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ASCERTAINING STATE LAW: THE CONTINUING ERIE DILEMMA

Geri J. Yonover*

Sometime after May 1, 1836, a citizen of Maine, the holder of negotiable paper, sued a New York defendant to collect payment. Almost 100 years later, a Pennsylvanian was struck by a train while he walked along an out-of-state defendant's right of way. Between the resolution of these two cases, brought into federal court on the basis of diversity jurisdiction, lies a juridical chasm.

This year marks the golden jubilee of the railroad case—a decision which has been called "a star of the first magnitude in the legal universe" and "one of the most important cases at law in American legal history."

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Note that 1938 not only marked the birth of Erie but also the Federal Rules of Civil Procedure. See generally Knowlin, The Impact of Erie Upon the Federal Rules, 17 S.C.L. REV. 480 (1965) (discussing conflict between Erie and Federal Rules of Civil Procedure). One observer suggests that the adoption of the Federal Rules ultimately had a greater impact on
Nevertheless, *Erie R.R. Co. v. Tompkins* is not without its detractors. It has been vilified as "reactionary" and the worst decision by the Supreme Court in this century; "the most colossal error the Supreme Court has ever made"; and "one of the most grossly unconstitutional governmental acts in the nation's entire history." In the Great Debates which *Erie* (and the burial of *Swift v. Tyson*) engendered, eminent legal scholars rolled up their sleeves and did intellectual battle. Whether characterized as a "[b]rooding [o]mnipresence" or an "[i]rrepressible [m]yth," the *Erie* legacy still generates controversy within the legal community. The continuing debate as to *Erie's* substantive law mandate finds participants in Judges Shadur and Marshall of the United States District Court for the Northern District of Illinois. The debate between the two judges is the focus of this Article.

It is well-settled, however, that *Erie* and the Rules of Decision Act require that federal judges sitting in diversity cases apply the substantive law of the litigants than did *Erie*. This may be because of the "curious relationship": *Erie* defederalized substantive law, while the Federal Rules federalized procedural law. Judge Jack Weinstein, Remarks at the Meeting of the Association of American Law Schools Section on Civil Procedure (Jan. 9, 1988).

Although *Erie* held that there is no general federal common law, 304 U.S. at 78, subsequent Supreme Court decisions have applied federal common law in the face of a strong federal interest in the issue. Wells, *Why Professor Redish is Wrong About Abstention*, 19 Geor. L. Rev. 1097, 1124 & n.135 (1985). See also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (federal law applies when foreign party involved); United States v. 93,970 Acres of Land, 360 U.S. 328 (1959) (federal law applies when essential federal interest, like military, is involved); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (noting federal interest in currency matters).


8. Id. at 916.


13. Section 34 of the Judiciary Act of 1789, 1 Stat. 92, provided: "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." In 1948, the phrase "civil actions" replaced "trials at common law." 28 U.S.C. § 1652.

Of course the prior, if not correlative, determination concerns the substantive-procedural dichotomy. Although some jurists would say that the Supreme Court has yet to "articulate a
forum state to questions of a substantive character. In Klaxon Co. v. Stentor Elec. Mfg. Co., the Supreme Court extended Erie and required federal judges to apply the forum state's conflicts of law methods. However, neither Erie nor any subsequent Supreme Court pronouncements have provided a definitive answer to the related question—how to resolve legal issues that have not been squarely decided by the highest court of the relevant jurisdiction. Thus, the particular difficulties inherent in federal determination of state substantive law persist.

The Erie substantive law "problem" contains at least four potential scenarios. In the first two, the state's highest court has spoken concerning the issues to be resolved in the federal court; in scenarios three and four, the state's highest court is silent. In the first situation, the highest court of the state whose substantive law is applicable has previously (and relatively recently) determined the issue posed in the diversity action or pendent claim.

Whether Erie was necessary to preserve constitutional principles, as suggested by Justice Brandeis in Erie, 304 U.S. at 77-78, is a matter of some controversy. See Shreve, Preclusion and Federal Choice of Law, 64 Tex. L. Rev. 1209, 1234 n.134 (1986) (discusses divided commentary).


15. Erie understandably sheds light on the ascertainment of unclear state law problem because the question was not presented. Recall that, in order to decide defendant's standard of conduct in a suit brought in New York, the choices were either the federal general common law a la Swift (under which Tompkins had the status of a licensee) or Pennsylvania law (which probably would have termed Tompkins a trespasser) as the law of the place of the injury. See Erie, 304 U.S. at 70.

16. While pendent jurisdiction is a doctrine of discretion, once asserted, the federal court is bound to apply state law to state claims. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966). The same doctrine applies in the context of statutory pendent jurisdiction. See, e.g., 28 U.S.C. § 1338(b) (1982) (federal courts have jurisdiction of any state unfair competition claims "when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws"). See also Hamilton v. Roth, 624 F.2d 1204, 1211 n.7 (3d Cir. 1980); Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540-41 n.1 (2d Cir. 1956). Federal courts exercising pendent jurisdiction over state law claims must apply
This situation is, of course, the least troublesome. In such a case, it is generally agreed that the federal judge who, under the *Erie* mandate, must apply state law, applies that law which has been enunciated by the highest court of the state. The second scenario presents a chronological variation; the state's highest court has spoken, but enough time has elapsed to cast a shadow of doubt over the continuing validity of the old decision. In this case, a federal judge is guided by *Bernhardt v. Polygraphic Co. of Am.*

In *Bernhardt*, the Court indicated that where there is "no confusion in the [state's] decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts, or ambiguities in the opinion of the [state's] judges on the question, [and] no legislative development that promises to undermine the judicial rule," the federal court must, under *Erie*, follow the decision by the state supreme court.

This 1956 pronouncement is the last word the legal community has received from the Supreme Court concerning ascertainment of state law in diversity cases.

A third variation of the *Erie* "problem" arises when there is no decision by the state's highest court but, perhaps, one by a trial or chancery court,

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state law as that state's highest court would. Hillery v. Rushen, 720 F.2d 1132, 1138 n.5 (9th Cir. 1983). See also Fleming v. Kane County, 636 F. Supp. 742, 748 (N.D. Ill. 1986).


or one or two congruent intermediate appellate court decisions. In a series of cases handed down in 1940, the Supreme Court ruled that where state law furnishes the rule of decision, a federal court must follow the decision of an intermediate appellate state court absent other persuasive evidence that the state's highest court would hold otherwise. This quandary is best illustrated by a recent series of decisions in which two federal circuits and several state chancery courts, applying Tennessee law, addressed the issue of

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20. Even prior to Erie, the Supreme Court had concluded that in circumstances where federal courts did apply state statutory and local law, intermediate state court decisions must be followed in the absence of an applicable determination by the highest state court. Blair v. Commissioner, 300 U.S. 5 (1937); Erie R.R. Co. v. Hilt, 247 U.S. 97 (1918). See also 1A J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice § 0.307 (2d ed. 1985) [hereinafter Moore's FEDERAL PRACTICE] (discussing pre-Erie law).


Fidelity Union, the broadest (and perhaps the most infamous) of the 1940 decisions, involved not an appellate court but a nisi prius decision. The issue was whether a Miss Peck created a valid trust entitling her friend, Miss Fields, to the savings bank deposit on Miss Peck's death. In 1943 the New Jersey legislature passed four statutes that clearly appeared to permit an individual to make a deposit in a savings bank for herself as trustee for another and create a tentative trust, revocable at any time before death—a so-called "Totten trust." Prior to 1932, New Jersey law had not permitted this type of trust. In 1935, Miss Peck made such a deposit and subsequently died. In 1936, the New Jersey Court of Chancery, in two cases involving other parties, "construed the statute away by decision." Clark, supra note 10, at 292. The Third Circuit, in Fidelity Union, rejected the reasoning of the state chancery court and awarded the deposit to the named beneficiary. 108 F.2d 521 (3d Cir. 1939). Even though the vice-chancellor's decision would not have been binding on any other court of the state, nor even on any other vice-chancellor, the Supreme Court reversed, reasoning that it is unacceptable that there be one rule of law for litigants in state court and another rule for those litigants in federal courts. 311 U.S. at 180.

Fidelity Union and the other "excesses of 311" were sharply excoriated. E.g., Friendly, supra note 9, at 400. See also 2 W. Crosskey, supra note 7, at 920-26 (comparing Fidelity Union to an event in "Alice in Wonderland"); Clark, supra note 10, at 290 (federal courts "must act as a hollow sounding board"); Gibbs, How Does the Federal Judge Determine What is the Law of the State?, 17 S.C.L. Rev. 487, 487 (1963) (in Fidelity Union, "the Erie Railroad ran off the track"). Although Miss Peck lost the battle, she won the war posthumously, albeit pyrrhically. Soon after the Supreme Court decision in Fidelity Union, another state vice-chancellor applied the statute exactly as had the Third Circuit in Fidelity Union. Hickey v. Kahl, 129 N.J. Eq. 233, 19 A.2d 33 (N.J. Ch. 1941). On this basis, Miss Fields applied for a rehearing which the Supreme Court denied. 311 U.S. 730 (1941), reh'g denied, 313 U.S. 550 (1941), motion to file new petition granted, 314 U.S. 709 (1941).

Though some feared that these 1940 decisions forced federal judges "to play the role [sic] of ventriloquist's dummy to the courts of some particular state," Richardson v. Commissioner, 126 F.2d 562, 567 (2d Cir. 1942), the Supreme Court later dispelled much of those fears. See Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956); King v. Order of United Commercial Travelers of Am., 333 U.S. 153 (1948). In King, the Supreme Court affirmed the appellate court's refusal to be bound by an unreported decision of a state trial court. 333 U.S. at 161-62. In Bernhardt, the Supreme Court issued guidelines in the determination of state law. 350 U.S. at 205. See supra text accompanying notes 16-17.
the descendibility of the right of publicity and reached varying results.  

Lastly, let us assume that a case is in federal court in State X, and State X’s law is clearly applicable. Again, the forum state’s law will apply because of diversity-based jurisdiction, traditional pendency, or because the federal question involves a state law issue. State X’s highest court has not addressed the issue posed. State X’s judiciary is divided into two or more appellate court districts. At least two of these intermediate appellate courts have


24. See Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967) (decision of state’s highest court controls as to undecided state law issue which determines resolution of federal question; absent such a decision, federal court should examine state lower court decisions and then determine controlling state law). See also Estate of Spiegel v. Commissioner, 331 U.S. 798 (1947) (following Illinois right of reverter law in tax action); Propper v. Clark, 337 U.S. 472 (1949) (applying state law to decide how foreign company may liquidate). To see the role which certification has in the process, see Imel v. United States, 375 F. Supp. 1102 (D. Colo.), cert. question answered, 184 Colo. 1, 517 P.2d 1331 (1974), aff’d, 523 F.2d 853 (10th Cir. 1975); D’Ambra v. United States, 354 F. Supp. 810 (D.R.I), aff’d, 481 F.2d 14 (1st Cir.), cert denied, 414 U.S. 1075 (1973), certified question answered, 114 R.I. 643, 338 A.2d 524, aff’d, 518 F.2d 275 (1st Cir. 1975). A further example indicating federal dependency on state law is foreclosure of copyright mortgages, which is also subject to varying state laws. P. Goldstein, Copyright, Patent, Trademark, and Related State Doctrines 789 (2d ed. 1981).

25. At present, some 37 states have a tri-level judicial system—trial court, intermediate appellate court and highest appellate court. Of these, 15 states have more than one intermediate appellate court: Arizona (two divisions); California (six districts); Florida (five districts); Arizona (two divisions); California (six districts); Florida (five districts); Illinois (five districts); Indiana (four districts) (fourth district includes all counties of the state); Louisiana (five districts); Michigan (three districts); Missouri (three districts); New York (four judicial departments); Ohio (twelve districts); Oklahoma (four divisions); Tennessee (three divisions); Texas (fourteen districts); Washington (three divisions); Wisconsin (four districts). Thirteen states lack an intermediate appellate court: Delaware, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Rhode Island, South Dakota, Utah, Vermont, and Wyoming. See generally M. Hough, The American Bench (4th ed. 1987-88).

For purposes of this article it is interesting to note that states differ in the intra-state precedential effect of their appellate court decisions. See infra text accompanying notes 144-
handed down decisions directly on point. These decisions conflict. Under the aegis of *Erie*, what must the federal judge do? If she or he neither abstains from deciding nor certifies the precise issue to State X's highest court, then resolution of the issue in federal court is required.

This Article will examine the various solutions proposed by federal judges to address the problems inherent in the fourth scenario, and will particularly focus on the debate currently waged by two such judges in the Northern District of Illinois. This debate concerns two interpretations of the *Erie* mandate. The debate focuses on the situation in which intermediate appellate court decisions conflict and no state supreme court authority exists. Such a situation occurs when the state's highest court has never addressed the issue or, if so, the decision has died of old age; *i.e.*, it is no longer a valid statement of state law. One approach, favored by many of the judges in the Northern District of Illinois, particularly Judge Marshall, suggests that *Erie* requires a federal court sitting in diversity to predict what the highest


26. The doctrine of abstention, and its subspecies, is discussed *infra* at notes 43-78 and accompanying text.

27. *See infra* text accompanying notes 79-133 for discussion of the availability of certification in certain jurisdictions.


court of the state would decide, giving due consideration to the varied appellate court decisions, and to hold accordingly. This approach views the appellate court decisions issued by different districts in an even-handed manner. Another approach, suggested by Judge Shadur, requires that the federal court decide issues of substantive law in the same manner as a state trial judge, sitting in the same location, would decide those issues. Judge Shadur's method, subject to certain refinements, requires the federal court to follow the decision enunciated by the state appellate court in the district in which the federal court sits. This Article concludes that Judge Shadur's approach is flawed.

In addition to Judge Marshall's predictive approach and Judge Shadur's internal choice of law methodology, some federal courts explore other avenues, such as certification and abstention, to resolve intrastate decisional conflict. The following discussion illustrates that, despite the availability of certification and abstention, federal courts may, as a prior matter, still have to resolve an ascertainment of state law issue.

I. To Decide or Not To Decide—Wherein A Federal Court Scores A T.K.O. 31

Regardless of the source of jurisdiction, the *Erie* doctrine operates whenever state law provides the rule of decision. 32 Although a question of state


31. In boxing, a technical knock-out.

law may arise in an action based on diversity, one pendent to federal question jurisdiction, or one incidental to the federal question presented, a litigant is not automatically assured that the federal court will resolve that state law question. As noted earlier, a federal court can avail itself of at least two exits: abstention and certification. Both procedures reflect the federalism concerns implicit in the uneasy, quasi-sovereignty of the state and federal judiciaries. In our country's judicial system state courts may, and often must, interpret federal law, subject of course to Supreme Court review. Federal courts, on the other hand, frequently rule on matters of state law which cannot be reversed by state courts, but merely repudiated by subsequent state court decisions. Thus, in certain situations it is "better"

36. See infra text accompanying notes 41-106. For a discussion of another judicial exit, see infra note 40.
38. If, for example, a federal court construes a state statute previously unexamined by the state courts, the statute might be interpreted in a singular fashion. The rights of all other litigants, however, may be governed by a state supreme court decision quite different from that of the federal court. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959). "No matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination." Id. at 27 (quoting Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 499 (1941)). Cf. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 151-52 (1984) (Stevens, J., dissenting) (if state disagrees with federal court's interpretation of state law, it can always clarify or change that law). However, even though the federal court cannot finally settle the relevant question of state law, it does adjudicate the rights of the parties before it. Meredith v. Winter Haven, 320 U.S. 228, 237-38 (1943).


for a federal court to allow a state court to resolve a state law question. Of course, if a federal judge employs abstention or certification, the Marshall/Shadur "dialectic" may not be implicated. Similarly, dismissal of the case under the forum non conveniens doctrine and transfer of venue based on convenience also represent "decision ducking" on the basis of "case avoidance," thereby possibly avoiding the Erie ascertainment of law issue. What follows is a digression concerning abstention and certification before further analysis of the Erie mandate according to Judges Marshall and Shadur. The point of the digression is to demonstrate that, despite the existence of these "escape" doctrines, federal district courts may still have to confront an Erie substantive law issue.

A. Abstention

The judicial doctrine of abstention was first enunciated by the Supreme Court in Railroad Comm'n of Tex. v. Pullman. Pullman abstention is provided that failure to use seat belts should not be deemed to constitute negligence so as to trigger Virginia's contributory negligence defense. 445 F. Supp. at 1373-74. This "intersystemic" (here state legislature and federal judiciary) response is discussed in LeBel, supra note 16, at 1035 n.108.

39. The term is used here to connote logical argumentation rather than in its strict Hegelian sense. Dialectical materialism as advanced by Hegel, and later Karl Marx, viewed social and economic events in terms of thesis (initial idea or event), antithesis (its opposite), and synthesis (reconciliation of the two extremes). See generally G.W.F. Hegel, Hegel's Philosophy Of Right (1952) (developing dialectic theory). This is not to suggest, however, that the positions of Judges Shadur and Marshall are not reconcilable, i.e., capable of synthesis. Cf. Friendly, supra note 9, at 421 (Hegelian dialectic is at work—with Swift v. Tyson the thesis, Erie the antithesis, and the new federal common law the synthesis).


41. 28 U.S.C. § 1404(a) (1982) ("for the convenience of parties and witnesses in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."). When the defendant in a diversity action moves for a § 1404(a) venue transfer, the transferee court must apply the state law that would have applied in the transferor court. Van Dusen v. Barrack, 376 U.S. 612, 626-43 (1964). Cf. In re Korean Airlines Disaster of Sept. 1, 1983, 56 U.S.L.W. 1053 (D.C. Cir. 1987) (where actions are transferred to federal district court for consolidated pretrial proceedings under 28 U.S.C. § 1407, transferee court may independently resolve issues of federal law already decided by appellate court in transferor circuit).

42. See LeBel, supra note 16, at 1002. The author distinguishes forum non conveniens and § 1404(a) transfer, which involve avoiding the case entirely, from abstention and certification, which involve "issue-avoidance." Id. at 1002-03. The doctrine of primary jurisdiction, based upon the interest in avoiding conflict between the courts and administrative agencies, furnishes yet another example of "decision-ducking." Id. at 1025 & n.72.

43. See generally 17 WRIGHT & MILLER, supra note 16, at §§ 4241-47 (general discussion of
appropriate when a state court’s interpretation of a state statute may avoid unnecessary determination of a federal constitutional question.\textsuperscript{44} While \textit{Pullman} abstention applies only where the state court has not previously examined the case\textsuperscript{46} or where there are ambiguities in the challenged state statute involving complex issues,\textsuperscript{47} the Supreme Court has approved abstention on \textit{Pullman} grounds in many cases.\textsuperscript{48} The \textit{Pullman} doctrine, like the three other types of abstention,\textsuperscript{49} avoids unnecessary friction between federal and state courts. It also promotes the vital judicial policy that disfavors needless or premature resolution of a federal constitutional question.\textsuperscript{50} Moreover, adjudication based on state law has only intra-state precedential effect, whereas a federal court decision on the constitutional claim may have an impact on other jurisdictions.\textsuperscript{51}

Although \textit{Pullman} abstention arises in the context of federal question jurisdiction, federal courts may often confront \textit{Erie} ascertainment of state law problems in determining the clarity and effect of whatever expositions of the relevant state law are found.\textsuperscript{52} Thus, even if a federal judge employs \textit{Pullman} as a “decision-ducking” device, an ascertainment of state law may, as a prior step, still be necessary.\textsuperscript{53} Consequently, the divergent approaches
taken by Judge Shadur and Judge Marshall theoretically could determine the propriety vel non of Pullman type abstention. For example, Judge Shadur might find clear and binding a decision of the First District Appellate Court of Illinois and therefore find it unnecessary to abstain. In contrast, Judge Marshall would be comfortable in not following the First District if its decision did not "represent" the law of Illinois. He might then employ Pullman abstention, and permit Illinois courts to construe the "unconstrued" statute so as to avoid the federal constitutional issue.

The Supreme Court, in Burford v. Sun Oil Co.,\(^\text{54}\) enunciated a second type of abstention. Burford abstention is appropriate "when the exercise of jurisdiction by the federal court would disrupt a state administrative process . . . or otherwise create needless friction by unnecessarily enjoining state officials from executing domestic policies."\(^\text{55}\) For example, the Court in Burford concluded that federal court decisions which review the state agency's regulation of oil wells would endanger the success of state policies.\(^\text{56}\) Therefore, abstention was proper. Based on notions of comity,\(^\text{57}\) Burford abstention is also proper where there are present difficult questions of state law concerning "problems of substantial . . . import whose importance transcends the result in the [instant] case . . . ."\(^\text{58}\)

Burford abstention, however, has little impact in the area of Erie concerns, other than the shared focus on federalism principles. The ascertainment of state law problem in Burford is meager—necessitating an inquiry only as to the presence and extent of a state regulatory scheme.\(^\text{59}\) Thus, even though

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57. "This Court has also upheld an abstention on grounds of comity with the states when the exercise of jurisdiction by the federal court would disrupt a state administrative process." Masuda, 360 U.S. at 185 (citations omitted).
58. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976). See also Law Enforcement Ins. Co., Ltd. v. Corcoran, 807 F.2d 38, 43-44 (2d Cir. 1986) (where state has comprehensive regulation of insurance companies—a special state concern which would be impaired by federal court intervention—Burford abstention is correct).
59. The Second Circuit described the appropriate analysis for determining whether Burford abstention is appropriate:

(1) the order under attack was part of a unified regulatory scheme on a complex subject matter of special state interest, a scheme in which the state administrative agency and the state courts cooperated closely to safeguard the values of uniformity, expertise, and due process; (2) the state had expressed its interest in unified decisionmaking by creating a system on the state level to avoid multiple inconsistent adjudications, a system that would be disrupted by the exercise of jurisdiction by the federal courts; and (3) the issues sought to be adjudicated in federal court were largely ones of state law.

Law Enforcement Ins. Co., Ltd. v. Corcoran, 807 F.2d at 43.
Burford abstention, like Pullman abstention, is a form of "decision-ducking," the Marshall/Shadur debate does not affect a Burford analysis.

Younger abstention is the third of the federal abstention doctrines. The slogan "Our Federalism," coined by Justice Black in Younger v. Harris, reflects the notion that in certain circumstances federal courts should not entertain constitutional challenges to state actions. Based on the principle of comity, Younger abstention is proper where "absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings." The doctrine also applies to state nuisance proceedings antecedent to a criminal prosecution, the collection of state taxes, quasi-criminal proceedings conducted simultaneously in state court, and civil proceedings which implicate certain discrete and important state interests. Thus, Younger abstention permits federal court intervention in these cases only if (1) the "state proceeding is motivated by a desire to harass or is conducted in bad faith"; (2) there exists "an extraordinarily pressing need for immediate equitable relief"; or (3) the "challenged provision is flagrantly and patently violative of express constitution prohibitions." Younger abstention, though based on the concept of federalism, has no impact on the ascertainment of state law problem because state law does not need to be ascertained in order to decide whether use of the doctrine is proper.

Colorado River Water Conservation Dist. v. United States represents a fourth category of cases in which a federal court should decline to exercise

60. 401 U.S. 37, 44 (1971) ("Our Federalism" describes a system in which both state and federal government interests are taken into account [and the government tries to avoid] excessive interference in the state's activities."). The phrase in its unemphasized form was a particular favorite of Justice Frankfurter. Wright & Miller, supra note 16 at § 4251. See generally Theis, Younger v. Harris: Federalism in Context, 33 Hastings L.J. 103 (1981) (courts need to give greater guidance in use of Younger doctrine); Gibbons, Our Federalism, 12 Supp. U.L. Rev. 1087 (1978) (federalism put forth in Younger without guidance to courts to aid in its use).


63. See Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293 (1943) (federal courts should avoid needless obstruction of state policy).


65. Id. See also Juidice v. Vail, 430 U.S. 327, 334 (1977); Trainor v. Hernandez, 431 U.S. 434, 444 (1977). For a recent Supreme Court discussion of the Younger doctrine, see Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519 (1987). The lower courts "failed to recognize the significant interests harmed by their unprecedented intrusion into the Texas judicial system" and should have abstained. Id. at 1525.

66. Jacobson, 824 F.2d at 569-70 (citations omitted). It should be noted that since Younger, the Supreme Court has never found that the exception for bad faith or harassment was applicable. Wright & Miller, supra note 43 at § 4255.

its jurisdiction. Colorado River "abstention" applies to prevent duplicative litigation in situations involving the contemporaneous exercise of jurisdiction by state and federal courts. Emphasizing that the doctrine can be invoked only in "exceptional" cases "for reasons of wise judicial administration" and "conservation of resources," the Supreme Court noted that the doctrine exists solely to avoid the danger of piecemeal litigation.

In at least some respects, Colorado River abstention is justifiable in a much narrower group of cases than the Younger, Burford, and Pullman, abstention doctrines. The Colorado River court, while finding abstention proper in that case, emphasized the "virtually unflagging" and "heavy" obligation of federal courts to exercise their given jurisdiction. Given this language, proper use of Colorado River abstention has been infrequent. Moreover, in the context of diversity jurisdiction, Colorado River abstention raises additional concerns involving the duty of federal courts to entertain cases based on diversity of citizenship which, by definition, involves state law. As Judge Skelly Wright remarked, "Congress having determined that

68. Justice Brennan, writing for the Colorado River majority, appeared unwilling to delineate the concept as abstention:

Given this obligation [for federal courts to exercise the jurisdiction given them], and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist. Id. at 818 (emphasis added). See also id. at 816 n.23 ("Our reasons for finding abstention inappropriate in this case . . . "). However, lower courts and commentators have characterized the doctrine as abstention. See, e.g., Law Enforcement Ins. Co., Ltd. v. Corcoran, 807 F.2d 38, 40 (2d Cir. 1986); Signady, Inc. v. City of Sugar Land, 753 F.2d 1338, 1339 (5th Cir. 1985); Sonenshein, Abstention: The Crooked Course of Colorado River, 59 Tul. L. Rev. 651 (1985).

69. Colorado River, 424 U.S. at 817-18. In Colorado River, a party sued by the United States in federal court brought suit in the state court for purpose of adjudicating all the government's state and federal claims. Id.

70. Id.

71. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 19, 20 n.22 (1983) (Colorado River involved a federal statute whose "primary policy" was the avoidance of piecemeal litigation).

72. Colorado River, 424 U.S. at 817.

73. Id. at 820.

74. See, e.g., Moses H. Cone Memorial Hosp., 460 U.S. at 2 (dismissal on judicial or administrative grounds requires "careful balancing . . . with the balance heavily weighted in favor of accepting jurisdiction"); Andrea Theatres, Inc. v. Theatre Confections, Inc., 787 F.2d 59, 62 (2d Cir. 1986) (state court should have broad jurisdiction to adjudicate federal claims if federal court abstains); Silberkleit v. Kantrowitz, 713 F.2d 433, 435 (9th Cir. 1983) (exceptional circumstances must be present to warrant abstention based on wise judicial administration).

75. E.g., Law Enforcement Ins. v. Corcoran, 807 F.2d 38, 42, 44 (2d Cir. 1986). Where there is little inconvenience to the parties, no substantial progress in the state suit when the federal suit is filed, federal and state relief are of approximately equal efficacy, and no "novel or obscure state law issues" exist, the case does not warrant Colorado River abstention. Id. at
parties are entitled to invoke diversity jurisdiction, it is no business of the federal court to withdraw that permission."

Each of the four categories of abstention—Pullman, Burford, Younger, and Colorado River—represents a form of "decision-ducking." However, as has been noted, the determination as to whether one of these doctrines should be used in a given case can itself require the ascertainment of state law. Further, the Supreme Court has often cautioned that a federal court may not abstain because of difficulty in determining state law or because of the risk that it could err in predicting state law. Perhaps heeding these warnings or relying on their own judicial competence to ascertain state law, federal judges do not often abstain.

B. Certification

The Supreme Court first encouraged certification in Clay v. Sun Ins. Office, Ltd. At that time, 1960, only Florida had a statute providing for

42. However, Burford-type abstention is appropriate. Id. at 44. See also Park v. Didden, 695 F.2d 626, 633 n.18 (D.C. Cir. 1982) (rejecting suggestion that "garden variety" issues governed by state law are more appropriately decided in state courts); Bryant Elec. Co. v. Joe Raniero Tile Co., 84 F.R.D. 120, 126 (W.D. Va. 1979) (illogical to permit a stay in diversity action because of subsequently filed state court action).


79. 363 U.S. 207 (1960). Justice Frankfurter, writing for the Court, noted the "rare foresight" with which the Florida legislature had addressed the problem of unresolved state law involved in federal litigation. Id. at 212.
certification. In 1967, the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Certification of Questions of Law Act. Presently only 12 states and the District of Columbia lack some certification statute or rule. Two of these states, California and Pennsylvania, have yet to authorize certification in spite of the fact that their federal courts hear a very large volume of cases. Of the 30-odd states that have adopted certification procedures, eight make certification available only to federal circuit courts and the Supreme Court. The remaining states and Puerto Rico authorize their highest court to answer questions certified to it by federal district as well as federal appellate courts, and 13 states and Puerto Rico allow for certification from courts of other states. Thus, the notion of certification is alive and well in many jurisdic-

80. FLA. STAT. ANN. § 25.031 (West 1957).
83. Entire circuits have fewer cases than did the four federal district courts of California in the year ending June 30, 1984—some 22,751 cases. See Note, THE LAW/FACT DISTINCTION AND UNSETTLED STATE LAW IN THE FEDERAL COURTS, 64 TEX. L. REV. 157, 163 n.43 (1985) [hereinafter Note, LAW/FACT DISTINCTION]. In the same time period, 12,188 cases were filed in Pennsylvania federal district courts. Id. at 163 n.45. The reluctance of California and Pennsylvania to authorize certification may relate, perhaps, to the perceived burden on already crowded state court dockets.
86. IOWA CODE ANN. § 684A.1 (1980); KANS. STAT. ANN. § 60-3201 to -3212 (1983); KY. R. CIV. P. 76.37; MD. CTS. & JUD. PROC. CODE ANN. §§ 12-601 to -609 (1984); MASS. GEN. R. 3.21; MASS. SUP. JUD. CT. R. 1.03; MICH. GEN. CT. R. 7.305(B); MINN. STAT. ANN. §§ 480.061 (1983); N.Y. RULE 550.17; N.D. CENT. CODE R. APP. P. 47; OKLA. STAT. ANN. tit. 20 §§ 1601-13; OR. REV. STAT. §§ 28.200-255 (1984); W. VA. CODE §§ 51-1A-1 to -12 (1981); WIS. STAT. ANN. § 821.01 (1983); P. R. R. CIV. P. 53.1(C). The Delaware Supreme Court will answer questions certified to it by other Delaware courts and the federal district court of Delaware, but will not accept certified questions from federal appellate courts. DEL. SUP. CT. R. 41. This
tions and has been frequently approved of by commentators87 and the Supreme Court alike.88 However, while certification may obviate the need for judicial guesswork, it may also be viewed as frustrating the constitutional grant of diversity jurisdiction to the federal courts.89

Although there is some disagreement as to whether certification is simply another abstention doctrine or whether it is more properly viewed as a way to implement an abstention decision,90 certification has, nonetheless, been employed in two principal areas. First, where a case filed in federal court raises a constitutional question and a decision could be premised instead on state law grounds, as in the Pullman abstention category,91 a federal court might certify the state law question and hope to obtain an answer which avoids a needless constitutional determination. In fact, because of the procedural advantages it has over Pullman abstention (there is less delay and expense because the question goes straight to the state’s highest court), certification might appear more attractive to a federal court than traditional Pullman abstention.92 In contrast, however, to the use of certification in Pullman-type circumstances, certification is not a viable alternative in Burford93


89. U.S. Const. Art. III, § 2. Certification may afford an end-run around the policy of providing a neutral forum for interstate dispute resolution and avoiding bias by state courts in favor of their own citizens. Note, Law/Fact Distinction, supra note 83 at 164.

90. E.g., LeBel, supra note 16 at 1002 n.13 (1985); WRIGHT & MILLER, supra note 16, at § 4241.

91. See supra text accompanying notes 43-51.


93. See supra text accompanying notes 54-58.
or Colorado River abstention situations because such cases do not turn on an ambiguity in applicable state law. Second, certification is available in private law actions based on diversity jurisdiction. In this situation, the state's highest court resolves an unsettled state law question posed to it by the federal court, thus simplifying the court's Erie task—the ascertainment of unclear state law.

The availability of certification to a federal court does not, of course, assure its use. The use of certification procedures "rests in the sound discretion of the federal courts." As such, courts weigh a number of factors in determining the propriety of certification. The most crucial factors are the "added delay and expense" which may result when litigants are shuttled from one courthouse to another and sometimes back again. Certification does impose "inevitable delay"; more time elapses, and perforce more expenditure is involved in terms of lawyer's fees and court costs than would occur in "an ordinary decision of the state question on the merits by the federal court."

Also to be considered is the burden, not only on litigants, but also on the state's judiciary. While certification will always impose an additional burden on state courts, the potential increase in a state supreme court's workload is even higher in those states which permit certification not only from the United States Supreme Court and federal courts of appeal, but also from federal district courts. For example, almost one-quarter of all civil cases filed in the year ending June 30, 1985 were based on diversity jurisdiction, and many of the remaining civil cases raised pendent state claims or otherwise

94. See supra text accompanying notes 67-71.
96. The federal court asking for clarification of state law may be a district court or an appellate court. See supra text accompanying notes 84-85.
100. American Fidelity Bank & Trust Co. v. Heimann, 683 F.2d 999, 1002 (6th Cir. 1982) (denying certification where state statute must be interpreted in light of federal statute).
102. See supra text accompanying notes 84-85.
required ascertainment of state law.\textsuperscript{103} If, for example, a Connecticut federal court, and indeed federal courts from other states, invoke the certificate process whenever faced with an unsettled question of Connecticut law, an "unreasonable and unnecessary burden" would be imposed on the Connecticut Supreme Court.\textsuperscript{104} Given the ramifications of frequent certification use, the very rationale of certification, comity and federalism, would be seriously thwarted by its overuse.\textsuperscript{105}

Because of the additional delay and expense associated with certification and the constitutional mandate to adjudicate,\textsuperscript{106} courts frequently examine the extent of the putatively "unsettled" state law, which is also known as determining the "closeness of the question."\textsuperscript{107} This examination takes all relevant factors into account, including the availability of the resources that would assist the judge in resolving the issue.\textsuperscript{108} Implicit, if not explicit, in this inquiry as to whether the state law is really so unclear, is the perceived competence of the federal judiciary to make the requisite \textit{Erie} determination without resort to certification.\textsuperscript{109} It has even been suggested that \textit{Erie} requires federal courts to use independent reasoning in searching for the substantive law that the state's highest court would apply,\textsuperscript{110} emphasizing that federal courts should and do play a large role in the evolution of common law.\textsuperscript{111}

\textbf{C. Certification and the Seventh Circuit}

The Seventh Circuit's experience with certification is illustrative. Each of the states which comprise the Seventh Circuit has a certification procedure.

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\textsuperscript{103} \textit{L. Cohen & Co., Inc.}, 629 F. Supp. at 1422 (citing ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U. S. COURTS (1986)).

\textsuperscript{104} \textit{Id.} at 1423 & n.2.

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{See supra} note 89 and accompanying text.

\textsuperscript{107} \textit{See, e.g.,} Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 274-75 (5th Cir. 1976), \textit{cert. denied}, 429 U.S. 829 (1976). \textit{See also} Dixon v. Nationwide Mut. Ins. Co., 800 F.2d 422, 423 (4th Cir. 1986) (certification desirable in "appropriate circumstances" but may delay resolution of cases and burden courts) (Wilkinson, J., concurring). Bi-Rite Enters., Inc. v. Bruce Miner Co., 757 F.2d 440, 443 n.3 (1st Cir. 1985) (despite its availability, certification should not be used if course adopted by state courts is clear); Harris v. Karri-On Campers, Inc., 640 F.2d 65, 68 (7th Cir. 1981) (in exercising discretion to certify, court should consider costs to, and delay for, litigants); Marston v. Red River Levee & Drainage Dist., 632 F.2d 466, 468 n.3 (5th Cir. 1980) (if at all possible, case should be resolved without certification).


\textsuperscript{109} \textit{See, e.g.,} \textit{L. Cohen & Co., Inc. v. Dun & Bradstreet, Inc.}, 629 F. Supp. 1419, 1425 (D. Conn. 1986) (federal courts should certify only those unusual questions that are particularly suitable for certification).

\textsuperscript{110} \textit{See Kramer, supra}, note 87, at 232.

\textsuperscript{111} \textit{Id.} at 263. \textit{See also} Landis & Posner, \textit{Legal Change, Judicial Behavior, and the Diversity Jurisdiction}, 9 J. LEGAL STUD. 367, 372, 386 (1980) (discussing role of federal courts in shaping common law). In this context, it is interesting to note that throughout the last 25 years, a plaintiff has had a better chance of stating a cause of action for intentional infliction of mental distress if the suit is filed in federal rather than state court. Sabin, \textit{Intentional Infliction of Mental Distress—25 Years Later}, 76 ILL. B.J. 864 (1987). In some 38 percent of the federal cases, the court found that a cause of action had been stated under Illinois law; in state court, only 10 percent of the plaintiffs passed that test. \textit{Id.} at 866-67.
Illinois adopted certification in 1983, permitting certification from the United States Supreme Court and federal appellate courts, but not from federal district courts. Wisconsin's certification procedure, also adopted in 1983, allows the Wisconsin Supreme Court to decide an unsettled question of state law upon request of the United States Supreme Court, the United States Courts of Appeal, or the highest appellate court of another state. Thus, certification to these states' supreme courts is unavailable to any federal district court, whether sitting in Illinois or elsewhere. Moreover, it is to these states that district courts in the Seventh Circuit would most likely need to certify a question.

Since 1982, the issue of certification has been presented to the Seventh Circuit Court of Appeals in about a dozen cases with varying results. In almost 75 percent of the cases in which one of the parties requested certification, the Seventh Circuit declined to certify the question to the relevant state supreme court. Despite the lack of controlling state supreme court precedent in these cases, the Seventh Circuit found either that there was sufficient precedent to determine how the state's supreme court would rule on the issue; or that the allegedly murky state law was not so unsettled as to justify the use of certification. The Seventh Circuit's general reluctance to certify has been echoed by other courts.

112. ILL. S. CT. R. 20.
113. Wis. STAT. ANN. § 821.01-.12 (West 1987).
114. IND. CODE ANN. § 33-2-4-1 (Burns 1985).
115. E.g., Smith v. Sno Eagles Snowmobile Club, Inc., 823 F.2d 1193 (7th Cir. 1987) (Wisconsin); Toro Co. v. Krouse, Kern & Co., Inc., 827 F.2d 155 (7th Cir. 1987) (Indiana); Country Mut. Ins. Co. v. Duncan, 794 F.2d 1211 (7th Cir. 1986) (Illinois); Schaefer v. Heckler, 792 F.2d 81 (7th Cir. 1986) (Wisconsin); In re Air Crash Disaster Near Chicago, Illinois, on May 15, 1979, 771 F.2d 338 (7th Cir. 1985) (Illinois); Fromm v. Rosewell, 771 F.2d 1089 (7th Cir. 1985) (Illinois), cert. denied, 475 U.S. 1012 (1986); Katapodis v. Koppers Co., Inc., 770 F.2d 655 (7th Cir. 1985) (Indiana). See also Kumpf v. Steinhaus, 779 F.2d 1323, 1325 (7th Cir. 1985) (Wisconsin) (although certification could be "an attractive route," case did not rest on issue plaintiff wished to be certified); Spearing v. National Iron Co., 779 F.2d 87, 89 (7th Cir. 1985) (Wisconsin) (court inclined to certify but defendants failed to argue point of law); Estate of Davis v. Johnson, 745 F.2d 1066, 1073 (7th Cir. 1984) (Illinois) (certification would be superfluous); Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1207 (7th Cir. 1984) (Illinois) (certification denied in light of state court decision).
116. Toro Co., 827 F.2d at 160; Katapodis, 770 F.2d at 660.
117. Smith, 823 F.2d at 1195 n.3; Country Mut. Ins. Co., 794 F.2d at 1214. See also Schaefer v. Heckler, 792 F.2d 81, 84 n.3 (7th Cir. 1986) (because issue can be resolved by reference to statutory and case law, motion for certification denied).
Since 1982, however, the Seventh Circuit has, in four cases, certified questions of state law to the state's highest court. The results have varied; the Wisconsin and Indiana Supreme Courts have exhibited greater judicial hospitality than the Illinois Supreme Court. For example, in In re Sandy Ridge Oil Co., the Seventh Circuit asked, and received an affirmative answer to, the question of whether a mortgage recorded in violation of the Indiana Code serves as constructive notice to a bona fide purchaser. Notably, the state law issued raised in Sandy Ridge was determinative of the bankruptcy appeal. In Kuba v. Ristow Trucking Co., after the Seventh Circuit certified the question, the Indiana Supreme Court held that the Indiana statute allowing treble damages for reckless, knowing or intentional destruction of property did not apply to wrongful death actions. The Seventh Circuit subsequently affirmed the district court decision based on the Indiana Supreme Court's answer. In Hansen v. A.H. Robins Co., another diversity case, the Seventh Circuit asked the Wisconsin Supreme Court to determine when a cause of action accrues under Wisconsin's statute of limitation for personal injury actions. The Wisconsin Supreme Court furnished the answer, and the Seventh Circuit vacated the district court's grant of summary judgment to the defendant manufacturer. Like the Seventh Circuit's experiences in Hansen, Kuba, and Sandy Ridge, other jurisdictions have successfully employed certification.

In contrast, on the sole occasion where the Seventh Circuit has certified a question of state law to the Illinois Supreme Court, that court tersely

119. Kuba v. Ristow Trucking Co., 811 F.2d 1053 (7th Cir. 1987); (Indiana); In re Sandy Ridge Oil Co., 807 F.2d 1332 (7th Cir. 1986) (Indiana); Citizens for John W. Moore Party v. Board of Election Comm'rs of Chicago, 781 F.2d 581 (7th Cir. 1986) (Illinois); Hansen v. A. H. Robins Co., 715 F.2d 1265 (7th Cir. 1983) (Wisconsin). See also Collins, Co., v. Carboline Co., 837 F.2d 299, 303 (7th Cir. 1988) (certifying to Illinois Supreme Court whether, in absence of contractual privity, express warranty extends to assignee's right to economic and consequential damages).

120. In re Sandy Ridge Oil Co., 807 F.2d at 1338.


122. In re Sandy Ridge Oil Co., Inc., 832 F.2d 75 (7th Cir. 1987) (subsequent opinion applying state supreme court's answer).

123. See supra note 24.

124. 811 F.2d 1053 (7th Cir. 1987).

125. 508 N.E.2d 1 (Ind. 1987).

126. 822 F.2d 1090 (7th Cir. 1987) (mem.).

127. 715 F.2d 1265 (7th Cir. 1983).

128. Id. at 1267.

129. See, e.g., Adams v. Murphy, 598 F.2d 982, 983 (5th Cir. 1979) (question certified), 394 So. 2d 411 (Fla.) (answer to question certified), 653 F.2d 224 (5th Cir. 1981) (subsequent opinion), cert. denied, 455 U.S. 920 (1982). But see Cowan v. Ford Motor Co., 713 F.2d 100, 104 (5th Cir. 1983) (question certified), 437 So.2d 46 (Miss. 1983) (court declined to answer question because not necessary and no great public interest involved), 719 F.2d 785 (5th Cir. 1983) (subsequent opinion).
refused, without explanation, to answer the question which was posed.\footnote{130} The refusal of the Illinois court, a reaction echoed by courts in other states,\footnote{131} undermines the certification procedure which the state court itself has promulgated and disserves the principle of federalism which underlie certification. Of course, if a state court refuses to accept a certified question, comity can hardly be said to be at issue. Having been asked to dance, and having refused, the state court cannot complain of being a wallflower.

If the Seventh Circuit experience is typical, with its infrequent use of certification and the lack of success in at least one case where the Seventh Circuit did certify the question, certification is not the cure-all for \textit{Erie} ascertainment ills. In any event, many federal district court judges, including Judges Marshall and Shadur, cannot refer questions of unclear state law to their respective state supreme courts.\footnote{132} Thus, despite our detour through the highways and byways of abstention and certification, federal judges are still often faced with the dilemma of ascertaining state law—the "Diogenes-like"\footnote{133} quest.

II. \textbf{Ascertainment State Law: The Intra-state Precedential Effect of State Law and the Impact of Klaxon}\footnote{134}

It may be helpful here to recapitulate the gist of the discussion up to this point. \textit{Erie} teaches that in diversity cases a federal court is to apply the substantive law of the forum state to substantive issues.\footnote{135} \textit{Klaxon} includes a state's conflict of laws within the realm of substantive law.\footnote{136} It is also clear that \textit{Erie}'s mandate impinges in areas of pendent and federal question, as well as diversity, jurisdiction.\footnote{137} Where a federal judge chooses neither abstention\footnote{138} nor certification\footnote{139} as a method of determining the "other law" question, the judge is necessarily left to determine the substantive law of the forum. In the absence of a recent and/or viable decision by the state's highest court, the federal judge may look to many sources in order to ascertain the state's law, such as the state appellate court's decisions and recent trends within and without the jurisdiction. It has been suggested, as

\footnote{130} Citizens for John W. Moore Party v. Board of Election Comm'rs of Chicago, 781 F.2d 581 (7th Cir. 1986) (question certified), 487 N.E.2d 946, 94 Ill. Dec. 69 (1986) (refusal to answer question), 794 F.2d 1254 (7th Cir. 1986) (subsequent opinion).
\footnote{132} See \textit{supra} text accompanying notes 82-85.
\footnote{133} Vestal, \textit{The Certified Question of Law}, 36 \textsc{iowa} L. Rev. 629, 644 (1951).
\footnote{135} 304 U.S. 64, 78 (1938). See \textit{supra} note 12.
\footnote{136} 313 U.S. at 496.
\footnote{137} See \textit{also supra} note 22.
\footnote{138} See \textit{supra} text accompanying notes 43-77.
\footnote{139} See \textit{supra} text accompanying notes 78-110.
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well, that federal judges also examine the judicial zeitgeist, *i.e.*, the inherent activism or restraint, of the state's highest court judges in determining first impression issues.\(^4\)

Judges Shadur and Marshall, however, differ dramatically as to the role conflicting state appellate court decisions should play in the ascertainment of state law. Judge Marshall adopts the now "classic" *Erie* predictive approach.\(^4\) Judge Shadur, recently joined by Judge Leinenweber, adopts an "internal choice of law" approach.\(^4\) In discrete situations, the internal choice of law approach requires, according to Judge Shadur, that each state trial court, and hence each federal trial court in a diversity case, be bound to follow the decisions of the appellate court in its own district when the appellate districts diverge.\(^4\) To understand Judge Shadur's approach, it is necessary to examine the nature of the Illinois judicial system and the impact of *Klaxon*.

**A. The Appellate Courts of Illinois**

Illinois has had intermediate appellate courts for more than 100 years.\(^4\) The Illinois constitution vests judicial power "in a Supreme court, an Appellate Court and Circuit courts,"\(^4\) and provides "five judicial Districts for the selection of Supreme and Appellate Court Judges."\(^4\) The Illinois constitution denotes the boundaries of the first judicial district as Cook County\(^4\) (note that the Dirksen Federal Building, which houses the courts of the Northern District of Illinois, is also in Cook County) and delegates to the legislature the power, with only some geographical limitations, to determine the boundaries of the other four districts.\(^4\) In spite of the unambiguous language concerning the unitary nature of the Illinois Appellate court ("an Appellate Court") and the division into five districts for convenience ("for the selection of . . . judges"), the Illinois judiciary has long assumed that the five appellate court districts are co-equal but distinct,

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\(^4\) See *supra* text accompanying notes 28-29.

\(^4\) See *supra* text accompanying note 30. For an example of Judge Leinenweber's concurrence with Judge Shadur, see Cresswell v. Bausch & Lomb, Inc., No. 85 C 5822, slip op. at nn.3 & 4 (N.D. Ill. Nov. 21, 1986).


\(^4\) Mattis & Kalowitz, *supra* note 25, at 571.

\(^4\) ILL. CONST. art. VI, § 1 (emphasis added).

\(^4\) ILL. CONST. art. VI, § 2 (emphasis added). Each of districts three to five are comprised of a single division; the first district has five divisions; the second district has two divisions. ILL. SUP. CT. R. 22(a); ILL. REV. STAT. ch. 110A, ¶ 22(a) (1987).

\(^4\) Id. The Illinois legislature has delineated the boundaries of appellate districts two to five. ILL. REV. STAT. ch. 37, ¶¶ 1.2-.5 (1987).
reigning over their respective geographic territories as independent judicial sovereigns. The stare decisis effect of this arrangement is that while all the appellate court districts are of course bound by decisions of the Illinois Supreme Court, each appellate district may, with stare decisis impunity, reach different results upon the same issue.

This multiplicity of voices heard on a single question, which furnishes the basis for much of the *Erie* controversy among federal judges within the Northern District of Illinois, is dramatically illustrated by a specific group of Illinois cases. The issue presented in these cases was whether Illinois common law permits an injured person or entity to maintain a claim against an insurer for its bad faith handling of an insurance claim. An Illinois statute provided for an award of attorney's fees, costs, and a limited penalty upon a showing that the insurer acted vexatiously and unreasonably in connection with an insurance claim. Illinois appellate courts in the first and third districts held that the Illinois statute precluded any common law recovery based on the insurer's bad faith. In contrast, the fifth district held that an independent cause of action existed, and the second district held that the Illinois statute barred common law punitive damages against an insurer, but did not limit recovery of compensatory damages.

The resulting divergence within the Northern District is thus expectable and interesting. Most of the federal decisions reach the same result as that espoused by the First District. Judge Shadur employs a different means to reach the same result; he feels bound under the internal choice of law rule to follow decisions of the First District Appellate Court. Judge

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149. See Mattis & Yalowitz, *supra* note 25, at 573, 578-81. The authors further note that the divisions of each district (five in the first; two in the second) may sit in any district in the state. Such interchangeability also indicates a single appellate court in Illinois. *Id.* at 579-80.


Marshall reaches a result different from that of the First District Appellate Court and Judge Shadur by employing the state supreme court predictive approach to the *Erie* problem posed by the split of authority in the Illinois appellate courts. It is both ironic and yet endemic to the predictive approach that other judges have reached the First District’s (and Judge Shadur’s) result by the “predictive” method employed by Judge Marshall, thus disagreeing with his “prediction.” These judges believe that the first district conclusion would be adopted by the Illinois Supreme Court if faced with identical circumstances.

B. Of Illinois Trial Courts: State and Federal

1. Illinois trial courts

Although at least one state court judge and several commentators have deplored the stare decisis nightmare resulting from the view of Illinois

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In none of these cases did the federal judge employ Judge Shadur’s “internal choice of law” formula. Instead, the Court attempted to predict, on the basis of “trends” or the “better reasoned” approach, the probable holding of the Illinois Supreme Court. Of course, federal courts sometimes make incorrect predictions as to undecided questions of state law. See Collins Co. v. Carboline Co., 837 F.2d 299, 301 (7th Cir. 1988) (noting Enis, holding that employee manual does not create enforceable contract rights, and subsequent Illinois Supreme Court holding to the contrary in Duldiulao v. St. Mary of Nazareth Hosp. Center, 115 Ill. 2d 482, 505 N.E.2d 314 (1987)). This inherent *Erie* problem makes certification an attractive alternative. Collins, 837 F.2d at 303.

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appeal courts as a non-unitary system, the following rules drawn from two seminal state appellate court decisions appear to be reasonably well settled. As articulated in Garcia v. Hynes & Howes Real Estate, Inc., an Illinois state trial court, "located in an appellate district where a conclusion on an issue is reached, should adhere to that conclusion and not to one promulgated in another district."163 People v. Thorpe, however, modified the Garcia rule somewhat by holding that if only one appellate court district has decided the specific issue, and the Illinois state trial court is located in another appellate district, the trial court is bound by that decision: "[T]he decisions of an appellate court are binding precedent on all circuit courts regardless of locale."166 With little guidance from the Illinois Supreme Court, the stare decisis effect on state trial courts of appellate court decisions has thus been left to the Thorpe/Garcia rules and to the appellate courts themselves.167

As noted earlier, Illinois is one of 37 states which have a tri-level judicial system and one of 15 states which have more than one intermediate appellate court. The intra-state precedential approach espoused by the Illinois appellate courts is not employed in all 15 states. For instance, in Oklahoma, appellate court decisions lacking approval by a majority of the Justices of the Oklahoma Supreme Court for publication in the official reporter do not carry precedential weight. Thus, a federal court sitting in diversity is not obliged to follow Oklahoma appellate court decisions. However, the Oklahoma "precedentless" approach appears to be unique.169

2. Federal trial courts

When Judge Shadur initially espoused the view that he was obligated to adhere to legal principles enunciated by the First District Appellate Court

("'Absent compelling differences of controlling precedent to the contrary, the decision of another appellate division should be followed'"), rev'd on other grounds sub. nom. Cornue v. Department of Pub. Aid, 64 Ill. 2d 78, 354 N.E.2d 359 (1976). Before his appointment to the Northern District of Illinois federal bench, Judge Leighton, the author of Cornue, served as a First District Appellate Court judge.

161. See Mattis & Yalowitz, supra note 25, at 595.

162. 29 Ill. App. 3d 479, 331 N.E.2d 634 (1975).


165. Id. at 579, 367 N.E.2d at 963. See also State v. Hayes, 333 So. 2d 51, 52-53 (Fla. App. 1976) (trial courts must follow higher court holdings).

166. See Thorpe, 52 Ill. App. 3d at 579, 367 N.E.2d at 963; Garcia, 29 Ill. App. 3d at 482, 331 N.E.2d at 636.

167. Mattis & Yalowitz, supra note 25, at 583.

168. See supra note 25.


170. Mattis & Yalowitz, supra note 25, at 596.
"just as a Judge of the Circuit Court of Cook County would," he did so without reference to the *Thorpe/Garcia* rule of stare decisis. At the time of Judge Shadur's internal choice of law pronouncement, a decision of the first district appellate court decision was apparently the only Illinois case on point. Judge Shadur's rationale for giving the decision determinative weight was the Supreme Court's decision in *Fidelity Union Trust Co. v. Field.* Although the "extreme applications" of the *Erie* doctrine, as typified by *Fidelity Union* and the other "311" cases, were questionable, the assumption of *Fidelity Union* was not: there should not be one rule for litigants in state courts and another rule for litigants in federal courts.

Shortly after Judge Shadur enunciated his internal choice of law rule, he was confronted with an issue upon which the Illinois appellate courts disagreed. In *Instrumentalist Co. v. Marine Corps League,* Judge Shadur felt "obligated," under the *Thorpe/Garcia* rule, to follow the First District Appellate Court. Only when there is a conflict within the divisions of the Illinois first appellate district does Judge Shadur believe that *Erie* requires a predictive approach to ascertain Illinois law. Accepting the correctness of Judge Shadur's general rule, however, one could question whether the logic of his position would not be served more consistently by applying the law of that division where venue would have been proper if the case had been filed in state court. Judge Shadur also employs the predictive method

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172. People v. Thorpe, 52 Ill. App. 3d 576, 367 N.E.2d 960 (1977); Garcia v. Hynes & Howes Real Estate, Inc., 29 Ill. App. 3d 47, 311 N.E.2d 634 (1975) (where appellate court decisions conflict, circuit court should follow decision of appellate court within its district). See supra text accompanying notes 161-64. As to whether the *Thorpe/Garcia* rule of stare decisis is really the same conceptual animal contemplated by *Klaxon,* see infra text accompanying notes 217-34.

173. 311 U.S. 169 (1940).


175. The "excesses of 311," Supreme Court decisions in volume 311 of United States Reports, are discussed at supra note 21.

176. *National Can,* 505 F. Supp. at 148 n.2 (quoting *Fidelity Union Trust Co. v. Field,* 311 U.S. 169, 180 (1940)).


178. *Id.* at 339 & n.4.

179. As of 1987, there were 21 judges sitting in the five divisions of the first district. See *Chicago Lawyer, Judicial Directory* (1987).

180. Bonanno v. Potthoff, 527 F. Supp. 561 (N.D. Ill. 1981). A conflict between two First District decisions leaves the federal judge "free to choose the most likely result before the Illinois Supreme Court" by looking at how it decided related cases. *Id.* at 563. See also *Commercial Discount Corp. v. King,* 552 F. Supp. 841, 845 n.6 (N.D. Ill. 1982) (rejecting as "wooden in the extreme" defendant's request that, given a split within the First District, the Court should follow the "most recent" First District decision). One can nonetheless question where the logic of Judge Shadur's position should lead him.
when there is neither an "Illinois case in point" nor "any significant Illinois precedent," and where a state court plaintiff could have sued in two different appellate court districts, but instead sues in the Northern District of Illinois federal court. In three decisions, Judge Shadur has written what is, at first blush, a persuasive apologia for the "internal choice of law approach." This method seems to be uniquely his own, although a few decisions in other jurisdictions have articulated similar concerns. Based on the "holy" trinity of *Erie, Guaranty Trust v. York,* and *Klaxon,* Judge Shadur reasons as follows:

(1) *Erie* requires federal courts to apply state substantive law in disputes between diversity-of-citizenship adversaries so as to avoid unequal protection of the law and to provide uniformity in the administration of laws;

(2) *York* teaches "that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result";

(3) *Klaxon* says that choice-of-law rules are substantive for *Erie* purposes, "otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side";

(4) Therefore, Judge Shadur concludes that the *Thorpe/Garcia* rule is just as binding on a federal court in Illinois "as any other Illinois choice-of-law, or other substantive law, rule."
Whether Judge Shadur is correct—whether *Erie* and its progeny have taken us so far—is problematic. Judge Marshall has questioned the internal choice of law approach from several perspectives. There are, in addition, several other concerns raised by Judge Shadur’s formula. Can *Klaxon*’s mandate be said to include the *Thorpe/Garcia* situation which involves, after all, a rule of stare decisis addressed to state courts? Even if we accept Judge Shadur’s general notion of evenhandedness as between a federal and state court sitting in the same geographical location, why should Judge Shadur follow a holding of the Illinois Second and Third Appellate Court Districts (*Thorpe/Garcia*) in situations where, under his own formula, the law of the First Appellate Court District should be applicable? These and other questions will be addressed in the next section.

**C. “Appellate Court Adherence”: A Critique**

The most fundamental difference between the Shadur approach and Marshall’s “Supreme-Court-prediction” concerns the weight to be afforded decisions of an intermediate state appellate court. This distinction, it would seem, pertains to whether a state appellate court has enunciated an “internal” rule of substantive law (e.g., the Illinois Insurance Code preempts a plaintiff’s right to recover punitive damages for an insurer’s breach of its good faith duty) or has spoken in terms of stare decisis or what Judge Shadur terms “choice of law” (e.g., when appellate courts differ, a state trial court is bound by a decision of the appellate court in its own district). Absent guidance from the state’s highest court, in certain situations Judge Shadur

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190. Roberts v. Western-Southern Life Ins. Co., 568 F. Supp. 536 (N.D. Ill. 1983) (Erie requires federal court to apply law that would ultimately apply; “state trial court” approach is incentive for forum shopping); Kelly v. Stratton, 552 F. Supp. 641 (N.D. Ill. 1982) (Judge Shadur’s approach may require federal court to apply law which would not be used if plaintiff filed in state court).


192. Id.


To students of Conflict of Laws, vocabulary terms such as “internal law,” “choice of law,” “whole law,” should raise the specter of renvoi—where the forum court not only looks to the internal law of the relevant jurisdiction, but to its choice of law approach. See RESTATEMENT OF CONFLICTS OF LAWS § 8 (1934). Under the renvoi doctrine, the foreign jurisdiction’s choice of law may lead back to the law of the forum (“remission”) or to that of a third state (“transmission”). See generally Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1166-70 (1938) (discussing four approaches to renvoi problems). See also *In re Schneider’s Estate*, 198 Misc. 1017, 96 N.Y.S.2d 652 (1950) (reference to law of situs is to whole law, including its conflicts of law rules).

195. Judge Shadur does not use the “appellate-court-adherence” approach when there is a conflict within the appellate district, when there is no significant precedent, or when the plaintiff could have sued in several Illinois counties. See supra text accompanying notes 176-80.
would give determinative weight to both types of intermediate appellate holdings. In contrast, Judge Marshall and the overwhelming weight of authority suggest that appellate court decisions provide only data, not determinative weight for ascertaining state law. Under *Erie*, if a federal court is convinced that the state's highest court would decide otherwise, the federal judge may disregard those appellate court decisions. There appears to be no reason, based on logic or the *Erie* doctrine, to treat the intermediate court decisions differently based upon whether they address "internal" law or "choice-of-law." Judge Shadur, of course, does not. He gives both types of decisions determinative weight. But it would seem clear that the great number of courts which view the *Erie* mandate vis-a-vis "internal" decisions of intermediate appellate court decisions as "data," or "evidence," or "indicators" would similarly construe alleged "choice of law" decisions of appellate courts, such as *Thorpe* and *Garcia*. In this regard it should be noted that federal courts often do employ a predictive method to ascertain whether a state's highest court would abandon the traditional, vested rights approach to choice-of-law in favor of a modern approach.

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197. See, e.g., *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (if state's highest court has not addressed issue, appellate court decisions not binding); *West v. American Tel. Co.*, 311 U.S. 223, 237 (1940) (federal court must have persuasive data to find that state supreme court will not follow lower court's holdings); *General Elec. Credit Corp. v. Ger-beck Mach. Co.*, 806 F.2d 1207, 1209 (3d Cir. 1986) (intermediate appellate court decisions must be given "significant" weight); *Green v. J.C. Penney Auto Ins. Co.*, 806 F.2d 759, 761, 765 (7th Cir. 1986) (where Illinois appellate decisions conflict, court adopts "superior rule" enunciated by Fifth District as that which the Illinois Supreme Court would adopt); *Williams, McCarthy, Kinley, Rudy & Picha v. Northwestern Nat'l Ins. Group*, 750 F.2d 619, 624 (7th Cir. 1984) (intermediate appellate court decision not binding evidence of state law where it is not a good predictor of what state's highest court would do); *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662 (3rd Cir. 1980) (federal courts should give "proper regard" but not "conclusive effect" to decisions of lower state courts and may not be bound by intermediate appellate court ruling), *cert. denied, 449 U.S. 976* (1980); *Coleman v. Western Elec. Co.*, 671 F.2d 980, 983 (6th Cir. 1982) (state appellate court decision is an "Erie indicator" for ascertaining state law).

198. See supra note 197.


Of course, a federal court may not "engraft onto those state [choice-of-law] rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the state in which the federal court sits." *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975). Cf. *Lester v. Aetna Life Ins. Co.*, 433 F.2d 884 (5th Cir. 1970) (court used an interest analysis and applied Louisiana law although Louisiana had adhered to traditional choice-of-law rule which pointed to foreign law). The *Lester* court side-stepped *Klaxon's* mandate to follow the "conflict of laws rules prevailing in the forum state," *313 U.S. 487*, 494 (1941), by noting that there was no conflict of laws present because only Louisiana policy was implicated in the case. *Lester*, 433 F.2d at 889.
The fundamental question still remains: Is Judge Shadur, who appears to be a "voice crying in the wilderness," correct in assuming that Erie and its progeny require that intermediate appellate court decisions be given determinative weight? Professor Corbin observes that a federal court must ascertain state law by examining "all the juristic data that are available to the state court. If the federal judge is required to disregard some of those available data [such as conflicting decisions of other appellate courts pursuant to the Shadur approach], the litigant is not getting the same justice that he would if the forum were a court of the state whose system of law is applicable..." For Judge Shadur to be bound by a First District Appellate Court decision when in his own scheme it is applicable might, in the words of one commentator, "turn out to be more hazardous a course than boldly to try to look into the womb of time and apply the law as it seems to be developing." Similarly, Judge Shadur's approach may be more hazardous than predicting how the Illinois Supreme Court would decide a case involving a state court litigant on subsequent appeal to the intermediate appellate court and, finally, to that court. Erie requires only that a federal court apply the law that "ultimately" would be applied had the case been litigated in a state court. Judge Shadur's approach requires the assumption that no diversity case brought in federal court, if brought in state court, would have reached that state's highest court.

200. For those very few decisions employing a similar analysis, see supra note 184.
201. At least in those situations where Judge Shadur deems it necessary. See supra text accompanying notes 176-80.
202. Corbin, The Laws of the Several States, 50 Yale L.J. 762, 774 (1941). Professor Corbin's classic remarks continue:

When the rights of a litigant are dependent on the law of a particular state, the court of the forum must do its best (not its worst) to determine what that law is. It must use its judicial brains, not a pair of scissors and a paste pot. Our judicial process is not mere syllogistic deduction, except at its worst. At its best, it is the wise and experienced use of many sources in combination—statutes, judicial opinions, treatises, prevailing mores, custom, business practices; it is history and economics and sociology, and logic, both inductive and deductive. Shall a litigant, by the accident of diversity of citizenship, be deprived of the advantages of this judicial process? Shall the Supreme Court, by what superficially appears to be an unselfish and self-denying ordinance, foreclose the use of such a process by federal judges? It is in fact a denial of justice to those for whom a court exists. We must not forget that a litigant has only one day in court. When forced into a federal court, that is his only court. If he is denied life, liberty, or property by the narrow syllogistic use of a state judge's worded doctrine, he is not restored by the fact that intelligent state judges later refuse to apply that doctrine to other litigants. True, he has had his day in court; but what a court!

Id. at 775.
205. Id. at 543 n.15.
On the other hand, Judge Shadur's method may achieve parity between state and federal court outcomes in more cases than Judge Marshall's approach, as few state court cases do reach the state supreme court.206

The Shadur approach, however, is flawed in an even more significant way. Consider the following hypothetical scenario: Mr. and Mrs. Smith of Iowa wish to have children. However, Mrs. Smith, after much testing, has been found to be incapable of conceiving. The couple enters into a surrogacy contract in Illinois with Mrs. Jones, an Illinois domiciliary. Upon the baby's birth, Ms. Jones has a change of heart and decides to keep the child. The Illinois Supreme Court has not yet addressed the validity of surrogacy contracts. However, the court of the Fifth Appellate District has recently declared such contracts to be valid and enforceable. The court of the First Appellate District, where proper state venue lies, has not yet spoken. Following the Thorpe/Garcia doctrine, Judge Shadur tells us that a federal court must give determinative weight to the Fifth District Appellate Court decision.207 If plaintiff filed in the proper state court, the trial court presumably would follow the fifth district holding.208 But on appeal, the first district might not do so, since decisions of a different district appellate court do not have stare decisis effect in another district.209 Moreover, given the cutting-edge nature of the issue, it is highly possible that the first district might reach a different conclusion. Thus, Mr. and Mrs. Smith, if they were wise (and lucky enough to have the case assigned to Judge Shadur), would file the case in federal court on the basis of diversity, thereby insuring that the favorable rule enunciated by the fifth district would be applied and upheld on appeal.210 This opportunity for intra-state forum-shopping between state and federal court violates the very heart of Erie, as well as Klaxon. The disuniformity between courts in a single state, forum-shopping "across the courthouse square," may be more serious than disuniformity between federal courts.211

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207. See, e.g., Commercial Discount Corp. v. King, 552 F. Supp. 841, 848 (N.D. Ill. 1982).

208. Under Thorpe and Garcia, in the absence of a conflicting decision by the appellate court in which district the trial court sits, the decisions of other appellate courts are binding authority. See supra notes 162-65 and accompanying text.

209. See supra text accompanying note 149.

210. See Roberts v. Western-Southern Life Ins. Co., 568 F. Supp. 536, 540-41 (N.D. Ill. 1983). As Judge Marshall notes, the same opportunity for forum-shopping is presented to a defendant if by removal that party could obtain a more favorable rule of law. Id. at 541. The underlying assumption of the hypothetical case is that Illinois law as to the validity and enforceability of the contract would be held applicable either because of a choice of law clause in the contract or because Illinois choice of law so indicates. See, e.g., Champagnie v. W.E. O'Neal Constr. Co., 77 Ill. App. 3d 136, 395 N.E.2d 990 (1979) (to determine validity of indemnity agreement Illinois employs the most significant relationship approach to choice of law); RESTATEMENT (SECOND) CONFLICT OF LAWS § 188 (1969).

211. See R. CRAMPTON, D. CURRIE, H. KAY, CONFLICT OF LAWS: CASES-Comments-QUESTIONS
A related but different forum-shopping problem also stems from Judge Shadur's approach; it requires federal courts to give more weight to state appellate decisions than would the courts rendering those decisions.\(^2\) Returning to our prior hypothetical surrogate scenario, it is conceivable that upon later reflection (i.e., consideration of current trends and more recent national litigation)\(^2\) the Fifth Appellate District Court might very well adopt a wholly different conclusion. Clearly, that court is completely free to reexamine its earlier holding and redefine the boundaries of that earlier decision. It is exactly that judicial process in which \textit{Erie} contemplates a federal court will engage, using "judicial brains, not a pair of scissors and a paste pot."\(^1\) If federal trial courts are permitted under \textit{Erie} to disregard a decision by a state's highest court if a developing line of authorities cast doubt as to the continuing validity of the other decision,\(^2\) then surely federal trial courts should not be more "bound" by intermediate appellate court decisions.\(^2\)

Yet another troubling question raised by Judge Shadur's intermediate appellate court adherence concerns his reading of \textit{Klaxon}. Whether viewed as the beloved, true progeny of \textit{Erie} or unwanted bastard child,\(^2\) \textit{Klaxon}...
is with us. But as will be seen, not even the broadest reading of Klaxon suggests that it embraces the stare decisis effect of decisions like Thorpe and Garcia on federal—as opposed to state—courts.

First, Thorpe and Garcia clearly and explicitly addressed their comments to state, not federal, courts. It would be both unprecedented and without constitutional authority for a state court to require that federal courts be bound by certain intermediate state court decisions. Erie does not go so far. Under Judge Shadur's approach, federal courts will not only encourage forum-shopping "across the courthouse square," but forum-shopping among federal courts located in Illinois. Sitting in different state appellate court districts, these federal courts would be obligated to follow decisions of that particular appellate court district. Moreover, Judge Shadur's approach creates uncertainty with respect to decisions of federal courts outside of Illinois. While Judge Shadur does not discuss this potential problem, it would arise whenever a non-Illinois federal court must apply Illinois law to resolve an issue. Should that court consider, for instance, whether plaintiff could have brought the case in the First District Appellate Court and thus apply that law? Such consideration would raise problems of indeterminate state venue because in Illinois venue is generally proper in the county of residence of any defendant. Moreover, domestic and authorized foreign corporations are, for venue purposes, "residents" of any county in which they do business. In such a context, it would seem far more appropriate for that "foreign" federal court to employ the well-settled Erie predictive and Klaxon formulae. In fact, failure to do so might conflict with recent Supreme Court choice-of-law pronouncements.

Second, and perhaps more to the point, Klaxon's focus is on traditional choice-of-law principles—those arising in the context of interstate (domestic vs. foreign jurisdiction), rather than intrastate, transactions. When Klaxon was decided in 1941, the prevailing choice-of-law rules used by state courts reflected those principles announced by the first Restatement of Conflict of Laws. In tort cases, state courts generally applied the law of the state where the injury or death occurred: lex loci delictus. In contract actions, the court would apply the choice of law rule of the state in which it sits, 313 U.S. 487, 496-97 (1941), and that rule presumably would point to Illinois substantive law.


218. See supra text accompanying notes 162-67.

219. See supra text accompanying note 211.

220. Under Klaxon, that federal court would apply the choice of law rule of the state in which it sits, 313 U.S. 487, 496-97 (1941), and that rule presumably would point to Illinois substantive law.


222. Id. ¶ 2-102(a).

223. For a federal court to be Erie-and Klaxon-bound by a decision of an appellate court in a district which has no interest nor any significant contact with the issue to be resolved raises constitutional concerns. See infra note 230.

224. See Cotter, supra note 217, at 104.

depending upon whether the issue was one of validity or performance, the law of the place of making or the place where the performance was to occur governed.\textsuperscript{226} All that was decided in \textit{Klaxon} was that the federal court in Delaware should follow the conflict of laws rules prevailing in the state in which it sits.\textsuperscript{227} The conflict of laws rules contemplated by \textit{Klaxon} are those rules, whether they be traditional First Restatement of Conflict of Laws method or one of the more modern approaches,\textsuperscript{228} which would direct the forum jurisdiction to apply the law of another jurisdiction. The intrastate precedential effect of intermediate state court decisions on state courts as exemplified by \textit{Thorpe/Garcia} is an apple, or better yet an asparagus, compared to \textit{Klaxon}'s orange! What is clearly understood by students (and critics)\textsuperscript{229} of \textit{Klaxon} is that \textit{Erie} does not permit federal courts to fashion their own choice-of-law rules or to substitute their "better view" for that approach adopted by a state.\textsuperscript{230} Thus, there can be no federal common law of choice-of-law.

\textsuperscript{226} \textit{Id.} §§ 332, 358.

\textsuperscript{227} 313 U.S. 487, 496 (1941). The Third Circuit in \textit{Klaxon} had not done so; instead it adopted the "better view" without regard to Delaware law. 115 F.2d 268, 275 (3d Cir. 1940).

\textsuperscript{228} See e.g., Currie, \textit{Notes on Methods and Objectives in the Conflict of Laws}, 1959 DUKE L.J. 171 ("interest analysis" isolates issues and identifies policy interests underlying them) (\textit{reprinted in} B. Currie, \textit{Selected Essays On The Conflict of Laws} 177 (1963)); \textit{Restatement (Second) of Conflict of Laws} §§ 6, 145 (1969) (tests seek "most significant relationship" to parties, suit and forum where suit brought); A. \textit{Von Mehren} & D. \textit{Trautman}, \textit{The Law of Multistate Problems} 76 (1965) ("functional approach . . . aims at solutions that are the rational elaboration and application of the policies and purposes underlying specific legal rules and the legal system as a whole."); R. \textit{Leflar}, \textit{American Conflicts Law} 195 (3d ed. 1977) ("choice-influencing considerations . . . (A) Predictability of results; (B) Maintenance of interstate and international order; (C) Simplification of the judicial task; (D) Advancement of the forum's governmental interests; (E) Application of the better rule of law.").


\textsuperscript{230} The only exception to a state's otherwise freely chosen choice-of-law method arises when application of a state's choice-of-law rule would be constitutionally impermissible under the full faith and credit clause or the due process clause. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985) ("Given Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits") (footnote omitted). See \textit{generally} Miller & Crump, \textit{Jurisdiction and Choice of Law in Multistate Class Actions} After Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1 (1986) (advocating legislative solution to jurisdictional problems of multistate class actions). \textit{Phillips} was the first Supreme Court decision in more than 38 years striking down as unconstitutional a forum court's application of forum law. See D. \textit{Weintraub, supra} note 227, at 527. See also Allstate Ins. Co. v. Hague, 449 U.S. 302, 320 (1981) (forum had a "significant aggregation of contacts with the parties and the occurrence" such that application of its law was "neither arbitrary nor fundamentally unfair" in violation of the due process clause or the full faith and credit clause). \textit{See generally} Symposium: Choice-of-Law Theory After Allstate Insurance Co. v. Hague, 10 \textit{Hopstra L. Rev.} 1 (1981) (discussing constitutional restraints on choice-of-law processes).
But *Klaxon* does not suggest, as Judge Shadur asserts, that a federal court in the first district appellate court is “bound” by a decision of that state court. Returning to our Smith/Jones hypothetical surrogacy scenario, let us assume that the contract was made in Iowa, that Mrs. Jones during her pregnancy was to stay with the Smiths in Iowa, and was to deliver her baby in Iowa with subsequent adoption in Iowa. Let us further assume that Mrs. Jones moved to Iowa (or to another state) after the Smiths properly filed the case in federal court, the Northern District of Illinois. Under Illinois’ choice of law approach, the governing law is that of the place with the most significant relationship to the issue.231 In the hypothetical *Smith* v. *Jones* case, it is most likely that Illinois choice-of-law rules would require application of Iowa law.232 Judge Shadur, however, would have the federal court adopt a decision (assuming one exists) of the First District Appellate Court because proper venue would presumably have lain there.233 The effect is that the Smiths’ day in Judge Shadur’s federal court ends with a result far different than would be reached in the vast majority of the nation’s federal courts and in any Illinois state court, presuming those courts employ the “choice-of-law” contemplated by *Klaxon*, *i.e.*, in Illinois, the law of the place with the most significant relationship.234 Although surely unintended by Judge Shadur, the result logically flows from his appellate court adherence approach.

Judge Shadur has also noted the possible tension between two lines of Supreme Court pronouncements on the issue of ascertaining state law.235 However, the alleged tension between such decisions as *Estate of Bosch*236 and *Bernhardt*237 and those of *Fidelity Union*238 and *Klaxon* is, at best superficial, or, at least resolvable.

In *Bosch*, the Court needed to determine state law in order to resolve a federal tax issue.239 The Court explicitly stated that appellate court decisions

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234. The hypothetical further assumes that Iowa courts validate surrogacy contracts and that the First District Appellate Court in Illinois does not—or vice versa.


239. *Erie*-type issues clearly arise in settings other than diversity. *See supra* note 16.
are only part of the data examined by a court to ascertain that state’s law.\textsuperscript{240} \textit{Bernhardt} teaches that it is appropriate for a federal court to follow an elderly decision of a state supreme court \textit{provided} there is no confusion in that state’s decisions, “no developing line of authorities” casting shadows over the aged decision\textsuperscript{241}—in short, where the state supreme court decision is aging but healthy. Twenty-six years before \textit{Bosch} and 15 years before \textit{Bernhardt}, \textit{Fidelity Union} instructed that there should not be, on the same legal issue, one rule of law for state court litigants and another rule for federal court litigants.\textsuperscript{242} \textit{Klaxon} later required a federal court to apply the choice-of-law rules of the state in which it sits. However, these earlier cases do not present a true conflict with the \textit{Bosch/Bernhardt} guidelines.

The later decisions describe a process in which a court examines lower state court decisions merely to predict how the state’s highest court would rule. However, this approach of \textit{Bosch} and \textit{Bernhardt} may be harmonized with the earlier \textit{Fidelity Union} doctrine. By applying the law which would be adopted by the state supreme court, the federal court, as mandated by \textit{Fidelity Union}, avoids applying a rule different from that which would ultimately be applied in state court. Moreover, the federal court in \textit{Fidelity Union} was not faced with conflicting state decisions which suggested that the state’s highest court would disagree with the existing state court decision. Instead, a sole \textit{nisi prius} state court decision was the only evidence of how the New Jersey Supreme Court would interpret a new state statute.\textsuperscript{243} Finally, as noted above, \textit{Klaxon}’s holding does not implicate intrastate “choice-of-law” doctrines such as \textit{Thorpe/Garcia}. Thus, what little guidance the Supreme Court has offered in the area of ascertaining state substantive law can also be easily incorporated into divination of a state’s choice-of-law approach.

Once \textit{Fidelity Union} and \textit{Klaxon} are synthesized with \textit{Bosch} and \textit{Bernhardt}, it becomes apparent not only that the two sets of cases are reconcilable, but also that the latter set is much more relevant to ascertaining state law in the

\textsuperscript{240} \textit{Bosch}, 387 U.S. at 465 (1967). Directly addressing \textit{Erie} situations, the Court said:

[U]nder some conditions, federal authority may not be bound even by an intermediate state appellate court ruling. . . [T]he underlying substantive rule involved is based on state law and the State’s highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving ‘proper regard’ to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, \textit{sitting as a state court}.

\textit{Id.} (citations omitted) (emphasis added). This language clearly seems to resolve whatever ambiguities are presented by the mandate of \textit{Fidelity Union Trust Co. v. Field}, 311 U.S. 169 (1940).

\textsuperscript{241} \textit{Bernhardt v. Polygraphic Co. of Am.}, 350 U.S. 198, 205 (1956).

\textsuperscript{242} \textit{Fidelity Union}, 311 U.S. at 180.

\textsuperscript{243} The existence in \textit{Fidelity Union} of only one apposite state court decision further suggests that \textit{Fidelity Union} does not mandate the Shadur approach, which by definition is used to ascertain state law among conflicting lower court decisions. Thus, \textit{Fidelity Union}, like \textit{Klaxon}, see supra notes 224-30 and accompanying text, may be irrelevant to Judge Shadur’s approach.
Thorpe/Garcia situation, which will always present conflicting evidence as to what is the relevant state substantive rule. This is so because under Thorpe/Garcia there may be as many “Illinois law” voices, five, as there are districts. In this setting, it is far more appropriate to discern intelligently rather than to follow blindly. In fact, this is what courts have done, and quite properly so. A “federal judge need no longer be a ventriloquist’s dummy.”

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In Saloomey, the Second Circuit, after extensive analysis, concluded that despite a 1977 Connecticut Supreme Court decision applying the rule of lex loci delicti (place of injury) in automobile tort cases, Gibson v. Fullin, 172 Conn. 407, 411, 374 A.2d 1061, 1064 (1977), the district court properly predicted that the Connecticut Supreme Court would apply the “most significant relationship” test of the Restatement (Second) of Conflict of Laws in a wrongful death action arising from an aviation accident. The Second Circuit found persuasive several facts: Connecticut had already rejected lex loci delicti in workers’ compensation actions, Saloomey, 707 F.2d at 675 n.6 (citation omitted); Gibson had presented “no compelling reason to abandon the traditional rule,” id. at 674 (citation omitted); and the most significant relationship approach comports with Gibson’s emphasis on easily determined and easily applied rules, and predictable results. Id. at 675 (citation omitted). The Second Circuit analysis is certainly within the contemplation of Bosch and Bernhardt. Both the district court and Second Circuit in Saloomey employed not only the Erie-ly correct method but also reached the “right” predictive result. See O’Connor v. O’Connor, 201 Conn. 632, 519 A.2d 13 (1986) (most significant relationship approach governs where application of lex loci delicti would produce arbitrary, irrational result). But cf. Habenicht v. Sturm, Ruger & Co., 660 F. Supp. 52 (D. Conn. 1986) (mem.) (because there are meaningful contacts with state in which injury occurred, Connecticut courts would continue to follow the doctrine of lex loci delicti) (decided six weeks prior to O’Connor).

In Southern Pacific, the court noted the parallel obligations placed on a federal court to determine state law under the directive of the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982), and in an action based on diversity jurisdiction. 462 F. Supp. 1227, 1233 (E.D. Cal. 1978). After an exhaustive examination of relevant Nevada and Ninth Circuit decisions, the court concluded that no reason existed to expect that the Nevada Supreme Court would depart from a clear line of lex loci delicti precedent and adopt the most significant relationship approach to choice-of-law issues. Id. at 1245. While later Nevada cases have adopted the Second Restatement approach in contracts cases, see Engel v. Ernst, 102 Nev. 391, 395, 724 P.2d 215, 216-17 (1986) (per curiam); Constanzo v. Marine Midland Realty Credit Corp., 101 Nev. 277, 279, 701 P.2d 747, 748 (1985) (per curiam); Sievers v. Diversified Mortgage Investors, 95 Nev. 811, 815, 603 P.2d 270, 273 (1978), the vested rights theories of the First Restatement still apply in Nevada with respect to tort cases. See, e.g., Laxalt v. McClatchy, 116 F.R.D. 438, 447-49 (D. Nev. 1987); Hubbard Business Plaza, 649 F. Supp. 1310 (D. Nev. 1986); Tweet v. Webster, 610 F. Supp. 104 (D. Nev. 1985).

For examples of successful ascertainment of Illinois choice of law, see Overseas Dev. Disc Corp. v. Sangamo Constr. Co., 686 F.2d 498, 510-11 n.43 (7th Cir. 1982); Zlotnick v. MacArthur, 550 F. Supp. 371, 373 n.2 (N.D. Ill. 1982); Adams Laboratories, Inc. v. Jacobs Eng’g Co., 486 F. Supp. 383, 389 n.6 (N.D. Ill. 1980), in which each federal court noted the Illinois trend of adopting the “most significant contacts test” where the contracts in issue were performed and executed in more than one state. Boise Cascades Home & Land Corp. v. Utilities, Inc., 127 Ill. App. 3d 4, 12, 468 N.E.2d 442, 448 (1st Dist. 1984).

245. See supra note 240.

246. C. Wright, supra note 5, at 373 (4th ed. 1983). Professor Wright continues:
A final drawback of the Shadur approach concerns the developmental impact on state law of federal court determinations of state law. Although the predictive approach may sometimes make the “wrong” guess, Judge Shadur’s formula stretches *Erie* and *Klaxon* too far. *Erie* and its progeny do and must afford federal courts some latitude in ascertaining state law. And when they do predict how the state’s highest court would decide the issue, the impact of that federal court decision is not insignificant. For example, it has been suggested that federal judges in diversity cases have made a disproportionate, though valuable, contribution to the development of state common law. The same impact would result, of course, whenever a federal court enunciates state law in cases involving pendent or federal question jurisdiction. The Shadur approach, therefore, would greatly limit the federal influence in this area.

Of course, one could argue that the outcome of the Marshall/Shadur debate is of little importance because the range of legal areas in which federal judges must apply state, as opposed to federal, law is shrinking. Judge Friendly’s hosannas to *Erie* in 1964 were accompanied by a faith that, in burying the notion of federal general common law, *Erie* opened the way for “specialized federal common law,” a development that has gone far and may likely go further. Just three years later, Judge Skelly Wright noted the rapidly expanding coverage of federal law which superseded or preempted state law, thus “persistently shrinking state law’s traditional subject-matter enclave.” Judge Wright’s comment, that “state law, in many of the eddies where it does still govern, is no more secure than a tenancy at will, terminable at Washington’s pleasure,” while perhaps an exaggeration, is equally, if not more, valid today.

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Instead he is free, just as his state counterpart is, to consider all the data the highest court of the state would use in an effort to determine how the highest court of the state would decide. This is as it should be. Unless this much freedom is allowed the federal judge, the *Erie* doctrine would simply have substituted one kind of forum-shopping for another. The lawyer whose case was dependent on an old or shaky state court decision that might no longer be followed within the state would have a strong incentive to maneuver the case into federal court, where, on the mechanical jurisprudence that the *Erie* doctrine was once thought to require, the state decision could not have been impeached.

Id. at 373-74 (footnote omitted).

247. See, e.g., Collins Co. v. Carboline, 837 F.2d 299, 301 (7th Cir. 1988).


249. See *supra* note 16.

250. Friendly, *supra* note 9, at 405.


252. Id. at 330. Judge Wright predicted that “by the end of the 1980’s . . . courts . . . [will]
This observation, however, must not lead to the conclusion that the jurisprudential argument between Judges Shadur and Marshall is a mere tempest in a teapot. For even if the size of the teapot (of applicable substantive state law) may have decreased, it is still necessary to use fine tea leaves to brew good tea; that is, to ascertain "unclear" state law in a manner effectuating the *Erie* policy of parity between state and federal courts. Further, given the present Supreme Court's narrower interpretation of federal preemption in certain areas, the importance of ascertaining state law may even grow. The Marshall/Shadur conflict, therefore, remains significant in achieving the proper balance between state and federal law. The ascertainment of state law problems which triggers the judges' debate warrants the Supreme Court's attention.

apply federal law in a large fraction of the cases for which, under diversity and *Erie*, they must now hasten willy-nilly to the law of the states." *Id.* at 336-37.


255. The Supreme Court's grant of certiorari in Exxon v. Banque de Paris et des Pays-bas, 108 S. Ct. 1572 (1988), may afford the Court the opportunity to comment on a federal court's duty to ascertain state law in diversity cases. The Court may thus shed light on the Marshall/Shadur dispute. At issue in *Exxon* is whether the Fifth Circuit should set aside its original ruling, 828 F.2d 1121 (5th Cir. 1987), and reconsider the case in light of a Texas intermediate appellate court decision. The state court rendered its decision while Exxon's request for rehearing was pending before the Fifth Circuit. The Texas state court decision conflicted with the judgment of the federal court.
III. Conclusion

It has been fifty years since Justice Brandeis said that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State . . . There is no federal general common law." Since Erie, however, fifty years of jurisprudence and critical commentary has not solved in a true and lasting fashion the dilemma of ascertaining the state law to be applied. Erie itself offered little practical guidance as to how to determine the applicable state law when the Court stated: "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." Quite often, federal courts are confronted with an issue which has been addressed neither by the concerned state’s legislature nor by its highest court.

In the first few years after Erie, the Supreme Court displayed a remarkable inclination towards giving great effect to decisions of state nisi prius and intermediate appellate courts, perhaps as witness to the strength of the Swift v. Tyson counter-revolution. But, the "excesses of 311," as these 1940 Supreme Court decisions were dubbed, gave way to a more restrained approach. Later Supreme Court decisions focused on whether the relevant intermediate appellate court decisions were, in fact, good and reliable indicia of how that state’s supreme court would resolve the posed issue, or on whether an aged decision of a state’s highest court would still best describe that state court’s position.

An end-run around ascertainment of state law dilemmas is found in the doctrines of abstention and certification. The Supreme Court first enunciated one form of abstention—Pullman abstention—in 1941 and encouraged certification, in appropriate circumstances, 19 years later. However, neither abstention nor certification furnish a panacea for Erie ascertainment.

257. Id.
258. See supra note 21 and accompanying text.
259. Id.
260. See, e.g., Commissioner v. Estate of Bosch, 387 U.S. 456 (1967). "If there be no decision by [the state’s highest] court then federal judges must apply what they find to be the state law after giving ‘proper regard’ to relevant rulings of other courts of the state. In this respect, [a federal court] may be said to be, in effect, sitting as a state court." Id. at 465 (citation omitted).
261. Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 204 (1956) (federal court is free to consider “later authority,” “fracture” in the later decisions, and “legislative movement” to change the earlier result, in determining state law and need not adhere blindly to state court decisions). See supra text accompanying notes 18-19.
262. See supra notes 43-78 and accompanying text.
263. See supra notes 79-133 and accompanying text.
of state law ills. For example, in order to conclude that *Pullman* abstention would be appropriate in a given case, a federal judge may first have to determine the clarity of the state statute and/or its interpretation by state courts,266 thus raising anew an *Erie* ascertainment quandary. Similarly, certification, while available in almost forty states,267 does not resolve the *Erie* problem completely. It is a discretionary procedure,268 and federal judges are often loath to impose upon litigants the additional expense and delay necessitated by certification.269 Federal judges also voice concern about the increased burden on state courts which certification imposes.270 Finally, not all states that have certification procedures permit their use by federal district, as opposed to federal appellate, courts.271

By far the most frequently employed method to ascertain state law is the classic predictive approach, espoused by Judge Marshall of the Northern District of Illinois and the vast majority of federal judges and commentators who have considered the issue in the last five decades. However, Judge Shadur, joined by one other judge in the Northern District of Illinois272 and echoed in just two other federal cases,273 posits a substantially different method. When no authority from the state’s highest court exists and intermediate appellate court decisions are in conflict, in certain circumstances Judge Shadur believes himself constrained by *Erie* and its progeny to give determinative weight to decisions of Illinois’ first district appellate court, which sits in the same geographical district as the Northern District of Illinois.

Judge Shadur’s internal choice of law solution to the *Erie* problem, while initially attractive (because the same result arguably would obtain in state and federal courthouses “a block away” from each other), is flawed.274 Instead, it is the predictive approach that, while at times susceptible to error, remains the best method to effectuate *Erie’s* policy of achieving parity between state and federal courts.

266. See supra text accompanying notes 53-54.
267. See supra notes 82-86 and accompanying text.
268. See supra note 98 and accompanying text.
269. See supra notes 99-101 and accompanying text.
270. See supra notes 102-04 and accompanying text.
271. See supra note 84 and accompanying text.
272. Judge Leinenweber has adopted Judge Shadur’s approach. See supra note 30.
273. See supra note 184.
274. See supra notes 191-246 and accompanying text.