. I also critique the model. Drawing on an argument developed by H.L.A. Hart, I note that, despite its association with legal realism, the model of law as prediction is in some ways quite unrealistic. Nevertheless, I conclude that Hart's argument does not rule out the possibility that, when used by lower court judges, the advantages of a prediction-based jurisprudence might outweigh its disadvantages.

In Part II, I clarify how a prediction-based jurisprudence differs from conventional legal reasoning. Under the conventional approach, lower court judges decide cases by consulting the same impersonal sources of law as high court judges consult. By contrast, a lower court judge following the prediction model uses not only conventional legal materials, but also information about the views of the individual judges who sit on the high court as a basis for predicting how those particular judges will rule.

In Part III, I consider the possibility that notwithstanding its theoretical difficulties, a lower court judge might find that as a practical matter, a predictive approach is more fair and efficient than a non-predictive approach, and is more consistent with the lower court judge's subordinate role within a hierarchical legal system. I find that there may be some marginal benefits from adopting such a predictive approach.

8. See 28 U.S.C. § 1367 (Supp. V 1993) (authorizing supplemental jurisdiction); 28 U.S.C. § 1332 (1988) (authorizing jurisdiction in diversity cases); 28 U.S.C. § 1652 (1988) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."). There are other circumstances in which a federal court must resolve a question of state law. For instance, in a federal question case alleging a violation of procedural due process, the federal court must preliminarily decide whether state law recognizes a property interest. Bishop v. Wood, 426 U.S. 341, 343 (1976). For simplicity, throughout this Article I shall refer, somewhat inaccurately, to all cases in which a federal court must resolve a question of state law as diversity cases.


10. See, e.g., infra Part V (discussing the standard an individual Circuit Justice should use in determining whether to grant a stay of a lower court decision).

In Part IV, I argue that as a general matter, the prediction approach undermines the rule of law. To the extent that the predictive enterprise differs from conventional legal reasoning, it promotes a conception of law as the sum of the views of the particular judges who happen to sit on the high court at any time, rather than a conception of law as an impersonal, ideal whole. The prediction model substitutes the rule of individual high court judges for the rule of law. Thus, I conclude that the marginal benefits identified in Part III cannot justify the prediction approach to lower court adjudication.

In Parts V and VI, I suggest that notwithstanding the fact that a judge generally ought not attempt to predict how other judges would rule, there may be special circumstances in which prediction is consistent with the rule of law. In Part V, I examine cases in the United States Supreme Court in which an individual Justice grants a stay of some lower court ruling, and I tentatively conclude that some form of the prediction model can be justified in these cases because of the Circuit Justice's unusual obligation to act as a surrogate for the entire Court.

In Part VI, I turn to the diversity cases. I argue that my general observations about lower court adjudication within a single legal system fully apply to cases in which a federal court must resolve an unsettled question of state law. I contend that application of the prediction model to diversity cases rests on a flawed interpretation of Erie Railroad v. Tompkins.\textsuperscript{12} Erie rejected the prior practice of Swift v. Tyson,\textsuperscript{13} under which, in the absence of an applicable state statute, federal courts applied general federal common law, rather than state common law as announced by a particular state's highest court. But Erie does not necessarily entail that the law is just what the relevant legal actors will say it is. That radical realist view is, I argue, neither required by, nor the best interpretation of, Erie. The prediction model is inappropriate because Erie is fundamentally not a case about legal realism but rather a case about federalism.

Although I critique the prediction model of lower court adjudication in this Article, I do not endorse any one approach to lower court jurisprudence. My position is compatible with a broad range of approaches which share a common feature: a belief in the independent integrity of law. In short, no judge ought to be anyone's "ventriloquist's dummy,"\textsuperscript{14} and any doctrine that does not recognize this merits serious reexamination.

\textsuperscript{12} 304 U.S. 64 (1938).
\textsuperscript{13} 41 U.S. (16 Pet.) 1 (1842).
\textsuperscript{14} Richardson v. Commissioner, 126 F.2d 562, 567 (2d Cir. 1942) (Frank, J.).
I. THE CASE FOR AND AGAINST PREDICTION AS A GENERAL MODEL OF LAW

A. The Legal Realist Case for Prediction

Holmes's statement that the law consists of nothing more than predictions of what the courts will do in fact\textsuperscript{15} encapsulates the strand of legal realism that provides the philosophical underpinnings for a predictive jurisprudence. An example will illustrate the realist roots of this view.

Suppose a factory owner asks his lawyer whether a particular course of conduct in which he wishes to engage would violate some environmental protection statute. Speaking conventionally, we would think that in answering her client's question, the lawyer would look to such legal materials as the text of the statute, its legislative history, its implementing regulations, and judicial decisions interpreting it, all in order to determine whether the proposed conduct \textit{violates the statute}. Holmes would argue, however, that this way of speaking is merely a convention, a shorthand. The client really seeks an answer to the following question: If I engage in the proposed conduct, will I be subject to a legal penalty?\textsuperscript{16}

To answer the client's real question, it may be helpful to look at a variety of legal materials, but, according to Holmes, one should not lose sight of the reason for consulting these materials. The lawyer does not seek an answer to the metaphysical question whether the conduct violates the statute in some absolute sense. The lawyer consults her law books in an attempt to predict what the courts would do if faced with her client's proposed course of conduct.

This approach is rooted in legal realism, as a comparison with the realist attack on the classical conception of property rights illustrates. As I have elsewhere described the realist position on property, its central claim is "that what makes an object yours rather than your neighbor's is not any metaphysical relationship between you and the object, but the government's willingness, under certain conditions, to use force to prevent your neighbor from appropriating that object."\textsuperscript{17} Similarly, what makes a

\textsuperscript{15} HOLMES, \textit{supra} note 6, at 173.

\textsuperscript{16} To the extent that the client is asking, "Can I get away with this conduct?," one sees the connection between Holmes's view of law as prediction and his observation that laws should be designed to deter a "bad man" who feels no moral obligation to conform his conduct to law. \textit{See generally id.} at 168-73 (setting forth both the "prophesy" view and the "bad man" view).

\textsuperscript{17} TRIBE & DORF, \textit{supra} note 5, at 70 & n.18 (citing Morris R. Cohen, \textit{Property and Sovereignty}, 13 \textit{CORNELL L.Q.} 8 (1927); Felix S. Cohen, \textit{Transcendental Nonsense and the Functional Approach}, 35 \textit{COLUM. L. REV.} 809 (1935)).
The course of conduct unlawful is not some metaphysical property of unlawfulness, but the fact that a court will impose sanctions for engaging in the conduct.

The above comparison shows that the predictive view attributes the power of quasi-sovereign to a court willing to enforce legal obligations. What makes a course of conduct unlawful is the declaration by the court in the particular case that it is so. As H.L.A. Hart noted, however, the prediction model at most encapsulates the lawyer’s perspective, and thus is not a complete account of law.

B. H.L.A. Hart’s Critique of the Prediction Model

H.L.A. Hart attacks the prediction theory of law through an analogy to a competitive game. He imagines that a group of people play a game without a referee, enforcing the rules and keeping score for themselves. He then asks how best to describe the rules of the game once an official scorer is added to the game. Hart notes that even if the scorer’s decisions are unappealable, it would be inaccurate to reduce the rules determining the score of the game to the proposition, “the score is what the scorer says it is.” The scorer applies the same scoring rules as the players formerly did. If a player believes her opponent has committed an infraction of some rule of the game, she is not predicting that the scorer will penalize her opponent. She, like the official scorer, is applying the rules. In short, Hart contends that the prediction model rests on the false premise that because the final authority in any legal system could, in theory, ignore all of the rules and conventions for deciding cases, the law is merely what the final authority says it is, even when that authority applies the relevant rules and conventions as required by her office.

Another way to understand Hart’s point is to ask how a court of last resort might decide a case under the prediction model. Here, however, the model makes no sense. A judge on a court of last resort does not attempt to predict how she herself will decide the case. Such an enterprise would be pointless, because any ruling by the court is, by definition, an exact

18. HART, supra note 11, at 138.
19. Id.
20. Id. at 139.
21. Id. at 139-40.
22. Id. at 142.
prediction of the court's ruling. Thus, it is not surprising that courts of last resort do not employ the prediction model. The prediction model is incomplete.

It is worth noting here that one need not accept Hart's overall philosophy of law in order to accept his critique of the prediction model. All that is required is a commitment to the notion that legal norms have an existence independent of their enforcement in a particular case. As Professor Dane has observed, such a commitment can be found not only in the writings of positivists like Hart, but also in those of his intellectual disputants, including Lon Fuller and Ronald Dworkin. In short, Hart's critique is compatible with a wide variety of jurisprudential philosophies.

Of course, Hart's critique is not compatible with all views. As he himself recognizes, it rests on the assumption that law is not entirely indeterminate, that, notwithstanding the open-ended character of much judicial decisionmaking, law constrains even those judges whose decisions are unreviewable. Some have rejected this assumption, arguing that law is never sufficiently determinate to foreclose any result, and that judges who assert

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23. This illustrates a further limitation inherent in the prediction view of law: it cannot account for judicial mistakes. See Brian Leiter, Legal Realism, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY (Dennis Patterson, ed., forthcoming).

24. Hart's argument does not so much defeat the prediction model as restrict it to its proper domain. It is doubtful that any of the proponents of the prediction model ever intended it to apply to judges, as opposed to lawyers. Consider, for example, Jerome Frank's sophisticated defense of prediction in Jerome Frank, Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings, 80 U. PA. L. REV. 17 (1931). Frank's basic point was that for law schools to do a proper job of training lawyers, they must teach students that legal rules play a relatively small role in the resolution of legal disputes. Id. at 17. Accordingly, Frank saw the prediction model as primarily descriptive of the process of dispute resolution in trial courts, not prescriptive of appellate court rule formulation. Id. at 25-29. Moreover, according to Frank, this was the point of other of "Holmes' followers." Id. at 26; see also JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 35 (1990) (stating that "it is really a cheap shot to take a programmatic remark such as 'law is a prediction of what courts will decide'" as a complete theory of law, since "[l]egal realism is, in large measure, [only] the lawyer's perspective").

25. See Dane, supra note 6, at 1217. Dane also notes that contrary to the views of some legal realists, a commitment to the independent existence of legal norms does not entail the proposition that legal norms are "ethereal beings brooding beyond the stratosphere or perched on top of flagpoles." Id. at 1225. For a fuller exposition of norm-based views, see infra notes 59-69 and accompanying text.

26. HART, supra note 11, at 141-42 (acknowledging that there must be some core of determinacy and then stating that judges "are parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision").
the contrary are either naive or politically motivated.  

Whatever one thinks of the claim that law is inevitably and completely indeterminate, that claim does not support any affirmative model of adjudication. A conscientious judge who wishes to apply the law receives no more guidance from, and is no more constrained by, a theory that tells her to do what she thinks best than one that gives her the circular advice: predict what you yourself will do. Like the conventional prediction model, the critical view that law is just the psycho-political preferences of judges, even if true, is not a prescriptive model of jurisprudence. Because this Article addresses the question how judges should decide cases, I shall make the rather modest assumption that law is not inevitably and thoroughly indeterminate.

C. Courts of Last Resort and Other Courts

Hart himself apparently believed that his argument showed that the prediction model is incoherent whenever it is applied to courts, as opposed to lawyers. Yet, strictly speaking, the argument applies only to a court of last resort. A court of last resort cannot sensibly “predict” how it will rule. By contrast, a lower court judge’s prediction of a higher court’s ruling is a perfectly comprehensible concept. So too is a federal court’s prediction of how a state high court would resolve a question of state law. Thus, Hart’s

27. See, e.g., Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1708 (1976) (arguing that courts often phrase legal norms as rules because “the rule form disguises the discretionary element involved in applying it to cases”). Critical scholars typically argue that, despite the law’s claim to objectivity, judges are socially situated persons whose rulings tend to serve the interests of particular segments of society, such as the dominant class, see, e.g., Joseph W. Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1, 6 (1984) (contending that law “is a mechanism for creating and legitimating configurations of economic and political power”), the dominant sex, see, e.g., Catharine MacKinnon, Feminism Unmodified: Discourses on Life and Law 37 (1987) (arguing that American law makes maleness an entitlement), or the dominant race, see, e.g., Derrick Bell, Faces at the Bottom of the Well 102-03 (1992) (describing the reasoning of Regents of the University of California v. Bakke, 438 U.S. 265 (1978), as a formalist mask). However, the indeterminacy thesis is not essential to the critical outlook. See, e.g., id. at 103 (denying that a critical perspective is inconsistent with a democratic society committed to law, and lauding legal realists for their concern “with making the law more responsible to or reflective of society”). Thus, even scholars who are quite skeptical about the power of doctrine to constrain could be characterized as holding views compatible with Hart’s critique of the prediction model. In short, only true nihilists will find fault with Hart’s premise that law has some constraining force.

28. See Murphy & Coleman, supra note 24, at 35 (“The insights of legal realism are mainly negative . . . ”).

29. Hart, supra note 11, at 143 (“Whatever truth there may be in [the prediction model], it can at best apply to the statements of law ventured by private individuals or their advisers. It cannot apply to the courts’ own statements of a legal rule.”).
argument would not appear to apply to the question of prediction by lower court judges or by federal judges in diversity cases.

Nonetheless, Hart's argument could be adapted to show that prediction inaccurately describes what lower courts typically do. Under this version of the argument, we would note that the process of legal reasoning a lower court judge uses to resolve a case does not significantly differ from the process used by courts of last resort. In other words, unlike the lawyer whose real question is, "Will my client ultimately be penalized for her conduct?", the lower court judge does not simply ask the analogous question, "Will I be reversed?" Instead, Hart might say, the lower court judge, like the judge on the court of last resort, asks, "What does the law require?" Accurate predictions are only a side-effect of the fact that the lower court and the court of last resort use the same rule book.

This adaptation of Hart's argument is purely descriptive: It supports the empirical claim that lower courts do not use the prediction model. Of course, the case for the prediction model is largely prescriptive, aiming to show that lower court judges should predict. It is conceivable that, despite our conventional understanding of how lower courts function, a lower court judge really ought to have quite a different function from a high court judge. Because prediction is a coherent conception of how lower courts should decide cases, we should not rule it out simply because it is unfamiliar.  

30. For simplicity, I shall sometimes use the term "lower court" to refer to any court that lacks final authority over the legal question it must decide. For example, in some sense all state courts are lower federal courts when deciding questions of federal law. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (holding that state court judges are bound by United States Supreme Court rulings of federal law).

31. Professor Caminker correctly notes that an evaluation of the prediction model of lower court jurisprudence should not be based on "some a priori definition of law, but rather on whether the model advances legitimate and important values intended to be secured by the adjudicatory process." Caminker, supra note 7, at 23. I agree, but as I discuss below, the model undermines the most important of these values. See infra Part IV.
II. PREDICTIVE AND NON-PREDICTIVE APPROACHES TO LOWER COURT ADJUDICATION

A. The Prediction Model

To see how prediction differs from conventional legal reasoning, let us begin by examining a case in which a federal appeals court predicted that the Supreme Court would overrule an existing precedent. Consider the situation in which the three-judge district court found itself in *Barnette v. West Virginia State Board of Education*.

That case presented the question whether a West Virginia Board of Education regulation requiring public school children to salute the American flag violated their rights or their parents' rights under the First Amendment. Just two years earlier, in *Minersville School District v. Gobitis*, the Supreme Court had upheld a nearly identical requirement against such a challenge. Nonetheless, Circuit Judge Parker, writing for the three-judge court, believed that if faced with the question again, the Supreme Court would overrule *Gobitis*. Putting to one side the reasons Judge Parker gave for adopting a predictive approach, let us look at the means he used to make his prediction.

Here is Judge Parker's entire discussion of the reasons he believed the Supreme Court would overrule *Gobitis*:

Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered

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33. 310 U.S. 586 (1940).
35. Judge Parker wrote:
   It is true that decisions are but evidences of the law and not the law itself; but the decisions of the Supreme Court must be accepted by the lower courts as binding upon them if any orderly administration of justice is to be attained. The developments with respect to the Gobitis case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority.

*Id.* Interestingly, the notion that legal decisions are evidence of the law but not the law itself, has traditionally been associated with the "transcendental" view of law that the Supreme Court mocked in *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). In the *Erie* context, *opposition* to the view of legal decisions as evidence of law has been offered as a basis for the prediction model: some argue that by rejecting the idea of law that transcends the pronouncements of any particular state court, *Erie* requires federal courts to view state law as whatever a state's highest court has said or will say it is. *See infra Part VI.C* (critiquing this view). By contrast, for Judge Parker, *endorsement* of the legal-decisions-as-evidence view serves as a basis for the court's predictive approach.
therein and three other justices in a special dissenting opinion in *Jones v. City of Opelika*, 316 U.S. 584 (1942). The majority of the court in *Jones v. City of Opelika*, moreover, thought it worth while to distinguish the decision in the *Gobitis* case, instead of relying upon it as supporting authority. 

Judge Parker's basis for prediction is *personal*. He asks: How would the individual Justices who now sit on the Supreme Court vote in the case I must now decide?

Even if one assumes that this is the correct question, it is hardly clear that the data Judge Parker cites support his conclusion. He only counts four definite votes to overrule *Gobitis*: Chief Justice Stone, who as an Associate Justice was the lone dissenter in *Gobitis*, and affirmed his willingness to overrule *Gobitis* in *Opelika*; 

as well as Justices Black, Douglas and Murphy, who voted with the majority in *Gobitis*, but confessed error and a willingness to overrule *Gobitis* in *Opelika*. True, two of the Justices in the *Gobitis* majority were no longer on the Court when the *Barnette* case arose, yet Judge Parker does not adequately explain why he assumes that at least one of the two new Justices would vote to overrule *Gobitis*.

Judge Parker invokes one arguably impersonal source for his conclusion that *Gobitis* is moribund. He notes that the majority opinion in *Opelika* distinguishes, rather than relies upon, *Gobitis*. He refers to the following passage from *Opelika*: “No religious symbolism is involved, such as was urged against the flag salute in *Minersville School District v. Gobitis*, 310 U.S. 586. For us there is no occasion to apply here the principles taught by that opinion.” Judge Parker appears to make the quite remarkable argument that by distinguishing *Gobitis*, the *Opelika* court *sub silentio* overruled *Gobitis*. The argument might have some force if the two cases were really indistinguishable; then the act of distinguishing *Gobitis* would merely be a way of overruling it in substance if not form. However, *Opelika* cannot be understood as implicitly overruling *Gobitis*, because both cases rejected First Amendment claims. Indeed, the dissenters in *Opelika* characterized the majority's decision as an extension of *Gobitis*. Thus, the *Opelika* major-

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37. 310 U.S. at 601 (Stone, J., dissenting).
38. 316 U.S. at 600 (Stone, C.J., dissenting).
39. Id. at 623-24 (Black, Douglas, & Murphy, J.J., dissenting).
40. Id. at 598 (opinion of the Court).
41. The *Opelika* Court upheld a licensing and taxation scheme for the door-to-door or street sale of books and pamphlets as applied to religious material. Id. at 597-600.
42. Id. at 623 (“This is but another step in the direction which *Minersville School District v. Gobitis*, 310 U.S. 586, took against the same religious minority, and is a logical extension of the principles upon which that decision rested.”).
ity opinion provides no basis for the conclusion that the Court, acting as a single body, had already rejected Gobitis.

On the other hand, if one views Judge Parker's reliance on the Opelika opinion as serving a different purpose, it supports his conclusion. Judge Parker apparently reads the Opelika majority opinion not as an expression of the law emanating from the Supreme Court as a single body. Instead, he sees in the opinion clues as to what individual Justices think. He asks: Why does the Opelika Court go to the trouble of distinguishing Gobitis, when Gobitis could be invoked to support the result in Opelika? He implicitly suggests the reason: At least one of the five Justices in the Opelika majority must disapprove of Gobitis, and may have joined the opinion only on the condition that it not refer favorably to Gobitis. When this Justice's vote is added to the vote of the four Opelika dissenters, a different five-Judge majority emerges to overrule Gobitis.

Judge Parker's reductive analysis proved prescient. On appeal, the Supreme Court affirmed the judgment invalidating the West Virginia School Board's mandatory flag salute regulation. The vote was 6-3. In addition to the the four Opelika dissenters, the majority comprised the two Justices who had not been on the Court when Gobitis was decided: Justice Jackson, who had voted with the majority in Opelika, and Justice Rutledge, who joined the Court after Opelika was decided.

Judge Parker's attempt to predict the outcome of Barnette by forecasting how each individual Justice would vote exemplifies the prediction model. The lower court judge strives, in each case, to predict what a majority of the relevant higher court would do.

What sources of information are relevant to a lower court's judgment under the prediction model? Judge Parker's Barnette opinion suggests the most obvious ones: the written opinions, concurrences, and dissents of the sitting Justices. It is important to understand, however, that as I am defining the prediction model, these statements are relevant, not because they contribute to the content of some transcendent conception of law; rather, they are significant because they provide evidence of how the individual judges currently sitting on the high court will decide the case. Thus, there is no obvious reason to limit the data relevant to a prediction to published opinions. To discern how the high court judges would rule, the lower court judge could also consider their non-judicial writings and speeches, their

general ideological commitments, or even reflect upon casual conversations
with them.\footnote{44}

B. Conventional Legal Reasoning

The prediction approach contrasts with conventional legal reasoning. The lower court judge engaging in conventional legal reasoning does not ask how particular high court judges would rule; instead, she asks what result the law requires, taking into account prior decisions and relevant legal arguments.

Conventional legal reasoning as I describe it here is not really one model; it includes a wide variety of attitudes towards law. For simplicity, I shall only discuss two models of conventional legal reasoning that lower court judges employ, recognizing that these represent points along a spectrum. Under the first model, which I term the execution model, the lower court judge views her task in narrower terms than the second, which I term the elaboration model. I now briefly describe these approaches.

C. The Execution Model

An analogy best illustrates the conception of lower court adjudication underlying the execution model. The composer Igor Stravinsky once said that his “music is to be ‘read,’ to be ‘executed,’ but not to be ‘interpreted.’”\footnote{45} Many lower court judges take a similar view, believing that their job is to execute the law as found in already decided cases, but not to craft novel interpretations.\footnote{46} For instance, lower court judges taking this view typically claim that arguments of policy, as opposed to doctrine,

\footnote{44} To the extent that a lower court judge relies on purely private knowledge of a high court judge’s views, this may resemble an improper ex parte communication.

\footnote{45} IGOR STRAVINSKY & ROBERT CRAF, CONVERSATIONS WITH IGOR STRAVINSKY 119 (1959). Dr. Wilbert Jerome located this source for me.

\footnote{46} Professor Levinson has noted that lower federal court judges frequently employ what I call the execution model in constitutional adjudication. Sanford Levinson, On Positivism and Potted Plants: “Inferior” Judges and the Task of Constitutional Interpretation, 25 CONN. L. REV. 843, 849-50 (1993) (observing that lower federal courts act as if doctrine were the only modality of constitutional argument) (citing PHILIP BOBBITT, CONSTITUTIONAL FATE 3-8 (1982) (setting forth the “modalities” of constitutional argument); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11-22 (1991) (same)).
cannot form the basis for their decisions, even while recognizing that policy arguments may legitimately be addressed to the high court.  

A sophisticated jurisprudent might reject this mechanistic view of the lower court judge executing the high court's doctrine for two reasons. First, she would reject the assumption that law can simply be executed. Adjudication always requires some measure of judgment, because at least in important cases, plausible arguments will be available to support a variety of results. The execution model of adjudication, like the execution model of music, is thus naive.  

Second, our sophisticated jurisprudent would reject the extreme separation between the functions of lower courts and high courts that the execution model requires. Virtually any model of lower court adjudication will admit that in at least one respect a lower court functions differently from a high court: The lower court lacks the power to overrule high court cases. However, the execution model introduces an additional functional difference: Whereas the high court can adopt a flexible approach to adjudication, the lower court judge following the execution model has fewer tools at her disposal. To remedy this apparent defect, and to provide a more realistic account of the actual decisionmaking process (at least in hard cases), our sophisticated jurisprudent will prefer the elaboration model.  

D. The Elaboration Model  

Under the elaboration model, the lower court judge does not simply look up the correct decision for each case in a book of self-applying legal precedents. The process is more open-ended. As the model's title suggests, the lower court judge must elaborate the reasons for her decision, drawing upon a range of arguments that go well beyond settled doctrine strictly construed. Under the elaboration model fewer disparities exist between the functions of a lower court and the high court than exist under the execution model. With the exception of its inability to overrule high court

47. See, e.g., Namm v. Charles E. Frosst & Co., 427 A.2d 1121, 1129 (N.J. Super. Ct. App. Div. 1981) (declining to recognize the doctrine of enterprise liability because "extensive policy shifts of this magnitude should not be initiated by an intermediate appellate court. The appropriate tribunal to accomplish such drastic changes is either the Supreme Court or the Legislature.").  

48. Taken in its context, Stravinsky's statement is more arrogant than naive. See STRAVINSKY & CRAFT, supra note 45, at 135 ("I am trying to sound immodest, not modest"). He understood that a composer cannot spell out all that a work of music includes by specifying notes, tempo, dynamics, and so forth. What Stravinsky meant was that in supplying the ineffable qualities, conductors ought to prefer Stravinsky's style to their own. See id. ("[M]y style requires interpretation[,] . . . [which is] why I regard my recordings as indispensable supplements to the printed music.").
cases, a lower court using the elaboration model will have at its disposal all of the legal tools that the high court has. As a consequence, there will not appear to be one meaning of law for the lower courts, and a different meaning for the high court. 49

E. Contrasting the Models

An example will highlight the differences among the execution model, the elaboration model, and the prediction model. Suppose that the recent decisions of a state high court indicate a trend of increasing willingness to recognize causes of action for non-physical injuries, but that the court has not yet decided whether to recognize the tort of negligent infliction of emotional distress. 50 A case presenting this question comes before a panel of the state intermediate appellate court. The appellate judges agree that the clear trend of the high court cases points towards permitting recovery for negligent infliction of emotional distress, and that as a matter of policy, the law ought to recognize the cause of action. However, in the most recent election for seats on the state high court, a new slate of judges came to power having run on a platform promising “to put an end to these ridiculous lawsuits.” Should the intermediate appellate court recognize the cause of action? Let us consider this question under each of the three models.

Under the execution model, the lower court judges must take a narrow view of precedent. No decision of the state high court recognizes a cause of action for the tort of negligent infliction of emotional distress. Therefore, no such cause of action exists. If the plaintiff wishes to make policy arguments or doctrinal arguments for extending the existing law, she should address them to the state high court.

Under the elaboration model, the lower court judges have a somewhat harder job. Since the case presents an open question, they must use their full range of legal skills. They will consider policy arguments, but also precedents in the broad sense, reasoning by analogy from high court cases.

49. Cf. Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 597 (1994) (“If a higher court asserts a greater freedom to depart from precedents than lower courts have, it will necessarily find itself on occasion reversing judgments which were free from error and wholly in accordance with law. Is this a purely formal difficulty? Or does it raise a real question about the integrity of the conception of the judicial function in the legal system?”).

recognizing the existence of other causes of action for non-physical harm.\textsuperscript{51} Based on these and other factors, let us assume that their best judgment is that the cause of action exists. If so, they will rule for the plaintiff.

If they employ the prediction model, the lower court judges will first replicate the reasoning process of the impersonal model, considering the relevant legal materials without regard to the high court's personnel. They do so because they know that the high court will itself consider these materials; hence impersonal legal sources provide a good starting point for the predictive enterprise. By assumption, the lower court judges conclude preliminarily that there is a cause of action. But the old court's defeat at the polls must also be taken into account. Based on the new judges' campaign statements, the appellate court recognizes that they are likely to reverse, or at least halt, the trend of recent cases. Hence, the appellate court predicts that the high court will not recognize a cause of action and rules accordingly.

Although in the above example the elaboration model is the worst predictor, the models will generally rank, in decreasing order of accuracy of prediction, as follows: prediction model; elaboration model; execution model. This hierarchy, however, only contains information about how accurately the various models predict results. If one also pays attention to predicting methodology, the models perform somewhat differently.\textsuperscript{52}

I noted above that under the execution model the functions of the high court and the lower court appear to be quite different.\textsuperscript{53} This will result in a different style of opinion as well. The lower court’s reasoning will emphasize doctrine and rules, strictly construed, to a much greater extent than the high court’s reasoning. By contrast, when a lower court uses the elaboration model, its opinions will be stylistically and methodologically indistinguishable from those of the high court.\textsuperscript{54}

If the methodology of the execution model is a skeletal version of a high court’s methodology, the approach of the prediction model is a different animal altogether. A lower court that predicts how the high court will vote based on an assessment of the views of the individual high court

\textsuperscript{51} See Michael C. Dorf, \textit{Dicta and Article III}, 142 U. Pa. L. Rev. 1997, 2060 (1994) (observing that “even where precedent is not binding, lawyers may argue from precedent by analogy”).

\textsuperscript{52} As I have noted elsewhere, the means by which a court reaches a particular result play a critical role in defining what the law is. See \textit{generally id.}

\textsuperscript{53} See \textit{supra} text following note 48.

\textsuperscript{54} The only difference will be that the high court will occasionally overrule its own prior decisions.
judges engages in a process in which the high court itself would never engage—since predicting its own views would be nonsensical. In the above example, the intermediate court of appeals would write an opinion expressly relying upon the campaign promises of the new judges as a means of ascertaining the law. However, when the case reaches the high court, the new judges would not simply declare: We're in power now, so our word is law. Rather, they would engage in conventional legal reasoning, drawing distinctions between earlier cases and the case before them, and espousing reasons of policy for not recognizing the tort of negligent infliction of emotional distress. Thus, of the three models I have discussed, the prediction model results in the greatest methodological divergence between high courts and lower courts.

One could argue that the divergence is more apparent than real. Although the new high court judges justify their volte-face through legal argument, their real reason may be a naked political preference. On this view, the appellate court's predictive opinion states the true reason for the high court's ultimate decision. The appellate court and high court opinions may appear different, but the underlying basis for decision—the political preferences of the new high court judges—is the same.

This skeptical critique cannot, however, entirely bridge the methodological gap between high court and lower court adjudication under the prediction model. Unless one is a complete cynic, some disagreements over the correct answer to a legal question will not appear as mere covers for underlying political disputes. For instance, in the above example, the new judges may honestly believe that the refusal to recognize a cause of action for negligent infliction of emotional distress can be reconciled with the prior cases, or they may believe that while drawing the line at this tort is somewhat arbitrary, the policy gains that will result outweigh any doctrinal inconsistency. In other words, they may have a simple disagreement with the appellate court judges who believe the law should recognize the cause of action. Where this occurs, a methodological gulf between the appellate court and high court opinions will exist. The appellate court will conclude that the right answer to the question presented is yes (the cause of

55. See HART, supra note 11, at 143.
56. I have argued elsewhere that disagreement about constitutional law does not necessarily evidence bad faith, see TRIBE & DORF, supra note 5, at 37 (noting that "honest and conscientious readers of a quite specific constitutional provision, engaged in the process of genuine interpretation, can reach entirely opposite conclusions, regardless of their overall philosophical leanings"), and this point applies to adjudication generally. Moreover, the need to write an opinion setting forth legal arguments justifying a position acts as a real, if loose, constraint on judicial action. See Dorf, supra note 51, at 2029.
action should exist), but that the high court will disagree, so the plaintiff loses before the appellate court. The high court will reason that the right answer to the question presented is no. Although the two courts will agree as to which party prevails, they will arrive at their respective decisions through quite different means.

As I noted above, a lower court judge using the elaboration model uses almost the exact same processes to decide a case as does a high court judge. Recalling H.L.A. Hart's analogy, we might say that the lower court judge and the high court judge use the same rule book. This cannot be said of the prediction model. If a judge using the prediction model has reason to believe that, despite the fact that the law commands X, the high court will say the law commands Y, she will favor the prediction over the law as she sees it.

The methodological differences between the elaboration model and the prediction model roughly correspond to the conceptual distinction in the jurisprudence literature between "norm-based" and "decision-based" theories of law. Under norm-based but not decision-based theories, legal rights and duties can exist apart from their enforcement. Although not universally endorsed, the norm-based view better reflects lay attitudes

57. Although the prediction may be based on the appellate court's knowledge of the new high court judges' political views, it does not necessarily follow that when the high court takes the predicted course, it acts purely politically. The political view itself—here a belief about the relative costs and benefits of litigation—may derive from a value system that also informs the new judges' legal analysis in an appropriate way. Cf. Richard D. Friedman, Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation, 142 U. PA. L. REV. 1891, 1896-97 (1994) ("[I]f the judge's mind is at all complex, his jurisprudential framework has aspects that are difficult to detect from the outside; the judge may be acting perfectly rationally within that framework even though we do not understand it and cannot explain it. The consequence of this argument may appear ironic: if we should expect a certain amount of (apparently) random behavior as a matter of course, then we need not resort in the first instance to a political explanation for such behavior.").

58. See supra Part II.D. Recall the one exception to this statement, that only the high court may overrule its own precedents.

59. See, e.g., Dane, supra note 6, at 1216-23.

60. Id. at 1220. See also Hermann Kantorowicz, Some Rationalism About Realism, 43 YALE L.J. 1240, 1250 (1934) ("The law is not what the courts administer but the courts are the institutions which administer the law. For this reason alone can it be foretold what the courts will do.").

61. See, e.g., GEORGE C. CHRISTIE, LAW, NORMS, AND AUTHORITY 1-31 (1982) (arguing that legal philosophers have substituted "norm" for "rule" to allow greater flexibility, but that for the norm concept to have its intended effect, it must be possible to formulate norms outside of concrete cases, and this is nearly impossible); Bingham, supra note 6, at 12-23 (denying that general principles announced by courts form any essential part of the law).
toward the nature of law than does the decision-based view, and also has wider acceptance among legal scholars.62

The norm-based classification includes a great variety of legal theories. Legal scholars disagree as to the source of legal norms. They may believe that legal norms owe their existence to the command of the sovereign,63 to a moral obligation to obey legitimate authority,64 to the requirement of principled consistency between cases,65 to the interaction of rules imposing primary obligations with organizing principles of society understood as rules conferring public and private power,66 or to some other source or sources.67 Scholars may also disagree about the content of legal norms. All that the label norm-based signifies is some belief in legal rights and duties independent of what a court will order someone to do in a particular case.

The elaboration model functions as a norm-based theory. The law to be applied by a lower court judge in any case will be found in the precedents of the high court and whatever other sources the particular legal system deems relevant to such a determination by the high court, such as statutes, evidence of legislative intent, and policy arguments. Although one could view these as sources relevant to predicting what the high court would do with a case, it would be simpler to view these sources as legal norms—especially since that is what they constitute when employed in the same manner by the high court.68

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62. See Dane, supra note 6, at 1217 (characterizing the norm-based view as "more venerable" than the decision-based view).
63. See, e.g., JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 13 (1954) ("Every law or rule ... is a command."); see also JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 11 (2d ed. 1980) (noting that for Austin, "[a] law is a general command of a sovereign to his subjects").
64. See Joseph Raz, Authority and Consent, 67 VA. L. REV. 103, 117 (1981) ("Legitimate authority implies an obligation to obey on the part of those subject to it.").
65. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82 (1977) (distinguishing principles from policies); see also LON L. FULLER, THE MORALITY OF LAW 15–30 (1964) (distinguishing deontological legal claims from utilitarian judgments).
66. See HART, supra note 11, at 77–96.
68. Note that under different versions of the elaboration model, lower court judges may ascribe greater or lesser normativity to the opinions of the high court. Under a strong version of the elaboration model, the lower court judge views her role as giving effect to not only the announced doctrines of the high court, but also to the more abstract principles that underlie those doctrines. Thus, for example, a lower court judge might take a strongly textualist approach to statutory interpretation in one area of the law because she observes that recent high court decisions in a variety of (other) contexts display a preference for textualism. Unlike the lower court judge who employs the prediction model, however, the lower court judge using the strong elabo-
By contrast, the prediction model is decision-based rather than norm-based because it treats the final enforcement of a legal obligation as the only legally meaningful event. For the lower court judge, law means predicting that event. Under the prediction model, it makes no sense to speak of a legal norm independent of its enforcement by the high court. If we take the norm-based view as exemplifying standard legal reasoning, then the question arises whether a lower court judge ought to depart from such a view and adopt the prediction model. In the next two sections I consider the benefits and costs of the prediction model of lower court adjudication.

III. THE PRACTICAL CASE FOR PREDICTION

Despite the theoretical shortcomings of the prediction model as a general account of law, at least three policy goals arguably support its use in lower court adjudication. First, the hierarchical arrangement of American court systems suggests a predictive model for lower courts. Second, the principle of equal treatment of similarly situated parties may warrant a predictive approach, since not all cases will make it to the court of last resort. Third, requiring parties to seek review in a court of last resort when a lower court can predict the outcome wastes resources and time. Below, I
set forth and evaluate the policy arguments derived from concerns about hierarchy, equality, and efficiency.

A. Hierarchy

American court systems are hierarchical, as a sketch of the federal system illustrates. At the top sits the United States Supreme Court, created directly by the Constitution; all other federal courts exist at Congress' pleasure and are "inferior" to the Supreme Court.70 Notions of inferiority and superiority have real effect because of appellate review. The Supreme Court can reverse the Courts of Appeals,71 which can in turn reverse the district courts.72

As a consequence of the hierarchical arrangement of American court systems, lower court judges may see themselves as the infantry carrying out the marching orders of generals who sit on the court of last resort. Ordinarily, lower court judges find those orders in the doctrines announced in decided cases of the high court. On those occasions when the lower court judge must decide a legal question to which the high court's precedents provide no ready answer, the lower court judge might ask herself: What would the generals on the high court do under these circumstances? She would then venture a prediction.

The hierarchical structure of American court systems hardly dictates the predictive approach, however.73 As an initial matter, the military metaphor appears to repeat the error that Hart identifies in the radical realist argument for prediction: it assumes that because the court of last

70. See U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").
72. Id. § 1291 (1988). This sketch is somewhat incomplete, as the hierarchy does not merely consist of three levels. For example, in some instances, the Supreme Court can review district court judgments, see id. § 1233 (direct appeals from decisions of three-judge district courts), courts of appeals sometimes review administrative rulings, see, e.g., 28 U.S.C. § 1295 (1988 & Supp. V 1993) (jurisdiction of the United States Court of Appeals for the Federal Circuit), and district courts exercise a kind of appellate jurisdiction over decisions of magistrates, see, e.g., id. § 636, and bankruptcy courts, see, e.g., id. § 1334.
73. Indeed, as Professor Caminker shows, the hierarchical structure of American court systems does not necessarily entail an obligation on the part of lower courts to follow clearly applicable precedents of higher courts. See Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 STAN. L. REV. 817, 865 (1994) (arguing that "the oft-heard suggestion that a pyramidal judicial hierarchy entails a duty to obey hierarchical precedent is simply false," but justifying hierarchical precedent in consequentialist terms).
resort has the final say as to what the law is, the law is nothing but what the court of last resort says it is.

In resisting the hierarchy-based argument for prediction, a lower court judge might note that she swears an oath to uphold the Constitution and laws of the United States, not her prediction of Supreme Court rulings. To be sure, the lower court judge must follow applicable Supreme Court precedent; but when the law is ambiguous, she may legitimately believe that a decision based on her prediction of Supreme Court behavior, when her reading of the applicable precedents and other sources of law leads her to a different conclusion, would violate her oath of office. She would emphasize her role as expositor of the law, and argue that Supreme Court finality does not entirely supersede that role, perhaps pointing to Justice Jackson's remark: "We are not final because we are infallible, but we are infallible only because we are final."

Moreover, accepting that lower court judges ought to emphasize their lowly status does not necessarily lead to a predictive approach. To the extent that prediction implies an activist role for the lower court judge, it may appear rather inconsistent with an emphasis on hierarchy. When a lower court judge predicts that the high court will adopt some legal principle, she takes a pro-active role. To be sure, she does so in the name of the high court, but it is a somewhat strange understanding of hierarchy that empowers those on the bottom, by virtue of their low status, to take a leading role. Perhaps a more natural hierarchy-based model of lower court adjudication would emphasize caution and conservatism, along the lines of the execution model discussed in the previous section. On this view, a lower court judge would apply existing high court doctrine, but would not attempt to anticipate extensions or modifications of that doctrine, precisely because that is the sort of task best left for the high court itself.

Despite these limitations, the hierarchical nature of American court systems does provide some practical support for the prediction model. The lower court judge may view her principal goal as avoiding reversal. If so, then whatever her philosophical attitude towards the nature of law, the best way to achieve her goal would be by predicting how a higher court would rule.

75. This will generally be true for a court from which there is an automatic appeal to a higher court, as in the case of appeals from a federal district court to a federal court of appeals. When review is discretionary, as for example by writ of certiorari from the Supreme Court to a federal court of appeals, the court of appeals will often avoid reversal simply because the Supreme Court does not review most of its decisions. Focusing only on cases in which the Supreme Court grants certiorari, a court of appeals that resolves unclear legal questions by predicting how the
B. Equality

Equality norms may also be invoked in support of a predictive model of lower court adjudication. In the federal system, only the rare case reaches the Supreme Court. Many state high courts have a practice of discretionary review similar to the Supreme Court's certiorari policy. In light of this, a lower court judge might consider it inequitable that a litigant whose case reaches the highest court within the system receives the benefit of whatever new doctrine that court announces, but a litigant in whose case the high court denies review must settle for the pre-existing law. In order to mitigate this inequality, a lower court judge may believe that she ought to predict how the high court would rule. Then, assuming an accurate prediction, the fortuity of which case reaches the high court will not control the outcome.

The importance of equality in this context should not be overstated. The kind of inequality that results from a lower court's failure to adopt a predictive approach is ubiquitous in the law. For example, if a final judgment has been reached in a case and the appellate process has run its course, the rules of res judicata do not ordinarily permit relitigation, even if the law has changed dramatically (and unpredictably) since the judgment became final. Moreover, even when litigation has not entirely run its course, the Supreme Court does not always permit litigants to benefit from the retroactive application of rules of law that were not in place when the primary conduct in question occurred. Nor does legislation typically

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Supreme Court would rule will generally have a lower reversal rate than a court of appeals that does not predict, at least if one assumes that conscious prediction of Supreme Court rulings is a better predictor of Supreme Court rulings than are other methods of adjudication.


77. A change in the law may be unpredictable if, for example, a long time passes between the disposition of the original case and the case in which the law is changed. Yet it is precisely this sort of case in which the policy of repose underlying rules of res judicata has the greatest force.

78. See, e.g., Barzin v. Selective Serv. Local Bd. No. 14, 446 F.2d 1382, 1383 (3d Cir. 1971) ("[A] prior decision may serve as res judicata even if a contrary judicial decision on the legal issues involved intervenes between the first and second suits.") (citing Clouatre v. Houston Fire & Casualty Co., 229 F.2d 596 (5th Cir. 1956)); accord United States v. Moser, 266 U.S. 236 (1924).

79. See, e.g., James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2442–45 (1991) (plurality opinion) (discussing considerations relevant to a decision whether a rule applies retroactively in civil cases); Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion) (holding that new rules of law will not ordinarily be applied retroactively to benefit state prisoners seeking the writ of habeas corpus). See generally Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retro-
apply retroactively.\textsuperscript{80}

One could view all of the above examples as inconsistent with the principle that like cases should be treated alike. Yet courts do not typically perceive them this way. Instead, American law comfortably tolerates the existence of intertemporal inconsistency within a single legal system. Viewed against this backdrop, it should not be particularly alarming that a lower court might apply what it perceives to be the applicable law in case 1, only for a higher court to deny review in case 1, but then accept review and apply a different legal principle in case 2. Perhaps the lower court in case 1 could have predicted how the higher court would rule in case 2, but if the application of different rules to the two cases merely constitutes one of the many instances of intertemporal differences, equality norms would not necessarily justify the adoption of a predictive approach by the lower court.

Assuming that the aggregate effect of a predictive approach is to reduce intertemporal inequality, so much similar inequality may remain as to make the gain negligible. Nonetheless, even a slight reduction of an evil is preferable to no reduction at all. Thus, the predictive approach appears to be a modest step in the right direction.

C. Efficiency

A concern for conserving the resources of litigants and the judiciary also lends arguable support to the predictive approach, as an example concerning the question of anticipatory overruling illustrates. Recall Judge Parker's view in the \textit{Barnette} case.\textsuperscript{81} The case appeared to be controlled by \textit{Gobitis}, but the appeals court had reason to believe that the Supreme Court would likely overrule \textit{Gobitis} if given the opportunity. By following the predictive approach, and disregarding an otherwise controlling precedent, the appeals court judges may have thought they could save the Supreme Court the work of having to overrule \textit{Gobitis} expressly, and save the litigants the work of having to seek review and present arguments to the Court. As Judge Woodbury, dissenting in a similar case in which the majority declined to adopt a predictive approach, \textit{United States v. Girouard},\textsuperscript{82} put it:

\textit{activity, and Constitutional Remedies, 104 HARV. L. REV. 1731 (1991).}

\textsuperscript{80} E.g., \textit{Landgraf v. USI Film Products}, 114 S. Ct. 1483, 1497 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence . . . ").

\textsuperscript{81} See supra notes 32--36 and accompanying text.

\textsuperscript{82} 149 F.2d 760 (1st Cir. 1945), rev'd, 328 U.S. 61 (1946).
Nothing is to be gained by our deciding a question contrary to the way we think the Supreme Court would decide it. And to determine how the Supreme Court would decide a question we ordinarily would follow and apply unreversed decisions of that court in point. . . . Nevertheless on rare occasions, . . . situations arise when in the exercise to the best ability of the duty to prophesy thrust upon us by our position in the federal judicial system we must conclude that dissenting opinions of the past express the law of today.83

In characterizing his job as entailing a "duty to prophesy," Judge Woodbury invokes the radical realist notion that (at least for a lower court judge) law is prediction. Yet he also relies on a more practical ground: He says that nothing will be gained, and much effort will be wasted, if litigants and lower court judges are required to act as though law is not about prediction. This is the efficiency-based argument for prediction.

Examining the subsequent history of the Girouard case illustrates the force of Judge Woodbury's practical point. As it turned out, Judge Woodbury's prophesy proved accurate. The Supreme Court granted certiorari84 and reversed the judgment from which Judge Woodbury had dissented.85 However, as Professors Henry Hart and Albert Sacks noted, the fact that the Supreme Court agreed with Judge Woodbury on the merits does not reveal whether it approved of Judge Woodbury's interpretive method, about which the Court said nothing.86 Nevertheless, suppose the Court had thought Judge Woodbury's predictive approach misguided. The Court might have scolded him for his hubristic jurisprudence, but ultimately would have vindicated him by adopting his bottom line. Indeed, the Supreme Court did precisely this in another case in which an appeals court correctly anticipated that the Supreme Court would overrule an earlier precedent.87

83. Id. at 765 (Woodbury, J., dissenting).
84. 326 U.S. 714 (1945).
86. HART & SACKS, supra note 49, at 619.
87. See Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (in the course of overruling Wilko v. Swan, 346 U.S. 427 (1953), admonishing the court of appeals for taking the same step "on its own authority"); id. at 486 (Stevens, J., dissenting) (agreeing with the majority that the court of appeals should have followed a controlling precedent, and terming its failure to do so "an indefensible brand of judicial activism").

The views expressed in Rodriguez are troubling because they apply not only to lower court predictions based on individual Justices' views, but also to determinations by a lower court that a precedent "appears to rest on reasons rejected in some other line of decisions." Id. at 484 (majority opinion). The appeals court in Rodriguez concluded that Wilko had been overruled sub silentio by subsequent cases. Rodriguez de Quijas v. Shearson/Lehman Bros., Inc., 845 F.2d
Notwithstanding Judge Woodbury's points, the efficiency-based argument for prediction rests on the rather dubious assumption that a lower court prediction that an existing high court precedent will be overruled will in fact prevent the high court from having to take the case. If anything, such an approach would seem to have the opposite effect. When a federal appeals court judge predicts that the Supreme Court will likely renounce some existing precedent, for all courts outside the judge's circuit, the prediction does not actually change the law: Only the Supreme Court can do that. Even if the appellate judge accurately predicts the Supreme Court's inclination to change the law, the Court will still have to take the case to do so. On the other hand, if the appeals court mistakenly predicts that the Supreme Court would overrule a precedent, the Court would almost certainly have to take the case to resolve the split in authority. Thus, regardless of the accuracy of the appeals court's prediction, it saves the Supreme Court no work.

By contrast, if the appeals court follows existing precedent, there is at least a possibility that the Supreme Court will not need to review its decision. If the Court agrees that existing precedent does not warrant reexamination, it can deny review.

Moreover, if the appeals court predicts that the Supreme Court will overrule an existing precedent, the parties' incentive to seek review of the appellate decision remains; the incentive will merely shift from one litigant to the other. Unless it is obvious that the Supreme Court would in fact overrule the precedent if it took the case, the losing party in the appeals court would probably seek review. Further, given that the losing party can invoke principles of stare decisis, the appeals court's prediction will rarely be obviously accurate.

1296, 1298-99 (5th Cir. 1988), aff'd, 490 U.S. 477 (1989). It did not predict that the Supreme Court would overrule Wilko, but reasoned that the Court had already done so, basing this determination entirely on impersonal materials. Since, in my view, such a determination represents conventional legal reasoning, see supra Part II.B., it ought to be a permissible choice for a lower court. The contrary view adopted by the Supreme Court in Rodriguez appears to confuse the power to declare a precedent dead with the power to kill it.

88. See SUP. CT. R. 10.1 (listing existence of a conflict among lower courts as important consideration warranting grant of petition for writ of certiorari).

89. For example, in Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992), the Supreme Court overruled National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967), to the extent that Bellas Hess held that the Due Process Clause prohibits state taxation of mail order transactions between residents of the taxing state and a mail order house in some other state. 112 S. Ct. at 1909-11. However, the Court in Quill Corp. declined to overrule Bellas Hess to the extent that the Bellas Hess Court reached the same conclusion based on the Dormant Commerce Clause. The Court justified its adherence to the Dormant Commerce Clause ruling by relying on principles of stare decisis, id. at 1914-16, despite the fact that the lower court had predicted the
Thus, the efficiency argument for a lower court basing its decision on a prediction that the high court would overrule an existing precedent appears weak. However, the efficiency argument applies not only in cases where a controlling precedent exists, but also where the law as announced by the high court is merely unclear. In this context, the efficiency argument has greater force.

Suppose, for example, that a federal appeals court judge's honest reading of Warren Court decisions regarding the rights of criminal defendants leads to, but does not compel, the conclusion that a particular defendant's conviction ought to be reversed. Nevertheless, the same judge believes that the Rehnquist Court would read the relevant precedents more narrowly. Under these circumstances, adopting the predictive approach would probably result in a lower likelihood that the Supreme Court would grant certiorari than would applying the appeals court judge's own conception of the relevant precedents. If we assume that most cases in which a lower court judge would predict the high court's decision would involve questions of uncertain law, rather than putatively moribund precedents, then the efficiency argument would appear to have some merit.

D. The Strength of the Practical Case for Prediction

Taken together, the hierarchical structure of American court systems, norms of equal treatment, and conservation of judicial and private resources provide some practical support for a predictive model of lower court adjudication. Just how much support these policies provide is difficult to quantify, but I would speculate that they provide quite modest support. These policies will be furthered by a deliberately predictive lower court jurisprudence only if a judge who decides cases by conscious prediction more successfully anticipates high court rulings than a judge who does not use the

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Court would declare the entire holding of Bellas Hess no longer good law. See State v. Quill Corp., 470 N.W.2d 203, 208 (N.D. 1991).

90. Note, however, that if the lower court judge employs the elaboration model with great care, the results reached will often closely resemble those reached under the prediction model. In the example discussed in the text, the elaboration model would require the lower court judge to consider the Warren Court decisions in light of intervening Rehnquist Court decisions. These later decisions may suggest an interpretation of the earlier ones that would not otherwise be apparent. Thus, the lower court judge employing the elaboration model construes the Warren Court decisions narrowly because the best—in the sense of most consistent with the overall fabric of the law—impersonal reading of those decisions so requires. As a result, the elaboration model leads to a ruling that will likely find favor with the current Supreme Court.

91. The equality argument, see supra Part III.B, also has greater force here than in a case in which a controlling Supreme Court precedent exists.
prediction model. However, as one leading realist proponent of the prediction model observed, it is notoriously difficult to predict the outcome of a contested legal question where impersonal legal sources leave the judge significant room to maneuver.\textsuperscript{92}

Should the lower court inaccurately predict the high court's decision, less, rather than more, hierarchical discipline, less, rather than more, equality, and less, rather than more, efficiency will result. These costs must be subtracted from any benefits that arise from the cases in which a lower court's resort to personal sources decreases the likelihood of reversal. Even if we assume that the net result, on average, furthers the policies of hierarchy, equality, and efficiency, we must next ask whether pursuing these practical advantages through the prediction model imposes unacceptable costs in terms of other important values served by the legal system. In the next section, I argue that it does.

IV. IMPERSONAL JUSTICE AND THE RULE OF LAW

A. Law and Whim

The prediction model conflicts with a set of popular assumptions that may be broadly grouped under the heading, rule-of-law values. With this admittedly imprecise term, I aim to invoke a concept similar to that articulated by the inhabitants of the island of Melos in Thucydides' account of their conquest by Athens.\textsuperscript{93}

While the Athenians prepared to invade Melos, they held a conference with the Melians. The Melians hoped to persuade the Athenians to leave them alone, and the Athenians in turn hoped to persuade the Melians to surrender without a fight. At the outset, the Athenians stated that "into the discussion of human affairs the question of justice only enters where there is equal power to enforce it, and . . . the powerful exact what they can, and the weak grant what they must."\textsuperscript{94} In other words, might

\textsuperscript{92} See Frank, supra note 24, at 47-49; Frank, supra note 6, at 245-49.

\textsuperscript{93} 2 THUCYDIDES, THE PELOPONNESIAN WAR 167-77 (Benjamin Jowett trans., 2d ed. 1900).

\textsuperscript{94} Id. at 169 (bk. V, verse 89).
makes right.\textsuperscript{95} The Melians responded that by this equation, the Athenians "set aside justice and invite us to speak of expediency."\textsuperscript{96}

The Melian rejection of the claim that might makes right constitutes a view of morality, but not necessarily a view of law. However, the view has implications for law. For example, because it rejects the equation of what is with what ought to be, the Melian position could be invoked to support the claim that an unjust law, even if duly enacted by the proper body, is no law at all. Although at one time the United States Supreme Court appeared to accept this view,\textsuperscript{97} it has become formally settled that the courts cannot invalidate an otherwise constitutional law simply because they believe it to be unjust.\textsuperscript{98}

I wish to focus here on a second dichotomy which the Melian position supports—the dichotomy between law and will. The concept of a \textit{nation of laws, not of men (or women)}, captures the distinction. One can distinguish between a legal system in which the relevant decisionmaker resolves disputes according to some system of principles or rules, and a system in which

\textsuperscript{95} Later in the dialogue, in response to the Melians' contention that the gods will favor them, the Athenians state:

As for the Gods, we expect to have quite as much of their favor as you: for we are not doing or claiming anything which goes beyond common opinion about divine or men's desires about human things. For of the Gods we believe, and of men we know, that by a law of their nature wherever they can rule they will. This law was not made by us, and we are not the first who have acted upon it; we did but inherit it, and shall bequeath it to all time, and we know that you and all mankind, if you were as strong as we are, would do as we do.  
\textit{Id.} at 173 (verse 105). For a critical assessment of such arguments in their historical context, see \textbf{HARTVIG FRISCH, \textit{MIGHT AND RIGHT IN ANTIQUITY}} (C.C. Martindale, trans. 1949).

\textsuperscript{96} 2 \textbf{THUCYDIDES}, supra note 93, at 173 (bk. V, verse 90). The Melians tried without success to persuade the Athenians that it was not in Athens' own interest to conquer Melos. \textit{Id.} at 169-72. In the end, Athens conquered Melos, executed all the men of military age, and enslaved the women and children. \textit{Id.} at 177.

\textsuperscript{97} See \textit{Calder v. Bull}, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) ("An \textit{ACT} of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.").

\textsuperscript{98} In form, the Supreme Court has adopted the views of Justice Iredell and ruled that it only may invalidate acts of the legislative and executive branches of the federal and state governments on the basis of specific provisions of the Constitution." \textbf{JOHN E. NOWAK & RONALD D. ROTUNDA, \textit{CONSTITUTIONAL LAW} § 11.1, at 352 (4th ed. 1991)}; see also \textit{Calder}, 3 U.S. at 399 (Iredell, J., concurring in the judgment) ("If any \textit{act} of Congress, or of the Legislature of a state, violates [the Constitution], it is unquestionably void . . . . If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice."). "In substance, however, the beliefs of Justice Chase have prevailed as the Court continually has expanded its basis for reviewing the acts of other branches of government." \textbf{NOWAK & ROTUNDA, supra, § 11.1, at 352.}
the decisionmaker resolves disputes according to her whim.\textsuperscript{99} This dichotomy differs from the first because the system of principles or rules may not be just,\textsuperscript{100} and conversely, the whim of the decisionmaker may result in just resolutions if, for example, the decisionmaker is benevolent.\textsuperscript{101} By contrasting law and will, I emphasize the impersonal character of law.\textsuperscript{102}

\textbf{B. Rule-of-Law Values in American Law}

The concept of justice as impersonal occupies a central place in American law. For example, the Constitution includes several provisions requiring that law not vary depending upon the person to whom it is applied. These include the Fourteenth Amendment's Equal Protection Clause and the prohibition on state or federal bills of attainder.\textsuperscript{103}

If American law places great importance on treating a person's identity as largely irrelevant when she is the object of law, it even more clearly enshrines the ideal of the irrelevance of a person's identity when she is a judge. American law is, in other words, impersonal in the sense that I used the term in describing norm-based models of lower court adjudication. Consider several central impersonal features of American law, all of which

\textsuperscript{99} I assume that the decisionmaker's whim does not itself depend upon some reasonably fixed principle, or that if it does, there are multiple decisionmakers, each of whose whims are guided by different principles.

\textsuperscript{100} See RONALD DWORIKIN, LAW'S EMPIRE 101-04 (1986) (explaining how the Nazis had a system of law, albeit an evil one).

\textsuperscript{101} One could characterize the whim-based legal system as guided by a rule that says: The law is whatever the decisionmaker says it is. Cf. \textit{supra} notes 18-22 and accompanying text (discussing the "rule" of "scorer's discretion"). Because this characterization would render all decisionmaking rule-based or principle-based, I prefer to treat it separately from more conventional forms of rule-based or principle-based decisionmaking.

\textsuperscript{102} Although one need not accept Ronald Dworkin's conception of law as integrity to recognize the impersonal ideal of American law, Dworkin's account of law as integrity captures much of the sense in which law is impersonal. He writes: "The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness." \textit{Dworkin, supra} note 100, at 225. Critically, the single author imagined is not any particular judge, but an abstracted transpersonal judge. \textit{See also} Charles Fried, \textit{Impudence}, 1992 SUP. CT. REV. 155, 187 (rejecting the prediction approach because a conscientious judge's "task is to interpret the superior courts' opinions, and that means taking their text—not the subjective intentions of their authors—and fitting it into the whole body of controlling legal materials") (footnote omitted).

\textsuperscript{103} U.S. CONST. art. I, § 9, cl. 3 (federal); U.S. CONST. art. I, § 10, cl. 1 (state). The tug of justice as an impersonal ideal is so strong that even in areas where a sensitive appraisal of historical and present-day facts might lead to the conclusion that various persons ought to be treated differently, the Supreme Court often prefers a model of strict even-handedness. \textit{See}, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-98 (1989) (holding that even assertedly benign racial classifications by states or their subdivisions are subject to strict scrutiny).
would be seriously undermined by widespread acceptance of the prediction model.

The requirement of the impartial adjudicator, an essential aspect of Due Process,\(^{104}\) is one important manifestation of the ideal of impersonal judgment. Impartiality not only implies that the judge will not favor some litigants over others; it also suggests an attitude of detachment from one's personal views. The concept of “judicial restraint” conveys the flavor of this attitude, although the term carries with it considerable political baggage.\(^{105}\) Dean Kronman's ideal of the lawyer-statesman provides a less controversial description of the impartial attitude that a judge ought to have towards her own views. According to Kronman, judging

is a deliberative activity that always starts from and returns to the specific facts of a concrete controversy, requires a combination of sympathy and detachment, and often presents the person engaged in it with conflicts between incommensurable goods, while nevertheless requiring him or her to pursue what I have termed the good of political fraternity.\(^{106}\)

Kronman defines a community that values “political fraternity” as “one in which the members of a community are joined by bonds of sympathy despite the differences of opinion that set them apart on questions concerning the ends, and hence the identity, of their community.”\(^{107}\) Kronman believes that the impartial judge attempts to distance herself from her own views, but not by adopting some fictional “neutral” position from which to view the conflict before her; instead, she attempts to see the dispute from the perspectives of the parties and other members of society. The impartial judge thus represents an impersonal, but not an antiseptic, ideal.

The prediction model undermines the ideal of the impartial judge. It conceptualizes a high court as the sum total of the views of the individual judges. By contrast, the ideal of impartiality requires that judges attempt to separate their individual views from the requirements of the law. Thus, even if the high court judges are persons of impeccable character, the prediction model undermines the ideal of impartiality by equating particular high court judges' views with the law.

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\(^{105}\) See generally Peter M. Shane, Rights, Remedies and Restraint, 64 CHI.-KENT L. REV. 531 (1988) (analyzing various rhetorical uses of the phrase “judicial restraint”).


\(^{107}\) Id. at 93.
The doctrine of stare decisis also manifests the ideal of impersonal judgment, and it too would be undermined by adoption of the prediction model. A new judge cannot simply ignore past decisions. While stare decisis does not preclude the occasional overruling of cases, the fact that a court's personnel have changed and the new judges have a different view of the law from that of their predecessors is not, by itself, a sufficient basis for overruling; the prediction model's suggestion that this is a sufficient basis for overruling erodes public faith in, and the reality of, the rule of law.\(^{108}\)

The doctrine of stare decisis rests upon a conception of a court continuing over time. To be sure, doctrines and attitudes may evolve, but the court continues.\(^{109}\) Just as we understand that a court may have an institutional existence beyond the existence of its members from one historical period to another, so too we ordinarily conceive of a court as more than the sum of its members at any given time.\(^{110}\) Hence, for example, a judge who dissents in one case will nonetheless generally apply its principles in a later case, recognizing that as precedent it stands on an equal footing with

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\(^{108}\) See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2813–14 (1992) ("To overrule prior law for no other reason than [a present doctrinal disposition to come out differently] would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."); Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) (quoted supra note 3).

\(^{109}\) A court continues over time, despite its change in personnel, in much the same way that a person continues to exist over the course of her lifetime even though her molecules, appearance, views, attitudes, and attachments may change. In some philosophical sense, we may agree with Heraclitus that one can never step in the same river twice, see C.E.M. JOAD, GUIDE TO PHILOSOPHY 178 (1936), or with Hume that there is no firm basis for our belief in extended consciousness over time. See DAVID HUME, A TREATISE OF HUMAN NATURE app. at 635 (L.A. Selby-Bigge ed., 1888) ("If perceptions are distinct existences, they form a whole only by being connected together. But no connexions among distinct existences are ever discoverable by human understanding. We only feel a connexion . . . ."); see also SURENDAR NATH DASGUPTA, A HISTORY OF INDIAN PHILOSOPHY 158–62 (1957) (describing the Buddhist doctrine of momentariness). But see John Locke, An Essay Concerning Human Understanding bk. II, ch. XVII, §§ 19–20, at 460 (Alexander C. Fraser ed., 1959) (attributing continuity of personal identity to memory). Whatever one makes of the continuity question as a philosophical matter, however, as a practical matter the premise that persons, things, and institutions continue over time is both sensible and essential to the regulation of human affairs.

\(^{110}\) As Justice Blackmun stated from the bench upon the occasion of his retirement, "ours is a common, not an individual, task . . . ." Blackmun Retires, with Tribute from Court, N.Y. TIMES, July 1, 1994, at A16. His successor, then-Judge Breyer, expressed a similar view during his confirmation hearings, expressly tying the dynamics of a multi-judge court to the ideal of impersonal justice, stating: "Consensus is important for a number of reasons. One is the effort to obtain consensus trends to downplay the individual ego of the individual judge, and that makes it more likely that there won't be subjectivity and there won't be personal views . . . ." Excerpts from Hearing on Breyer Nomination to High Court, N.Y. TIMES, July 14, 1994, at D22.
cases decided before she became a judge. 111 For a judge to continue to adhere to her views once they have been rejected by her colleagues requires some special justification. 112

The precedential weight afforded plurality opinions of the Supreme Court also shows how the Court functions as an institution rather than the sum of the views of its members. When a majority of the Court agree on the outcome of a case, but the case produces no majority opinion, the judgment in that case will have less precedential weight in later cases before the Court than a majority opinion. 113 The majority opinion reflects the considered view of the Court, acting as a court, and is therefore entitled to more respect than the view of any individual Justice or group of Justices acting in their individual capacities.

It is true that as far as the lower courts are concerned, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” 114 However, this appears merely to be a necessary convention for bringing clarity to the law, 115 rather than an endorsement of the reductionist view that the Court is but the sum of the views of individual Justices. It certainly does not reflect an acceptance of the pre-

111. See Lewis A. Kornhauser & Lawrence G. Sager, Unpacking the Court, 96 YALE L.J. 82, 111 (1986) (“The extent to which incoherence will plague a multi-member court will depend in part on how each judge conceives her role. The most serious problem will arise if no judge believes that she has a duty to accommodate her judgment in a case before her to prior decisions of the court which she believes were wrongly decided.”).

112. For Justices Brennan and Marshall (and for Justice Blackmun during his last Term on the Court), the gravity of imposing the death penalty justified sacrificing institutional coherence. Brennan and Marshall would have held the death penalty unconstitutional under all circumstances in Gregg v. Georgia, 428 U.S. 153, 230–31 (1976) (Brennan, J., dissenting), and dissented from every application of the death penalty thereafter. See Jordan Steiker, The Long Road Up from Barbarism: Thurgood Marshall and the Death Penalty, 71 TEX. L. REV. 1131 (1993) (explaining that while Justice Marshall never wavered from his belief in the unconstitutionality of the death penalty, his reasons evolved); see also Callins v. Collins, 114 S. Ct. 1127, 1129–30 (1994) (Blackmun, J., dissenting) (stating that the states have been unable to design death penalty procedures consistent with the requirements of the Eighth Amendment, and vowing, “[f]rom this day forward, I no longer shall tinker with the machinery of death”).

113. See, e.g., United States v. Pink, 315 U.S. 203, 216 (1942) (“While it was conclusive and binding upon the parties as respects that controversy . . . the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases.”) (citing Hertz v. Woodman, 218 U.S. 205, 213–14 (1910)).


diction model because in ascertaining whose votes were necessary to the judgment, the lower courts look to the Court as it existed at the time of the plurality decision, not at the time the lower court must apply the plurality decision. If the procedure were designed to predict how a present-day majority might vote, the latter approach would be more efficacious.

The prediction model requires lower court judges, as well as the lawyers and clients who appear before them, to conceive of law as a prediction of how the particular individuals sitting on the high court would resolve the issue presented. This conception is inconsistent with central specific practices of American law—including the norm of the impartial adjudicator, the doctrine of stare decisis, and the institutional integrity of courts. More broadly, the prediction model is inconsistent with the overarching theme of the rule of law, of which these specific practices are manifestations.

It is difficult to imagine that the marginal and partial benefits that might accrue from adopting a predictive view of law could outweigh the costs that result from undermining the rule of law. Therefore, I shall not attempt to balance these competing concerns explicitly. Instead, I will respond to one objection to the entire rule-of-law-based argument: that the concept of impersonal law is a myth because judges' personal views inevitably influence their professional judgment.

C. The Role of Judicial Personality in a System of Impersonal Justice

To acknowledge the impersonal ideal of law does not require that one deny that an individual judge's experiences, education, temperament, and values often play a decisive role in her resolution of cases. Indeed, if one accepts that principles of morality often should and do inform judicial decisionmaking, it would be unwise and unjust for judges to attempt to

116. See, e.g., Planned Parenthood v. Casey, 947 F.2d 682, 693–94 (3d Cir. 1991) (explaining the Marks standard for discerning the law based on a plurality decision), aff'd in part and rev'd in part on other grounds, 112 S. Ct. 2791 (1992); id. at 694–97 (applying the Marks test to the Court's splintered decisions concerning abortion, but ignoring the fact that Justices Brennan and Marshall had retired since the Court's then most recent abortion decision, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989)).

117. See supra Part III.D.

118. Because of the importance of these personal characteristics, it matters a great deal to whom we entrust the business of judging. See generally KRONMAN, supra note 106, at 319.

119. See, e.g., BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 173 (1921) ("My duty as judge may be to objectify in law, not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of the men and women of my time."); DWORINK, supra note 100, at 263 ("The spirit of integrity . . . would be outraged if
separate value judgments from legal judgments. However, one can distinguish between giving legal effect to value judgments in the course of consulting other sources of law, and giving legal effect to value judgments simply because the value judgments are those of the judge who happens to be assigned the case. Judges rarely believe it appropriate to refer to their personal views expressly in deciding a case, and when they do, it is typically to explain why their personal views are irrelevant to the decision.\textsuperscript{120}

Furthermore, the requirement that judges justify their decisions according to impersonal principles plays an important part in ensuring that the decisions can in fact be justified by impersonal principles. This requirement serves to reinforce democratic values by limiting judicial power. As I have stated elsewhere:

Legal and judicial culture play a critical role in checking abuses of the judge's countermajoritarian power. Central to that culture is the notion that any judicial decision must be justified by the giving of reasons. A justice who refuses to explain her decisions might not thereby commit an impeachable offense, but she would lose the respect of the legal community, which, in the long run, would undermine her ability to translate her views into law. For the judiciary, giving reasons justifies the exercise of governmental authority, much as elections justify its exercise by the political branches.\textsuperscript{121}

Moreover, even if one believes that as a general matter the constraints law places on judicial decisionmaking are quite weak, permitting judges to in-

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\textsuperscript{51} Dorf, supra note 51, at 2029 (footnote omitted).

\textsuperscript{120} See, e.g., Planned Parenthood v. Casey, 112 S. Ct. 2791, 2806 (1992) ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision."); Texas v. Johnson, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring) ("The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result . . . ."); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646-47 (1943) (Frankfurter, J., dissenting) ("Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime.").
voke this fact as a justification for resolving cases by reference to personal views only further weakens law's power to constrain. 122

Impersonal law is not so much a myth as a noble aspiration. The prediction model, if widely accepted, would breed disrespect for law by encouraging the public to act like Holmes' bad man, understanding the law as imposing an obligation not to get caught,123 rather than an obligation to conform to a norm. To be sure, contract law includes a doctrine of efficient breach, under which a contract to do X is understood as imposing an obligation to do X or pay the resulting damages from not doing X.124 But this hardly describes all law. Certainly criminal laws impose an obligation to obey, rather than to obey or cheerfully disobey and accept the appropriate punishment: As Professor Colb has noted, the noncommission of a crime is very different from the commission of a crime followed by a punishment.125 The same is true of much of tort law as well.126

To be sure, the prediction model does not authorize lower court judges to invoke their own personal views; they invoke the (predicted) views of the judges who sit on the high court. But this nonetheless exacerbates the departure from the ideal of impersonal justice. The prediction model conditions lower court judges—and derivatively, the lawyers and litigants who come before them—to believe that real adjudicatory authority resides in the individual judges of the high court. Given the low probability of high court review of any legal controversy, primary actors subject to law are likely to feel less bound to regulate their own conduct or to accept the

122. See Scott Altman, Beyond Candor, 89 Mich. L. Rev. 296 (1990) (arguing that judges ought not to be introspective about the arguably personal bases for their decisions).
123. HOLMES, supra note 6, at 168–69.
124. See, e.g., id. at 175 ("The duty to keep a contract... means a prediction that you must pay damages if you do not keep it—and nothing else.").
125. See Sherry F. Colb, Freedom from Incarceration: Why Is This Right Different from All Other Rights?, 69 N.Y.U. L. Rev. (forthcoming 1994) (noting that incarcerating persons who perform proscribed acts deprives them of the fundamental right of liberty from physical confinement and therefore ought to trigger heightened constitutional scrutiny, even though taking measures to make it impossible for persons to perform the proscribed acts does not necessarily raise constitutional concerns).
126. Indeed, when private actors explicitly arrange their affairs on the assumption that they are equally free to satisfy a civil obligation or to violate it and pay damages, they may generate community outrage. See, e.g., Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 387–88 (Ct. App. 1981) (affirming a multi-million dollar punitive damages award against automobile manufacturer who knew of dangerous defect but chose not to correct the condition because recall costs would exceed manufacturer's projected liability).
authority of a lower court, if the judges of the high court constitute the only true source of law.\textsuperscript{127}

An expressly prediction-based model would undermine the ideal of impersonal justice by merging law and politics.\textsuperscript{128} The example in Part II in which an intermediate state court predicts how the state's highest court would rule based on the statements of the high court judges in their election campaigns illustrates this problem,\textsuperscript{129} which affects jurisdictions with both appointed as well as elected judges. For instance, may a federal district judge base a prediction of how the Supreme Court will rule on the election of a new President and the failing health of several sitting Justices? If the district judge determines that the case would not reach the Supreme Court until after the next election, does the prediction model permit, or perhaps even require, her to speculate as to which Presidential candidate will win? These tasks seem wholly extra-judicial; yet one can imagine that in an appropriate case they would provide the most reliable basis for prediction.\textsuperscript{130}

\textsuperscript{127} For example, Lieutenant General Claudius E. Watts III, president of The Citadel, appeared to accept the prediction model of lower court adjudication when he expressed defiance of a federal district judge's order that the all-male state-supported military academy admit a woman. He stated, "An institution as venerable as ours should not be required to transform itself by being forced to become co-educational until after the United States Supreme Court has ruled on an issue this significant." Ronald Smothers, Citadel Is Ordered to Admit a Woman to Its Cadet Corps, \textsc{N.Y. Times}, July 23, 1994, at 6.

\textsuperscript{128} I do not contend that judges currently decide cases without any reference to political considerations. The inevitability of some departure from the ideal of impersonal justice in a legal system administered by fallible human beings does not, however, mean that such departures ought to be encouraged.

\textsuperscript{129} See supra Part II.E.

\textsuperscript{130} Even Professor Caminker, who tentatively approves the prediction model of lower court adjudication, balks at permitting lower court judges to consult the "non-adjudicatory pronouncements and general ideological commitments" of high court judges in predicting their rulings. Caminker, \textit{supra} note 7, at 48. He thus avoids the embarrassment of endorsing a view of adjudication that, in his words, "would clearly link politics and legal judgment in a direct and public manner." \textit{Id.} at 66. In doing so, however, Caminker undermines his broader claim that lower court judges ought to take a predictive approach, for there is no principled way to distinguish "non-adjudicatory pronouncements and general ideological commitments" from nonbinding \textit{adjudicatory} pronouncements, such as a judge's stated views in a dissent. A judge's dissenting opinion no more constitutes the law than do her \textit{ex cathedra} writings or general commitments.

Although Caminker asserts that non-adjudicatory pronouncements and general ideological commitments have weak predictive value, \textit{id.} at 48-49, he provides no evidence that would distinguish such sources from those he approves, in terms of their predictive power. Certainly, a judge's general ideological commitments will sometimes be a good predictor of how she will vote in a specific case; by contrast, the fact that a judge dissented or concurred separately in an earlier case does not ensure that she will not, in a later case, accept the earlier judgment on stare decisis grounds.

While the unacceptable link between law and politics is most clearly visible when a lower court judge bases her prediction on the general political views of high court judges, the link is present whenever lower court judges conceive of their job as predicting how the individual judges
Given these shortcomings, why would anyone advocate the prediction model? The case for the model appears to rest on the mistaken assumption that its only alternative is the unsatisfactory execution model. Advocates of the prediction model begin with the legal realists’ correct observation that the formal rules of legal doctrine do not provide a complete account of how judges actually decide hard cases. They then assume that since the rules do not bind the judge, the law is whatever the judge says or will say. But this approach ignores non-rule-like sources of law that are nonetheless impersonal. Such sources include “perceived intentions of founding fathers, a conception of good social policy, and general moral principles.” Only by ignoring the existence of open-ended norm-based theories can the costs to rule-of-law values entailed in the adoption of the prediction model be made to appear justifiable.

The prediction model should be rejected as a general approach to lower court adjudication, but not because it is inconsistent with some a priori conception of law. One could imagine a legal system in which lawmaking authority is vested in particular high court judges while lower court judges and primary actors understand themselves as obligated to conform their rulings and conduct respectively to a prediction of what the high court judges would ultimately decree. However, this imaginary legal system is not the American legal system. Principles of limited judicial power deeply rooted in federal and state law limit the legitimate authority of courts to the rendering of decisions justified on impersonal grounds. The departure from this ideal that adoption of the prediction model entails thus would be inconsistent with essential principles of republican government as practiced in the United States—and as a consequence would undermine the public’s confidence in, and its felt obligation to, the rule of law.

sitting on the high court would vote. The reliance on personal factors renders the prediction enterprise political because it departs from the ideal of impersonal justice.

131. See, e.g., Caminker, supra note 7.
132. MURPHY & COLEMAN, supra note 24, at 41.
133. But see Caminker, supra note 7, at 23 (characterizing opposition to the prediction model as based on a priori conceptions of law).
134. This is not to say that all departures from the impersonal ideal are unjustified. Thus, to the extent that lower courts associate the rulings of higher courts with the views of the judges on those higher courts, the obligation of a lower court to follow the extant rulings of a higher court may partially undermine the ideal of impersonal law. This impurity could be viewed as a justifiable cost of the need for order in a system of hierarchical courts. But the inconsistency should not be overstated. Lower courts can (and typically do) follow higher court precedents because they have become part of the fabric of the law, absorbed into the system of norms. For example, if asked what legitimates the power of judicial review, most federal judges would likely respond by
V. PREDICTION IN SINGLE-JUSTICE STAY CASES

Even if one finds the above critique of the prediction model of lower court adjudication generally convincing, one might nevertheless think that there exist specific areas of law in which a predictive jurisprudence does not undermine rule-of-law values. In this section, I examine one area about which this claim might be true. When a single Justice of the United States Supreme Court must decide whether to grant a stay of a lower court’s judgment, the Justice attempts “to determine whether four Justices would vote to grant certiorari, to balance the so-called “stay equities,” and to give some consideration as to predicting the final outcome of the case in [the Supreme] Court.”135 This is an expressly prediction-based model of adjudication. Is this consistent with the general critique of the prediction model? Putting the question differently, is there anything special about the single-Justice stay context that justifies prediction?136

In contrast with a lower court judge who may or may not understand her job as simply carrying out the wishes of a higher court, a single Justice asked to grant a stay is universally agreed to be acting for the full Court. Individual Justices have the power to grant stays because it is often impossible or inconvenient to convene the full Court to consider a stay application in time to prevent the application from becoming moot.137 Hence, when an individual Justice decides whether to grant or deny a stay, she acts in the Court’s name, not in her own. As Justice Marshall put it, “when I sit in my capacity as a Circuit Justice, I act not for myself alone but as a surrogate for the entire Court, from whence my ultimate authority in these matters pointing to the principles elaborated in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), rather than their obligation to do the bidding of Chief Justice John Marshall or his successors. Higher court precedents, in other words, give rise to legal norms.

137. See Scali, supra note 136, at 1026-27 (noting that Congress authorized single-Justice stays to facilitate “rapid decision-making and the reduction of the Court’s heavy workload”); accord Comment, supra note 136, at 436 & n.5; Felleman & Wright, supra note 136, at 981. When the stakes are high, in cases in which a death-sentenced petitioner seeks a stay of his imminent execution, individual Justices appear to give less weight to the need for speed and efficiency, typically referring the application to the full Court. E.g., Gacy v. Page, 114 S. Ct. 1667 (1994) (Mem.); Garrett v. Texas, 112 S. Ct. 1072 (1992) (Mem.); Rodriguez v. Colorado, 498 U.S. 1055 (1991) (Mem.).
Acting as a surrogate, it makes some sense for the individual Justice to hazard a prediction as to what her colleagues would do.

Despite the frequent claim that a Circuit Justice must predict how his or her colleagues would vote, in the vast majority of the reported single-Justice stay cases, the Justice notes the requirement that he or she make a prediction, and then explains why a stay ought or ought not to be granted without any reference to other Justices' views. Since these cases are not, in my view, true prediction cases, I concentrate on the much smaller category of cases in which a Justice bases a prediction upon an assessment of the views of his or her colleagues.

In his capacity as Circuit Justice, then-Justice Rehnquist described his task in the following terms:

[A]s has been noted before in many Circuit Justices' opinions, the Circuit Justice faces a difficult problem in acting on a stay. The Justice is not to determine how he would vote on the merits, but rather forecast whether four Justices would vote to grant certiorari when the petition is presented, predict the probable outcome of the case if certiorari were granted, and balance the traditional stay equities. All of this requires that a Justice cultivate some skill in the reading of tea leaves as well as in the process of legal reasoning.

On this account, predicting other Justices' votes involves something beyond conventional legal reasoning.

A review of single-Justice stay cases reveals that Justice Rehnquist's depiction is accurate. On occasion, a Circuit Justice will actually provide reasons why, apart from the Justice's own views of the law, his or her colleagues would be likely to vote in a certain way. One obvious means of doing this is for the Circuit Justice to consult the prior merits votes of indi-


139. A WESTLAW search turned up over 80 reported single-Justice stay cases from January, 1980, through April, 1994, in which the Circuit Justice expressly referred to his or her obligation to predict his or her colleagues' votes. In over three-quarters of these cases, however, the reference appears to be conclusory. The Circuit Justice does not give any indication—apart from his or her own assessment of the case—why other Justices would vote in accordance with the prediction. See, e.g., INS v. Legalization Assistance Project, 114 S. Ct. 422, 424 (1993) (O'Connor, Circuit Justice); Baltimore City Dep't of Social Servs. v. Boaknight, 488 U.S. 1301 (1988) (Rehnquist, Circuit Justice); Curry v. Baker, 479 U.S. 1301 (1986) (Powell, Circuit Justice); Bellotti v. Latino Political Action Comm., 463 U.S. 1319 (1983) (Brennan, Circuit Justice). I discuss cases in which the Circuit Justice indicates why he or she believes the particular members of the Court would vote in one way or another below. See infra notes 142-46 and accompanying text.

vidual colleagues to predict their likely disposition towards a certiorari petition.141

Other means of prediction are less overtly personal. For example, a Justice may cite the fact that the Court has recently denied certiorari in a case presenting issues similar to those presented by the stay application.142 This qualifies as prediction because certiorari denials do not ordinarily set any precedent.143 Thus, no norm can be found in a denial of certiorari. If the Justices vote to deny certiorari in case 1, and then vote to grant certiorari in case 2 presenting the same issue, they do not thereby overrule the disposition in case 1. The fact that the Court denied certiorari in a similar case does suggest, however, that fewer than four Justices believed a case of the type presented warranted review, and that absent a change of personnel or intervening change of circumstances such as the development of a split of authority in the lower courts, the Justices will conclude that the second case does not warrant review either. Although the Circuit Justice relies on impersonal materials—here the action of the full Court in denying certiorari—the underlying reason for doing so is an assessment of how individual Justices would vote.144

141. See, e.g., In re Roche, 448 U.S. 1312, 1314–15 (1980) (Brennan, Circuit Justice) (discerning views by looking at which Justices had joined prior majority opinions, dissents, and concurrences).

142. See, e.g., Packwood v. Senate Select Comm. on Ethics, 114 S. Ct. 1036, 1038 (1994) (Rehnquist, Circuit Justice) (“Our recent denial” of “a petition for certiorari raising this precise issue” “demonstrates quite clearly the unlikelihood that four Justices would vote to grant review on this issue.”); South Park Indep. Sch. Dist. v. United States, 453 U.S. 1301, 1303–04 (1981) (Powell, Circuit Justice) (“The issues presented by applicants are almost identical to those presented three years ago, when the Court voted to deny certiorari.”).

143. See, e.g., Brown v. Allen, 344 U.S. 443, 491–92 (1953) (“Thirty years ago the Court rather sharply remanded the Bar not to draw strength for lower court opinions from the fact that they were left unreviewed here. ‘The denial of a writ of certiorari imports no expression of opinion upon the merits of the case . . . .’”) (quoting United States v. Carver, 260 U.S. 482, 490 (1923)); see also Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950) (“The one thing that can be said with certainty about the Court’s denial of Maryland’s petition in this case is that it does not remotely imply approval or disapproval of what was said by the Court of Appeals of Maryland.”).

144. By contrast, a Circuit Justice’s reliance upon a grant of review in a similar case as a basis for resolving a stay application, see, e.g., United States Postal Serv. v. National Ass’n of Letter Carriers, 481 U.S. 1301, 1302 (1987) (Rehnquist, Circuit Justice) (observing that the Court had already granted certiorari in a case raising “the identical issue”), typically constitutes an impersonal—i.e., nonpredictive—method. When a certiorari petition presents an issue that the Court expects to resolve in a case already on its plenary docket, the Court ordinarily holds the petition pending the resolution of that case. See STERN ET AL., supra note 1, § 5.12(b), at 249. Thus, when a Circuit Justice receives a stay application presenting such an issue, she may rely on that fact as part of her own assessment of whether to preserve the status quo so that a remand would be possible following the plenary decision. E.g., California v. Hamilton, 476 U.S. 1301, 1302 (1986) (Rehnquist, Circuit Justice) (“I believe that a majority of this Court would not want to
A Circuit Justice's reliance on past certiorari denials or the prior merits votes of colleagues as a basis for the predictions necessary to decide whether to grant a stay application does not undermine the rule of law, in the way that prediction generally does, because no idealized law of certiorari grants and denials exists to undermine. The decision to grant or deny certiorari is discretionary, and therefore inherently somewhat personal.

This is not to say that the prediction approach is the only defensible way of resolving stay applications. Lower court judges deciding whether to grant a preliminary injunction must consider factors quite similar to those that bear on the Circuit Justice's decision, and do so without attempting to predict how other judges would resolve the case. It would not be unworkable for an individual Circuit Justice to decide whether or not to grant a stay based entirely on her own assessment of what the law requires. Moreover, it may be something of an overstatement to say that there is no law of certiorari grants and denials. The Supreme Court Rules set forth factors to be considered in deciding whether to grant or deny a certiorari petition. Although application of these factors, unlike application of a statute, sets no formal precedent, the factors limit the Justices' discretion in disposing of certiorari petitions. Thus, there may be some real deviation from the ideal of impersonal justice whenever a Circuit Justice hazards a prediction about how her particular colleagues will vote.

Nonetheless, if one accepts the view that the requirement of a speedy decision justifies the conception of the Circuit Justice as surrogate for the full Court, then this conception provides considerable support for the existing prediction standard. Under this standard, there appear to be few limits to the sources the Circuit Justice may consult. For example, years of experience on the Court may lead Justice A to believe that Justice B almost invariably votes to grant a certiorari petition that squarely presents an issue as to which the federal appeals courts are divided, even if the issue is not of overriding importance. Justice A's view of Justice B might be based largely

dispose of the petition for certiorari in this case before a decision is rendered in "a case presenting a related question.")

145. When deciding whether to grant a preliminary injunction, courts weigh: (1) the significance of the threat of irreparable harm to the moving party if relief is not granted; (2) the harm that granting the injunction will inflict on the non-moving party; (3) the probability that the moving party will succeed on the merits; and (4) the public interest. 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948, at 430-31 (1973).

146. See Scali, supra note 136, at 1049-52 (arguing that the prediction standard ought to be abandoned because the individual Justices do not make accurate predictions and because preliminary decisions cast as predictions tend to be given undue weight in later stages of the same case).

147. See SUP. CT. R. 10.
on unpublished conference votes,\textsuperscript{148} or unrecorded statements by Justice B. In other words, there may be no formal acknowledgment that Justice B applies the certiorari criteria in a somewhat different manner from other members of the Court. Nonetheless, there would appear to be nothing improper about Justice A calculating the likelihood of four votes for granting the petition by taking account of Justice B's individual proclivity. On the whole, this approach enhances the accuracy of Justice A's prediction.

Does this mean that all sources of information may legitimately be used by the Circuit Justice? Suppose Justice A believes that Justice C always votes to deny petitions presenting explosive issues if the outcome has the potential to benefit the Republican Party nominee in a Presidential election. We may assume that Justice C has never articulated this as the reason for his voting pattern—either because he wishes to disguise his true motives, or because he is not fully aware of them. If Justice A receives a stay application presenting the kind of issue that A believes would prompt a politically motivated vote to deny certiorari from Justice C, should A take that into account in predicting how the full Court would resolve the case? This looks corrupt, although it is not obvious that A's decision to consider C's political calculations renders the decision corrupt; perhaps the corruption is due entirely to C's underlying illicit criterion.\textsuperscript{149}

On the other hand, by taking account of C's corrupt certiorari criterion, in some sense A becomes an accomplice.\textsuperscript{150} Moreover, Justice A may reason that no litigant has a right to a decision based on Justice C's political motives, so no unfair prejudice results from A's refusal to take them into account. This example exposes the peril of a prediction approach, even when prediction appears to be a defensible method, as in the single-Justice stay cases. Prediction occasionally requires judges to employ adjudicative criteria that they rightly consider wholly illegitimate.

Of course, even under a nonpredictive impersonal approach, a lower court judge will also sometimes find herself in this position. For example, the lower court judge may believe that some controlling decision of the

\textsuperscript{148} "Most orders of the Court denying petitions for writs of certiorari do no more than announce the simple fact of denial, without giving any reasons therefor." \textit{Stern et al.}, supra note 1, § 5.5, at 234.

\textsuperscript{149} By contrast, in the example involving the newly-elected state high court judges, see \textit{supra} Part II.E, the appearance of corruption stems entirely from the lower court's prediction based on campaign statements. If sincerely justified in impersonal terms, the decision of the new high court judges itself may be perfectly legitimate. See \textit{supra} note 57.

\textsuperscript{150} Cf. Palmore v. Sidoti, 466 U.S. 429 (1984) (holding that the Fourteenth Amendment's Equal Protection Clause prohibits a state judge from basing a custody determination on the belief that a child raised by an interracial couple will face discrimination, because such a decision gives legal effect to the otherwise private discrimination).
high court is so egregiously wrong as to be illegitimate. Nonetheless, she follows the high court decision because the principle of vertical stare decisis obliges her to do so. To some extent, the Circuit Justice who believes her colleagues would apply a certiorari criterion she considers illegitimate may justify her own use of that criterion by invoking her obligation to act as a surrogate for the Court. But because this obligation to act as surrogate is less central to the functioning of the legal system than the need for lower courts to follow the decisions of higher courts, the Circuit Justice may have a weaker justification for applying a certiorari criterion she considers illegitimate than a lower court judge has for applying a higher court decision she considers illegitimate.

The single-Justice stay cases comprise one area of the law in which an explicitly prediction-based approach can be justified. Even in this unusual context, however, attempts to predict how specific judges will vote can create jurisprudential difficulties. In the next section, I examine another area of the law in which the courts purport to employ an expressly prediction-based approach—diversity cases.

VI. PREDICTION IN DIVERSITY CASES

In diversity cases, the law is settled that where state law is unclear, a federal court must attempt to predict how the state high court would resolve a factually indistinguishable case. In this section, I describe how the federal courts adopted this view, and its practical meaning. I then argue that the predictive approach to determinations of state law is unjustified.

A. The Origin and Contemporary Justification for the Prediction Approach in Diversity Cases

The view that a federal judge's job in a diversity case is to predict how the state's highest court would rule could be traced to this statement in 

Erie Railroad v. Tompkins: "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." Even under Swift v. Tyson, however, in cases involving state statutes, federal courts sitting in diversity accepted the highest state court's interpretation of the statute. Thus, combining this pre-existing deference to state high courts on statutory matters with Erie's mandate of deference as to common law, Justice Brandeis' opinion implies that federal courts will find all state law in pronouncements of the state's highest court.

The supremacy of state high courts as to state law leads to a simple rule in cases where the state court has resolved a legal question: The federal
court must follow the state high court's ruling. But what should the federal court do if there is no state high court authority? In 1940, the Supreme Court decided a group of cases requiring that under these circumstances the federal courts must defer to decisions of the lower state courts. Those decisions were roundly criticized by, among others, Professor Arthur Corbin and Judge Charles Clark.

Corbin argued that the 1940 decisions were mistaken because they introduced a methodological gap between state court adjudication and federal court adjudication in diversity cases. A federal court would have to follow a lower state court decision, whereas the state high court, or in some cases other state lower courts, would be free to ignore it. In Corbin's words, in determining state law, a federal court "must use its judicial brains, not a pair of scissors and a paste pot." Judge Clark expressed similar views. He complained that the 1940 cases required federal judges to engage in "formalistic" reasoning, acting as "hollow sounding board[s], wooden indeed, for any state judge who cares to express himself." To some degree, Corbin, Clark, and others overreacted to the 1940 cases. The Court had not decreed that state lower court opinions must invariably be followed. Instead, the Court's language effectively established a rebuttable presumption that state lower court opinions reflected state law, requiring that they be followed "in the absence of more convincing evi-

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157. One leading authority states the rule as follows: "Even if, by the lights of the federal court or the courts of other states, a rule of law as announced by a state's highest court is anomalous, antiquated, or simply unwise, it must be followed unless there are very persuasive grounds for believing that the state's highest court no longer would adhere to it." 19 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4507, at 91-92 (1982) (footnotes omitted); see also id. at nn.32-33 (collecting cases). I discuss the reasons why a federal court may anticipate that a state high court would overrule a decision below. See infra note 172 and accompanying text.


161. Corbin, supra note 159, at 771 (arguing that federal courts should be permitted to look to "the same 'persuasive data'" as state courts can) (citation omitted).

162. Id. at 775.

163. Clark, supra note 160, at 284.

164. Id. at 290-91.
dence of what the state law is."165 The Court had at least paid lip service to the view that "it is the duty of the [federal courts] in every case to ascertain from all the available data what the state law is . . . ."166 Thus, when the Court eventually made clear that federal courts are not inevitably bound by state lower court rulings,167 it was not acting inconsistently with the 1940 cases, so much as underscoring the reason why lower court decisions were to be given deference: because they provide a generally reliable basis for predicting how the state high court will rule.

This move toward a predictive view of state law was not an inevitable consequence of the recognition that strict adherence to state lower court rulings leads to an overly mechanical approach in diversity cases. Instead, one could read both Corbin's and Clark's attacks on the rigidity of the 1940 cases as critiques of the execution model of diversity adjudication, with the more open-ended elaboration model as the preferred alternative. Neither Corbin nor Clark distinguished between the methods used by state lower court judges and state high court judges. In Corbin's view, all courts ought to use "all the available data."168 Clark went so far as to suggest that by straightjacketing federal judges, the mechanical interpretation of Erie169 made it difficult for federal judges to use their expertise in developing state law.170 In rejecting a mechanical approach to diversity cases,


166. West, 311 U.S. at 237.

167. Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967). Bosch was not a diversity case, but a federal estate tax case in which a preliminary issue of state law arose. Nevertheless, the Court noted that the same principles applied as in diversity cases. Id. At various points in the Bosch opinion, the Court suggested that the reason the federal court could disregard the state court ruling in question was that the ruling came from a state trial court. E.g., id. at 462 n.3. However, the distinction is untenable because the leading 1940 case, Fidelity Union, involved a ruling by a state trial court—the New Jersey Chancery Court. 311 U.S. at 175. (The Fidelity Union Court's reference to an "intermediate state court," id. at 177, is therefore mysterious. See Corbin, supra note 159, at 767 n.10 (noting that "the Vice-Chancellor is the judge of a court of first instance"). As the Bosch Court stated: "Under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling." 387 U.S. at 465.

168. Corbin, supra note 159, at 771.

169. As Judge Friendly noted, the mechanical approach was not inherent in Erie itself. See Friendly, supra note 154, at 400 ("Nothing in the Erie opinion gives the slightest basis for thinking Brandeis would have disagreed with Professor Corbin's comment that it could not have been intended that federal judges were 'being directed to act differently from the Pennsylvania judges themselves.'") (quoting Arthur L. Corbin, The Common Law of the United States, 47 YALE L.J. 1351, 1352 (1938)).

170. Clark, supra note 160, at 283. But see Dolores K. Sloviter, A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism, 78 VA. L. REV. 1671 (1992) (arguing that federal diversity jurisdiction undermines state sovereignty and therefore should largely be abolished);
both Corbin and Clark apparently assumed that state lower courts and state
courts of last resort ordinarily engage in the same general processes, and
that federal courts sitting in diversity ought to follow suit.

The view that federal courts ought to predict state high court rulings
appears to be based on: (1) the assumption that state lower courts generally
follow the execution model, combined with (2) the familiar Erie policy of
equal treatment in state and federal court. If a case is tried in the state
court system, the litigants will typically have access by way of appeal to the
state's highest court. By contrast, in cases tried in federal court, any appeal
will be within the federal system. This creates the potential for unequal
treatment because the state's highest court may make new law in the case
originating in state court; however, if the federal district court were to act
as if it were a state trial court applying the execution model, the parties to
the state law claim in federal court would be treated differently. To avoid
this asymmetry, the argument goes, a federal court sitting in diversity ought
to mimic the state's highest court rather than imitate a state trial court.\footnote{Northrop Corp. v. Litronic Indus., 29 F.3d 1173, 1180 (7th Cir. 1994) (Ripple, J., concurring) (warning that federal judges sitting in diversity should not comment on wisdom of state's approach to its own law).}

Of course, there is only a significant asymmetry if one assumes that in
determining state law lower state courts and federal courts generally use
methods that differ significantly from those used by state high courts. If, on
the other hand, the lower state courts and federal diversity courts generally
apply the elaboration model, then access to the state's highest court does
not introduce a new asymmetry between state and federal courts. The
distinction between a federal court and a state trial or intermediate appel-
late court would not be significantly greater than the difference between a
federal court and a state high court.

Even if the lower state courts and federal courts follow the elaboration
model, one inequality remains, resulting from the fact that the federal court
litigants lack access to the state high court: Neither the lower state courts
nor federal diversity courts can overrule existing state high court prece-
dents, but only litigants in state court can receive the benefit of an overruling decision by the state high court. If one considers this inequality serious, that would justify a departure from the normal practice in federal court, and federal diversity courts would thus be able to disregard an existing state high court precedent that they believe the state high court would overrule if presented with the opportunity. Perhaps for this reason, some federal courts have declined to follow existing state high court precedents when, under analogous circumstances, they would be required to adhere to existing United States Supreme Court precedents on questions of federal law.\textsuperscript{172}

Nonetheless, it is hardly obvious that the lack of access of federal court litigants to the state's highest court justifies a different jurisprudential philosophy for diversity cases. For one thing, it is not always true that litigants in state court have access to the highest court of the state. Many state high courts have discretionary review policies similar to the United States Supreme Court's certiorari policy.\textsuperscript{173} Nor is it true that litigants in federal court necessarily lack access to state high courts. Federal courts have the discretion to certify questions to a state high court.\textsuperscript{174} Abstention in favor of a pending state court decision is another possibility.\textsuperscript{175} If one were

\textsuperscript{172} Compare McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 662-66 (3d Cir. 1980) (holding that Ohio Supreme Court's decision in Melnyk v. Cleveland Clinic, 290 N.E.2d 916 (Ohio 1972), undermined policy basis for its earlier decision in Wyler v. Tripi, 267 N.E.2d 419 (Ohio 1971), so that federal court was not bound to follow Wyler even in case factually closer to Wyler than to Melnyk) and Mason v. American Emery Wheel Works, 241 F.2d 906, 909-10 (1st Cir. 1957) (holding that a 1928 decision of Mississippi Supreme Court requiring privity of contract between plaintiff injured by defective product and manufacturer was not binding because, if faced with the question anew, Mississippi Supreme Court would "declare itself in agreement with the more enlightened and generally accepted modern doctrine"), cert. denied, 355 U.S. 715 (1957) with Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (discussed above, supra note 87). But see Air-Sea Forwarders, Inc. v. Air Asia Co., 880 F.2d 176, 188 (9th Cir. 1989) (stating, erroneously, that for federal diversity court to predict that California Supreme Court would overrule existing case "would be unprecedented"), cert. denied, 493 U.S. 1058 (1990).

\textsuperscript{173} See supra note 76 and accompanying text.

\textsuperscript{174} See Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974) (certification is discretionary); see also, e.g., Todd v. Societe BIC, S.A., 9 F.3d 1216, 1221-22 (7th Cir. 1993) (en banc) (certifying question where erroneous prediction of state law might have effect of funneling all similar cases into federal court, thereby precluding resolution of the issue by Illinois Supreme Court). But cf. Geri J. Yonover, Ascertaining State Law: The Continuing Erie Dilemma, 38 DEPAUL L. REV. 1, 21-22 (1988) (arguing that because of state court reluctance to accept certified questions, federal courts will inevitably have to decide some unclear issues of state law).

\textsuperscript{175} See, e.g., In re Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 850-51 (2d Cir. 1992) (directing trial court to abstain from deciding question of New York law pending resolution of same issue in state intermediate appellate court). In the absence of a pending state court case raising the same issue or some other special circumstance, however, the mere difficulty or uncertainty of state law does not by itself warrant abstention. See Louisiana Power & Light Co. v.
Prediction and the Rule of Law

seriously concerned about access to state high courts, more frequent use of certified questions or abstention might be a better response than attempting to predict what another court would do.

B. Sources of Prediction in Diversity Cases

In principle, the federal courts look to "all available data" to predict how a state high court would resolve a novel legal question. This test suggests that federal judges consider the individual views of particular state high court judges. In practice, however, federal courts typically rely upon impersonal materials in "predicting" state high court rulings.

For example, in giving effect to a New York statute that had not been construed by the New York Court of Appeals, the Second Circuit stated that it would consult the statutory language, pertinent legislative history, the statutory scheme set in historical context, how the statute can be woven into the state law with the least distortion of the total fabric, state decisional law, federal cases which construe the state statute, scholarly works and any other reliable data tending to indicate how the New York Court of Appeals would resolve the issue.

The lower federal courts typically cite these and other sources without attempting to predict how individual state high court judges would rule.

City of Thibodaux, 360 U.S. 25, 27-29 (1959) (describing kinds of cases in which deference is appropriate); Meredith v. Winter Haven, 320 U.S. 228, 234 (1943). I considered some of the costs and benefits of abstention in a related context in Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 STAN. L. REV. 235, 286-87 (1994) (discussing limited circumstances under which federal court should abstain from rendering ruling on question of state severability law).


178. E.g., Ryan v. Royal Ins. Co., 916 F.2d 731, 734-35 (1st Cir. 1990) (listing “such sources as analogous state court decisions, adjudications in cases elsewhere, and public policy imperatives”) (quoting Kathios v. General Motors Corp., 862 F.2d 944, 949 (1st Cir. 1988)); Milgard Tempering, Inc. v. Selas Corp., 902 F.2d 703, 708 (9th Cir. 1990) (listing “recognized legal sources including statutes, treatises, restatements, and published opinions [as well as] well-reasoned decisions from other jurisdictions”) (quoting Takahashi v. Loomis Armored Car Serv., 625 F.2d 314, 316 (9th Cir. 1980)); Bailey v. V & O Press Co., 770 F.2d 601, 604 (6th Cir. 1985) (listing “the decisional law of the Ohio Supreme Court in analogous cases and relevant dicta in related cases,” decisional law in the lower Ohio courts, restatements, law review commentaries, and decisions from other jurisdictions); Reeves v. American Broadcasting Cos., 719 F.2d 602, 605 (2d Cir. 1983) (listing “prior California cases construing the disputed sub-section, relevant opinions relating to other subsections . . . and accepted treatises and other authoritative sources”).
Nevertheless, judges occasionally employ some variant of the prediction model in diversity cases. In *State Farm Mutual Automobile Insurance Co. v. Armstrong*, for instance, the Third Circuit had to decide whether Pennsylvania law recognizes the right of an insurer to rescind a fraudulently obtained compulsory insurance policy in an action by an injured third party against the (fraudulently) insured party. The question had not been decided by the Pennsylvania Supreme Court, so the Third Circuit attempted to predict how that court would resolve the question.

The Third Circuit began by noting that the Pennsylvania Supreme Court had decided two cases involving the common law rights of an insurer against its insured in the voluntary market. In *Metropolitan Property and Liability Insurance Co. v. Insurance Commissioner of Pennsylvania*, the Pennsylvania Supreme Court had held that a state statute setting forth procedural requirements for terminating an insurance contract supplanted the common law right of rescission, and in *Klopp v. Keystone Insurance Companies*, the same court had held that an insurer retains the common law right of rescission for sixty days after the insurance contract's formation where the contract was fraudulently obtained. In order to predict how the Pennsylvania Supreme Court would resolve a case involving a claimed right of rescission against a third party in the involuntary market, the Third Circuit pieced together the views of five individual Pennsylvania Justices as expressed in various plurality opinions, concurrences, and dissents. The Third Circuit concluded from its exercise in head-counting that a majority of the individual Justices on the Pennsylvania Supreme Court would hold that an insurer may not rescind a fraudulently procured insurance contract in an action by a third party. In other words, the Third Circuit employed the prediction approach to ascertaining Pennsylvania law.

Although unambiguous instances of prediction such as *State Farm Mutual* are rare, some of the apparently impersonal methods federal courts use to ascertain state law may reflect an underlying assumption that the

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179. 949 F.2d 99 (3d Cir. 1991).
180. See id. at 101.
181. Id.
182. Id. at 102-03.
186. Id. at 104.
goal of the federal court is to predict how particular state high court judges will vote. For example, the Eleventh Circuit in Wammock v. Celotex Corp. stated that “[i]n the absence of evidence to the contrary, we presume that the Georgia court would adopt the prevailing rule if called upon to do so.” The Eleventh Circuit made no claim that the Georgia courts themselves presumptively follow the majority rule. Rather, the presumption appears to reflect the view that if one knows nothing else about a state high court, it is more likely, as a statistical matter, that the court will adopt a majority rule than a minority rule on any given legal question. In strictly statistical terms, this may be a reasonable presumption; yet, the Georgia court itself would not resolve a case of first impression by adopting a majority rule, simply because it is the majority rule. To be sure, the Georgia court might consider a rule’s widespread acceptance as persuasive authority, but it would exercise its own judgment as to the wisdom of the rule. There would be no presumption upon which the court could rely. The Eleventh Circuit’s reliance on the presumption introduces the kind of methodological gap between the predicting court and the court of last resort that typifies the prediction model, even though the Eleventh Circuit does not expressly refer to the views of any specific Georgia judge.

Not all departures from the elaboration model in diversity cases result in prediction. Often courts appear to veer in the opposite direction, adopting the execution model described in Part II.C. As one court put it:

A federal court may act as a judicial pioneer when interpreting the United States Constitution and federal law. In a diversity case, however, federal courts may not engage in judicial activism. Federalism concerns require that

187. 835 F.2d 818, 820 (11th Cir. 1988).
188. As support for its presumption, the Eleventh Circuit in Wammock cited Hensley v. E.R. Carpenter Co., 633 F.2d 1106, 1109 (5th Cir. 1980). Wammock, 835 F.2d at 820. But Hensley involved an assessment of Mississippi law. There the Fifth Circuit (prior to its split into the current Fifth and Eleventh Circuits), stated: “Absent evidence to the contrary, we presume that the Mississippi courts would adopt the prevailing rule if called upon to do so.” 633 F.2d at 1109 (citing United States v. Southeast Miss. Livestock Farmers Ass’n, 619 F.2d 435, 437, 439 (5th Cir. 1980)). Thus, the Wammock court clearly understood the presumption in favor of the prevailing rule as a general principle about ascertaining state law, rather than a specific principle of Georgia law.
189. To the extent that a federal diversity court considers decisions of other jurisdictions as persuasive authority, see, e.g., Reid v. Life Ins. Co., 718 F.2d 677, 680–82 (4th Cir. 1983) (considering decisions of other jurisdictions in light of principles of South Carolina contract law), or as a means of fostering nationwide predictability for commercial transactions, see Northrop Corp. v. Litronic Indus., 29 F.3d 1173, 1178 (7th Cir. 1994) (interpreting Illinois version of Uniform Commercial Code), it employs an impersonal approach.
190. See supra Part II.A.
191. See supra Part II.C.
we permit state courts to decide whether and to what extent they will expand state common law.192

Oddly, courts taking this narrow view of their function persist in describing the task as that of predicting state high court decisions.193 Use of this nomenclature can confuse even a master of federal jurisdiction, as an opinion by Judge Friendly illustrates.

Concurring in Essex Universal Corp. v. Yates,194 Judge Friendly explains how he approaches diversity cases given unclear state law. He first posits that were he a judge of the New York Court of Appeals, he would decide the question on the basis of policy considerations, and then contrasts this process with the “more modest” task “of predicting how the judges of the New York Court of Appeals would rule.”195 He goes on to note that a federal judge “must make this prediction on the basis of legal materials rather than of personal acquaintance or hunch.”196

Judge Friendly accepts the requirement that he predict how the state high court would rule. However, apparently concerned about the rule-of-law implications of adopting a prediction approach based on the views of individual state judges, he makes clear that only “legal materials” may serve as the basis for his prediction. But he does not adopt the elaboration model. Instead, the method he proposes resembles the execution model. Unlike the state high court, the federal judge cannot use policy considerations. Thus, state law rules applied to litigants in federal court will be based on a narrower range of sources than those applied to litigants in either the state high court or in the state lower courts that follow the elabo-

192. City of Philadelphia v. Lead Indus. Ass'n, 994 F.2d 112, 123 (3d Cir. 1993); accord, e.g., Taylor v. Phelan, 9 F.3d 882, 887 (10th Cir. 1993) (“As a federal court, we are generally reticent to expand state law without clear guidance from its highest court . . . .”); Shaw v. Republic Drill Corp., 810 F.2d 149, 150 (7th Cir. 1987) (stating unwillingness to “speculate on any trends in state law,” especially in cases where plaintiff voluntarily seeks in federal court an expansion of state law); Galindo v. Precision Am. Corp., 754 F.2d 1212, 1217 (5th Cir. 1985) (stating “it is not for us to adopt innovative theories of recovery or defense for Texas law, but simply to apply that law as it currently exists”); A.W. Huss Co. v. Continental Casualty Co., 735 F.2d 246, 253 (7th Cir. 1984) (discussing “the limited discretion of a federal appellate court in a diversity case with respect to untested legal theories brought under the rubric of state law”).

193. See, e.g., Batts v. Tow-Motor Forklift Co., 978 F.2d 1386, 1389 (5th Cir. 1992) (“When we are required to make an Erie guess, it is not our role to create or modify state law, rather only to predict it.”).

194. 305 F.2d 572 (2d Cir. 1962).

195. Id. at 581-82 (Friendly, J., concurring).

196. Id.
Judge Friendly's justifiable reluctance to predict the votes of individual state judges leads him to adopt a view of adjudication that ironically widens the methodological gulf between state and federal court determinations of state law in the name of fidelity to state law.

The Supreme Court has not endorsed any particular method by which lower federal courts ought to predict state law, although several Justices have given their apparent endorsement to the prediction model in diversity cases. Dissenting in *Salve Regina College v. Russell*, Chief Justice Rehnquist observed that when a federal judge attempts to predict how a state court would resolve a novel legal question, the federal judge "must use not only his legal reasoning skills, but also his experiences and perceptions of judicial behavior in that state." By contrasting experiences and perceptions with legal reasoning, Chief Justice Rehnquist suggested that legal consequences may legitimately follow from judicial behavior that cannot be explained simply by legal reasoning. The notion of "judicial behavior," moreover, may imply that a federal judge ought to scrutinize state judges' idiosyncracies.

In *Salve Regina*, Chief Justice Rehnquist was in dissent, speaking only for himself, Justice White, and Justice Stevens. The majority in the case decided that a federal appeals court should review a federal district court's judgment on a matter of state law *de novo*, rather than deferring to the district judge's view of state law. The Court reasoned that an appellate

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197. For this reason, some federal courts reject the execution model in favor of a more flexible approach that better approximates the methodology of a state high court. See, e.g., *Kathios v. General Motors Corp.*, 862 F.2d 944, 949 (1st Cir. 1988) (including "public policy imperatives" among sources of state law); *Weiss v. United States*, 787 F.2d 518, 523 (10th Cir. 1986) ("[W]e may also look to policies, principles, and state court decisions on analogous areas of Colorado law to predict how the Colorado Supreme Court would rule."); *Stafford v. International Harvester Co.*., 668 F.2d 142, 148 (2d Cir. 1981) (federal courts need not "rigidly or mechanically follow every state court pronouncement").

198. 499 U.S. 225 (1991) (holding that federal appeals court should apply *de novo* standard to state law questions in diversity suit, rather than deferring to federal district court).

199. *Id.* at 241 (Rehnquist, C.J., dissenting).

200. Like Judge Friendly, however, the Chief Justice appeared to conflate prediction with other methods, echoing the former's view that a federal judge in an *Erie* case should follow the execution model. He stated that:

Federal courts of appeals perform a different role when they decide questions of state law than when they decide questions of federal law. In the former case, these courts are not sources of law but only reflections of the jurisprudence of the courts of a State. While in deciding novel federal questions, courts of appeals are likely to ponder the policy implications as well as the decisional law, only the latter need be considered in deciding questions of state law.

*Id.* at 242.
Thus, to some extent, Salve Regina undercuts the predictive approach to diversity cases. To require federal judges to predict how state judges would rule treats the content of state law as a kind of "fact." If state law were conceived this way, then it would make sense for federal appeals court judges to defer to federal district judges' perceptions since, one might assume, the federal district judge sitting in one state has a clearer view of that state's judges than do the federal appellate judges whose jurisdictions include several states. Deference would be appropriate in the same way it is appropriate for an appeals court to defer to a trial court's findings of fact based on live testimony. By rejecting this analogy, the Court in Salve Regina seemed to reject a central premise of the prediction approach to diversity cases—that state law is reducible to whatever state court judges say in particular cases.

Nonetheless, Salve Regina did not expressly disturb the rule that absent a definitive state high court ruling, federal judges sitting in diversity must attempt to predict how the state high court would rule. The conventional justification for this model in diversity cases is the view that it is necessary to treating litigants in state and federal court equally. I have demonstrated the weaknesses of this justification and some of the confusion

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201. Id. at 231-40 (opinion of the Court).
202. Indeed, a recent academic proposal that the meaning of law be subject to the same kind of standards of proof as the existence of facts in the real world expressly connects the law-as-fact view with the prediction approach to law. See Gary Lawson, Proving the Law, 86 Nw. U. L. Rev. 859, 879 (1992) ("In the functional context of the practical lawyer's art, an interpretation is legally 'true' to the extent that it accurately predicts or describes the behavior of official agents or private actors of concern to the client.") (emphasis added).
204. Salve Regina may be seen as rejecting the approach of cases such as Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278 (2d Cir. 1981), cert. denied, 456 U.S. 927 (1982). There, the Second Circuit was required to resolve a question of Tennessee law upon which there were no opinions from the Tennessee courts. There was however, a decision of the Sixth Circuit on point, and the Second Circuit simply followed it, noting that its author "is a distinguished member of the Tennessee bar, whose sense of what may be expected of the Tennessee Supreme Court surely surpasses our own." Id. at 283 n.7. Salve Regina suggests that contrary to the Factors approach, a particular judge's familiarity with the law and judges of a given state does not, by itself, justify deference to that judge.

Of course, the Factors decision was problematic even before Salve Regina. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941), requires a federal diversity court to apply the choice of law doctrine of the state in which it sits. Thus, arguably the Factors court should have given the Sixth Circuit opinion the deference that the New York Court of Appeals would have. See Rogers v. Grimandi, 875 F.2d 994, 1002 n.10 (2d Cir. 1989); Wright et al., supra note 157, § 4507, at 112; cf. Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960) (Friendly, J.) (stating that diversity court must "determine what the New York courts would think the California courts would think on an issue about which neither has thought").
that it generates. Before considering alternative approaches, let us now turn to one last potential justification for the prediction view in diversity cases: the claim that Erie rests on the same radical realist conception of state law that underlies the prediction model of law generally.

C. The Radical Realist Roots of Erie as a Source of the Prediction Model in Diversity Cases

Writing for the Court in Guaranty Trust Co. v. York,205 Justice Frankfurter stated that Erie did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare. . . . Law was conceived as a 'brooding omnipresence' of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law, even in cases where a legal right as the basis for relief was created by State authority and could not be created by federal authority . . . .206

The prediction model of diversity jurisprudence may be justified by Justice Frankfurter's implicit assertion that Erie substituted for the brooding omnipresence the radical realist view that state law is, by definition, precisely what the state judges say it is. Is Justice Frankfurter correct? Is Erie a case about radical realism?

The opinion in Erie provides some support for Justice Frankfurter's view. As one commentator put it, in Erie the Court abandoned the "oracular" model of common law adjudication, in which judicial precedents were understood to be mere evidence of an ethereal, Platonic LAW.207 Common law judges were seen as oracles through whom the general principles of law were revealed. Under Erie, by contrast, the law has a more corporeal existence. In Justice Brandeis' words in Erie, law does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority

206. Id. at 101-02.
of that State without regard to what it may have been in England or anywhere else.\textsuperscript{208}

The invocation of "some definite authority" suggests the positivist view that a rule or principle is law because the proper authority commands it—and the further suggestion that the appropriate authority is the state's highest court invokes the radical realism of the prediction model. Furthermore, the section of Justice Brandeis' opinion in which this statement appears repeatedly relies upon Holmes' earlier realist and positivist criticisms of Swift.\textsuperscript{209}

Nevertheless, neither realism nor positivism constitutes the principal basis for the Court's opinion in \textit{Erie}. The \textit{Erie} Court invokes the realist/positivist argument for a limited purpose—to counteract the view that there exists a field of "general law" that is neither state nor federal law. As others have pointed out, the shift from \textit{Swift} to \textit{Erie} is best understood as one rooted in federalism.\textsuperscript{210} The Constitution, the Rules of Decision Act, and in appropriate cases the Rules Enabling Act, divide the space of judicial decisionmaking into state and federal domains.\textsuperscript{211} \textit{Erie} left open the size of each domain,\textsuperscript{212} but its basic holding was rather straightforward: For a variety of constitutional, statutory, and prudential reasons, there are some cases, including \textit{Erie} itself, where state law supplies the relevant rule in federal court.

In rejecting the notion of law as a general "brooding omnipresence" that is neither state nor federal, the \textit{Erie} Court thus did not rule out the possibility that there is "an omnipresence brooding over the state of Pennsylvania."\textsuperscript{213} In other words, notwithstanding Justice Frankfurter's

\begin{itemize}
  \item \textsuperscript{208} Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938).
  \item \textsuperscript{209} See id. at 79 & n.23 (citing Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370-72 (1909) (Holmes, J., dissenting); Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 532-36 (1927) (Holmes, J., dissenting)).
  \item \textsuperscript{210} See, e.g., Allan R. Stein, \textit{Erie and Court Access}, 100 \textit{YALE L.J.} 1935, 1941 (1991) ("Whatever deference is appropriately paid by the federal courts to the states pursuant to the \textit{Erie} doctrine arises from the demands of federalism.").
  \item \textsuperscript{212} The domain question has two aspects that occupy scholars in the field: (1) When state and federal law conflict, which governs?; and (2) When state law appears inapposite, do the federal courts have authority to formulate federal common law?
  \item \textsuperscript{213} Arthur L. Corbin, \textit{The Common Law of the United States}, 47 \textit{YALE L.J.} 1351, 1352 (1938).
\end{itemize}
broad remarks in York, nothing in Erie precludes the judges and citizens of a
particular state from understanding the adjudicatory process as one in
which judges find law rather than make it, or from viewing law in any oth-
er manner. The Erie Court takes federal judges as its audience and instructs
them to apply state, rather than federal, law in diversity cases. But it says
almost nothing about how to ascertain state law. It would be odd indeed if
Erie's command, based on principles of federalism, were to authorize federal
judges to employ a particular conception of state law that is not necessarily
shared by the state in question.

The period since Erie has seen an enormous increase in the scope of
national power. As a result, the federalism implications of Erie may appear
somewhat antiquated. Congress could, through legislation pursuant to the
Commerce Clause, establish federal rules of decision for virtually all of the
subject matter areas that typically arise in diversity cases. Thus, as a
matter of constitutional law, Erie provides little protection for state sover-
ignty. However, as Professor Rutherglen perceptively notes, requiring
Congress to legislate in order for federal law to displace state law has real
effect. Principles of separation of powers enforce Erie's conception of
federalism. And it is federalism, not legal realism or positivism, that
lies at the heart of the Erie doctrine.

214. Whether Congress could authorize the federal courts to formulate federal common law
substantive rules of decision for diversity cases presents a more difficult question. Compare
broad view of federal common law) with Martin H. Redish, Federal Common Law, Political Legiti-
(questioning legitimacy of most federal common law). Since Congress has not even taken the
clearly constitutional step of enacting substantive laws displacing much of state common law, the
debate about whether it could authorize the federal courts to displace state common law through
federal common law is primarily academic.

215. George Rutherglen, Reconstructing Erie: A Comment on the Perils of Legal Positivism, 10

216. Id. at 288 n.17 (citing Herbert Wechsler, The Political Safeguards of Federalism: The Role
of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543,
546-52, 558-60 (1954)); Ely, supra note 211; Paul J. Mishkin, Some Further Last Words on Erie-
The Thread, 87 HARV. L. REV. 1682 (1974)).

217. Rutherglen argues that positivism cannot by itself account for the Erie principle because
positivism's central premise is that all lawmaking authority must be traced to some pre-existing
source, but Erie's conception of federalism cannot itself be traced to any such source. Rutherglen, supra note 215, at 294-95. This clever argument feels somewhat like a magic trick,
and for that reason I hesitate to rely on it to undercut the positivist elements of Erie. After all,
the Erie Court itself seems to accept that the Constitution authorizes its view of federalism, and
this is hardly a frivolous position. See Friendly, supra note 154, at 392-98.
D. Alternative Approaches to Ascertaining State Law

If *Erie* does not dictate a predictive approach to determinations of state law, what approach ought the federal courts take? Although the federal courts uniformly treat this question as one of federal law, it is conceivable that state law ought to govern the jurisprudential choice. For concreteness, suppose that in state X, lower court judges routinely decide cases by attempting to predict how the particular judges of the X high court would resolve the question presented, and that the high court approves this practice. Is the requirement that lower courts adopt this approach part of the "laws of" state X, to be applied by a federal court in a diversity case? If so, then a federal court would adopt a predictive approach when applying the law of state X, and a different approach when applying the law of some state with a different conception of the relation of lower courts to higher courts.

To decide between state and federal jurisprudential approaches we may invoke the familiar (if somewhat inscrutable) principles by which federal judges sitting in diversity ordinarily choose whether state or federal law applies to any issue. Early post-*Erie* cases indicated that wherever the choice between state and federal law may "significantly affect the result of a litigation," state law should govern, regardless of whether the issue to be decided is considered substantive or procedural. The outcome-determinative test must now be understood, however, in light of the gloss it received in *Hanna v. Plumer*. In *Hanna* the Supreme Court held that the choice between state and federal law does not arise where a valid Federal Rule of Civil Procedure—and by implication, any other valid federal rule, statute, or constitutional provision—governs by its terms. Under those circumstances, the Rules Enabling Act (in the case of a Rule of Civil Procedure) supersedes the Rules of Decision Act and provides the relevant standard. The *Hanna* Court also observed how to choose between state law and *judge-made* federal law. *Hanna* modified the outcome-determinative test by focusing the inquiry on whether the choice between state and feder-

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220. Id.
222. See Ely, supra note 211, at 697–98.
al law "would affect [the] outcome independent of how the parties conducted the litigation."223

Applying these principles to the prediction question does not yield a clear answer. Although no federal rule or statute requires the lower federal courts to take any particular approach toward ascertaining the law on a given subject, the Constitution arguably does. In discussing the limits the rule of law places on a lower federal court's ability to adopt the prediction model, I noted that the conception of impersonal justice has constitutional roots.224 If the prediction model is unconstitutional, then a federal court may not employ it in a diversity case any more than it may in a federal question case.225 Indeed, because the apparent source of the requirement of impersonal justice is the requirement of due process—applicable to the states and the federal government alike—no state court would be permitted to use the prediction model either.

Although I accept the view that the Constitution may have jurisprudential implications,226 this argument does not quite work here. Because the doctrine of separation of powers does not even apply to the states,227 no constitutional difference exists between a state court and a state agency that adjudicates cases in accordance with due process. Further, it would be difficult to maintain that a state administrative agency would deny due process were it to predict how the state courts would decide unresolved legal questions.

One might argue that while it may be permissible for a state lower court to predict how the state high court would rule, the federal court sitting in diversity has additional constitutional constraints, perhaps rooted

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223. Stein, supra note 210, at 1947. See Hanna, 380 U.S. at 469. The original justification for the outcome-determinative test was Erie's concern for equality—that the law should be the same in the state and federal courts. See Guaranty Trust Co., 326 U.S. at 109–12. By focusing only on prelitigation differences, the Hanna Court apparently believed that it did not undermine the quest for equality, because once in court lawyers could conform to the requirements of federal practice, even if it differed from state practice. 380 U.S. at 469. For insightful critiques of the Hanna Court's approach to the choice between state law and judge-made federal law, see Stein, supra note 210, at 1946–53; Redish & Phillips, supra note 211, at 363–67 (arguing for a balancing approach loosely based on Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958)).

224. See supra notes 103–104 and accompanying text.

225. Cf. Byrd, 356 U.S. at 537 (discussing "the influence—if not the command—of the Seventh Amendment" in a diversity case) (citing Jacob v. New York, 315 U.S. 752 (1942)).


in Article III.228 This argument also falls short. My discussion in Part IV shows that a predictive approach is inconsistent with the best understanding of the rule of law. But state courts are under no obligation to adopt the best understanding of the rule of law. Federal judges sitting in diversity have no greater justification in refusing to apply what they perceive to be a bad conception of the rule of law than they do in refusing to enforce what they perceive to be an unwise or unjust state law.

It would appear, therefore, that in those cases in which federal and state judges take different approaches towards ascertaining the law, the choice will be between state jurisprudential principles and federal judge-made jurisprudential principles. Under Hanna, the modified outcome-determinative test governs this choice.

Here, as elsewhere, it may be difficult to say whether the choice between federal and state law is outcome-determinative.229 Often a predictive approach will lead to the same rule of law as a non-predictive approach; occasionally it will not. We may assume, however, that in those cases in which the issue matters, the choice will substantially affect the outcome. We then must ask whether this is the kind of prelitigation outcome-determinativeness that matters under Hanna.

To the extent that we envision the choice between predictive and non-predictive methods of adjudication as a decision about how to organize the internal decisionmaking process of a court, it appears to be procedural—a choice between different means by which primary rights and duties are enforced, but not between different sets of rights and duties themselves. On the other hand, the question whether to adopt one or another jurisprudential approach may be viewed as central to the primary rights and duties recognized by a legal system because it is a choice about whether to recognize legal norms, and if so, about how to infer their content.

228. The argument would focus on Article III’s reference to the “judicial Power.” It could be claimed that to exercise judicial power necessarily entails an impersonal view of law. In other words, one might attempt to trace the argument based on rule-of-law values described in Part IV to Article III’s invocation of the “judicial Power.” Cf. Dorf, supra note 51, at 1997 n.4. As I note in the text, I am skeptical about the persuasiveness of such an argument.

Note, however, that a stronger argument based on the language of Article III could be made in favor of the view that in deciding federal question cases, lower federal courts ought not to predict how the Supreme Court would rule. Article I vests “[t]he executive Power” in the President. Article III vests “[t]he judicial Power” in the Supreme Court and in whatever lower federal courts Congress creates. This language could be taken to imply that the lower federal courts exercise the same power as the Supreme Court, a power that does not include prediction. (This line of argument was suggested to me by John Manning.)

Moreover, *Erie* has been generally understood to require federal court adherence to state "meta" principles of law, as well as state definitions of rights and duties. For example, a federal court sitting in diversity must apply state choice-of-law principles.\(^230\) In an even closer context, the Fifth Circuit ruled that in determining the content of Louisiana law, it would follow "Louisiana's Civilian methodology with respect to interpreting law and legislation," noting further that "[t]he concept of stare decisis is foreign to the Civil Law, including Louisiana."\(^231\) In other words, the Fifth Circuit was prepared to adopt Louisiana's approach to Louisiana precedent rather than a general federal approach.

Thus, if we treat the choice between a state predictive approach and a federal non-predictive approach as an ordinary *Erie* problem, it would appear that state law ought to govern. Nonetheless, treating this as a conventional *Erie* problem begs an important question: Should the federal court even view itself as if it were a state lower court? If the federal court views itself as standing in for the highest court of the state, then state law doctrine about how lower state courts ascertain state law is irrelevant to the federal court's task. That doctrine, by definition, cannot apply to the state's highest court. As a result, the federal court would have to decide for itself what methods it will use to mimic the state's highest court.\(^232\)

Yet this assumes that mimicking the state's highest court is appropriate. We saw above that the conventional justifications for a federal diversity court's obligation to mimic a state high court are inadequate.\(^233\) Does it follow that the federal court should mimic a lower state court?\(^234\) Per-


\(^231\) Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co., 953 F.2d 985, 988 (5th Cir. 1992). Since there were no relevant decisions of the Louisiana Supreme Court on point, id., Louisiana's unusual approach apparently did not play an important role in the Fifth Circuit's decision.

\(^232\) In this context, consider Gustin v. Sun Life Assur. Co., 154 F.2d 961 (6th Cir.), cert. denied, 328 U.S. 866 (1946). There, the federal court discounted an Ohio statute providing that unreported opinions are not precedents, reasoning that although unreported, an earlier Ohio Supreme Court opinion nonetheless provided excellent evidence of how that court would resolve a similar case. *Id.* at 962 (citing *West v. AT&T Co.*, 311 U.S. 223, 225, 227 (1940)). If one accepts the prediction approach, this makes sense. The Ohio rule is a rule of internal court organization, not applicable to predictions made from the outside. Of course, on my view, reliance on an unpublished opinion as such is misguided because the unpublished opinion is not in any way part of the law of Ohio. Its only utility would be its persuasive force.

\(^233\) See supra Parts VI.A, C.

\(^234\) Some federal courts take this view, albeit without explaining why. See, e.g., Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 398 (5th Cir.) (stating that federal court must follow same course that "a lower Mississippi court would"), cert. denied, 478 U.S. 1022 (1986); DiPascal v. New York Life Ins. Co., 749 F.2d 255, 260 (5th Cir. 1985) ("It is our duty . . . to view ourselves in diversity cases as an inferior state court and to reach the decision that we think a state
haps not.\textsuperscript{235} The Rules of Decision Act, after all, obliges federal courts to apply state law. It does not expressly instruct federal judges to envision themselves as state judges. The most natural reading of the Act may be that federal judges should attempt to find governing principles in the body of state law conceived as a coherent whole.

On this view, the principles governing the relation between state lower courts and a state’s highest court would be irrelevant to the federal court’s determination of state law, because the federal court sitting in diversity does not see itself anywhere within the state court hierarchy. The federal court stands outside the state court hierarchy, but attempts to apply the template of state law to the cases brought in federal court. The federal court need not attempt to locate state law in the views of any particular state judge or judges.\textsuperscript{236}

This vision accords proper respect to state law as a system of norms, rather than a collection of arbitrary facts about the past and future rulings of a state high court. No doubt Judge Friendly was correct to praise the beautiful symmetry of the principle “that federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states whereas state courts must follow federal decisions on subjects within national legislative power where Congress has so directed.”\textsuperscript{237} But the necessary finality of state and federal high courts in their respective spheres need not blind us to the fact that there exist bodies of law about which their decisions are final. A federal judge sitting in diversity should not attempt to view herself inside the head of a state high court judge; instead, she

\textsuperscript{235} But see Yonover, supra note 174 (assuming that federal court sitting in diversity must view itself as either state high court or state lower court, and pointing out practical difficulties that arise from the latter view).

\textsuperscript{236} Under certain extreme assumptions about state law, this proposition might not hold. For example, suppose that a statute of state X provides that where conventional legal sources do not uniquely determine the result in a case, each judge of the state high court should resolve the case by reference to her own moral philosophy. Suppose further that the statute provides that lower state court judges should resolve such cases by predicting how the judges then sitting on the high court would rule. How should a federal judge sitting in diversity resolve a case arising under the law of state X where conventional legal sources do not uniquely determine the result? Here a predictive approach might be warranted because even if the federal court generally takes a norm-based view of law, the state statute appears to establish the individual state high court judges as the ultimate source of norms. Fortunately for present purposes, no state accords such a status to its high court judges.

\textsuperscript{237} Friendly, supra note 154, at 422.
should try to view the state law—in all its subtlety—inside her own head, as she resolves legal disputes in accordance with state law.\textsuperscript{238}

\textbf{CONCLUSION}

As a complete account of law, the prediction model fails. Nevertheless, judges who must apply a body of decisional law that they have not themselves made, and which they lack final authority to change, may find it tempting to view their job as one of making predictions. They should resist the temptation because the prediction model undermines the rule of law by over-emphasizing the role of individual judges. Whenever there exists a coherent body of law—regardless of the jurisdiction that gives rise to it—judges ought to attempt to apply that law. That this remarkably simple proposition should be controversial only shows how powerful the grip of radical realism remains.

\textsuperscript{238} Cf. Polk County, Ga. v. Lincoln Nat'l Life Ins. Co., 262 F.2d 486, 489 (5th Cir. 1959) (rejecting prediction approach because it seeks "to psychoanalyze state court judges rather than to rationalize state court decisions").