

Applying Federal Court of Appeals’ Precedent: Contrasting Approaches to Applying Court of Appeals’ Federal Law Holdings and *Erie* State Law Predictions

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The precedential force of decisions by a federal circuit court of appeals might strike the typical practitioner as a settled issue. It is axiomatic, for example, that a federal circuit court of appeals’ decision on questions of federal law binds subsequent panels of that court and district courts within that circuit, absent intervening contrary authority in the form of a federal statute, a decision from the court of appeal sitting en banc, or the Supreme Court of the United States. One might anticipate that a federal circuit court of appeals’ “prediction” of state law in a diversity jurisdiction case pursuant to *Erie Railroad Co. v. Tompkins*,¹ would have similar force, but is this true?

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¹ 304 U.S. 64 (1938).

And what about cross-jurisdictional applications of federal court of appeals decisions in state courts? State courts certainly do not consider themselves bound by a federal court of appeals' *Erie* predictions.² But do they feel similarly about a federal court of appeals' decisions on questions of federal law? For example, where the United States Supreme Court and the Pennsylvania Supreme Court have not spoken on a Fourth Amendment search and seizure question, does the Pennsylvania Superior Court consider itself bound by a Third Circuit decision addressing that question?

Needless to say, how a particular court treats federal court of appeals' precedent can often be critical in litigation. For example, counsel handling a case in Mississippi state court implicating a question of federal law should be well aware that a Fifth Circuit decision on that question will control the Mississippi court.³ And counsel preparing an appeal of a state law question before the Fifth Circuit should be cognizant of that court's strong deference to its own precedent on the question, whether or not the relevant state's intermediate appellate court has weighed in on it.⁴

This Article will provide a thorough examination of the state of the law on each of these important questions of federal court of appeals' precedent, and offer some analysis on the correctness of the various approaches taken to these questions.

I. FEDERAL COURTS OF APPEALS' *ERIE* PREDICTIONS

A. *Erie and the Supreme Court's Teachings on How to Make Erie Predictions*

In *Erie Railroad Co. v. Tompkins*, the Supreme Court overruled its decision in *Swift v. Tyson*⁵ and held that in cases where state law provides the rule of decision, federal courts have a constitutionally-rooted obligation to ascertain and apply "the law of the state."⁶ The Court declared that "whether the law of the State shall be declared by its

² See, e.g., *Cambria-Stoltz Enters. v. TNT Invs.*, 747 A.2d 947, 952 (Pa. Super. Ct. 2000) (Third Circuit's interpretation of state law not binding on Pennsylvania state courts) (citation omitted).

³ See *King v. Grand Casinos of Miss., Inc.*, 697 So. 2d 439, 440 (Miss. 1997) ("This Court's task in the present case is simplified greatly by the fact that there is a Fifth Circuit Court of Appeals decision on point, which this Court considers to be controlling with regard to the present issue of federal law.").

⁴ *FDIC v. Abraham*, 137 F.3d 264 (5th Cir. 1998).

⁵ 41 U.S. (16 Pet.) 1 (1842).

⁶ *Erie*, 304 U.S. at 78.

Legislature in a statute or by its highest court in a decision is not a matter of federal concern[.]”⁷ implying at least that federal courts must look to a state’s highest court in ascertaining state law.⁸ Only a few years later, the Court stated clearly that “the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.”⁹

If a state’s highest court has not addressed an issue of state law, but its intermediate appellate court has, how should a federal court in *Erie* mode assess that intermediate appellate court decision? The Supreme Court first addressed this question in a quartet of cases decided shortly after *Erie*.¹⁰ In *West v. American Telephone & Telegraph Co.*, the Court explained that a “rule of law” announced by an intermediate appellate

⁷ *Id.*

⁸ See Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 696 (1995) (noting that, combined with the Court’s pre-*Erie* deference to the highest state court’s interpretation of a state statute, this statement from *Erie* “implies that federal courts will find all state law in pronouncements of the state’s highest court.”).

⁹ *Vandenbark v. Owens-Ill. Glass Co.*, 311 U.S. 538, 543 (1941). It should be noted, however, that this rule is not ironclad. In *Meredith v. City of Winter Haven*, decided only a few years after *Vandenbark*, the Supreme Court stated that “the rulings of the Supreme Court of Florida . . . must be taken as controlling . . . unless it can be said with some assurance that the Florida Supreme Court will not follow them in the future.” 320 U.S. 228, 234 (1943) (citations omitted) (emphasis added). See also *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 205 (1956) (following old Vermont Supreme Court decision, but only after finding “no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule.”).

Often relying expressly on *Meredith* and *Bernhardt*, numerous federal courts rendering *Erie* predictions have deemed themselves free to depart from a decision of the state’s highest court in predicting how that court would rule. See, e.g., *AIG Centennial Ins. Co. v. Fraley-Landers*, 450 F.3d 761, 767 (8th Cir. 2006) (stating that “[w]e are not required to apply all decisions of the Arkansas Supreme Court [on matters of Arkansas law], even if they have not been expressly overruled, if we are convinced that that court would not follow them[.]” and refusing to follow a 1960 Arkansas Supreme Court decision in ascertaining Arkansas law) (citation omitted); *Swix v. Daisy Mfg. Co.*, 373 F.3d 678, 681 (6th Cir. 2004) (“Where a state’s highest court has spoken to an issue, we are bound by that decision unless we are convinced that the high court would overrule it if confronted with facts similar to those before us.”) (citing *Bernhardt*); *MindGames, Inc. v. W. Publ’g Co., Inc.*, 218 F.3d 652, 656 (7th Cir. 2000) (stating that “there will be occasional, though rare, instances in which the best prediction of what the state’s highest court will do is that it will *not* follow its previous decision[.]” and refusing to follow a 1924 Arkansas Supreme Court decision in ascertaining Arkansas law) (emphasis added); *In re Ryan*, 851 F.2d 502, 509 n.9 (1st Cir. 1988) (noting that *Bernhardt* “indicated that on certain occasions a federal court need not follow an old state supreme court decision.”).

¹⁰ *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223 (1940); *Fid. Union Trust Co. v. Field*, 311 U.S. 169 (1940); *Six Cos. v. Joint Highway Dist. No. 13*, 311 U.S. 180 (1940); *Stoner v. N.Y. Life Ins. Co.*, 311 U.S. 464 (1940).

state court “is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.”¹¹ As discussed in the sections that follow, the rule of *West* sets the stage for conflict and uncertainty in assessing the precedential weight of a federal court of appeals’ *Erie* prediction where the relevant state intermediate appellate court has decided the state law question differently.

B. Federal Courts of Appeals’ Contrasting Approaches to Assessing the Precedential Force of Their Own Erie Predictions

The Supreme Court of the United States has thus made clear that while decisions from a state’s intermediate appellate court do not bind a federal court rendering an *Erie* prediction, they must be considered, if not followed, unless the federal court is “convinced” by “persuasive data” that the intermediate appellate court decision would not be followed by the state’s highest court. But the Supreme Court has not addressed how a federal court of appeals should treat such an intermediate appellate court decision when that decision conflicts with the court of appeals’ own, previous decision. This creates an obvious possibility of conflict, for it is well-settled that federal courts of appeals follow their own, prior precedent unless that precedent has been abrogated by (a) federal statute, (b) a decision of the federal court of appeals sitting *en banc*, (c) a decision of the United States Supreme Court, or generally, in the case of an issue of state law, (d) a decision of the relevant state’s highest court.¹² Assuming none of these abrogating events has transpired, how should a federal court of appeals treat its own prior *Erie* prediction where that prediction has been rejected, criticized or otherwise undermined by an intervening decision of the relevant state’s intermediate appellate court? Should it blindly follow its own precedent, pursuant to *stare decisis*? If not, under what circumstances can or should it adopt the view of the state intermediate appellate court as the appropriate *Erie* prediction of state law?

There appears to be disagreement among the circuits as to the precedential weight afforded to a federal court of appeals’ prior *Erie*

¹¹ *West*, 311 U.S. at 237. See also *Stoner*, 311 U.S. at 467 (“[F]ederal courts, under the doctrine of *Erie* . . . must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently.”).

¹² Although, as discussed above, the circuits have generally recognized their freedom to depart from a decision of the relevant state’s highest court where there is good reason to believe that court would not follow that decision. See *supra* note 8.

prediction.¹³ There is language from decisions in a number of circuits that suggests those circuits will follow their own *Erie* prediction precedent despite a contrary, intervening decision from a state intermediate appellate court. In *Wankier v. Crown Equipment Corp.*,¹⁴ for example, the Tenth Circuit, in a decision requiring the prediction of Utah law, explained that when a court of appeals must perform its “ventriloquial function” under *Erie* of predicting how the state’s highest court would rule, it “is bound by ordinary principles of stare decisis.”¹⁵ “Thus,” the court concluded, “when a panel of this Court has rendered a decision interpreting state law, that interpretation is binding on district courts in this circuit, and on subsequent panels of this Court, unless an intervening decision of the state’s highest court has resolved the issue.”¹⁶ As such, *Wankier* can be read to preclude subsequent panels of the Tenth Circuit from ignoring a prior panel’s *Erie* prediction even where state intermediate appellate courts have rejected that prior prediction, though the court in *Wankier* did not confront that scenario.¹⁷

The Eleventh Circuit appears to have moved recently toward a more robust stare decisis approach to assessing its own state law predictions. In *Palmer & Cay, Inc. v. Marsh & McLennan Cos.*,¹⁸ the court stated in dicta in a footnote that it was bound by its prior panel’s decision on the relevant issue of Georgia law, notwithstanding an intervening decision from Georgia’s intermediate appellate court to the contrary, “unless and until [the prior panel’s decision] is overruled by intervening, on-point case law from our circuit sitting *en banc*, the Supreme Court, or, on matters of Georgia state law, the Georgia Supreme Court.”¹⁹

¹³ See Jed I. Bergman, Note, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 970 (1996) (noting that the “rules governing the binding force of predictive precedents in the federal courts . . . [are] confused and inconsistent.”).

¹⁴ 353 F.3d 862 (10th Cir. 2003).

¹⁵ *Id.* at 866.

¹⁶ *Id.* (citations omitted).

¹⁷ However, it should be noted that it is not at all clear that this reading of *Wankier* accurately depicts the Tenth Circuit’s approach to dealing with prior panel precedent that conflicts with an intervening state intermediate appellate court decision. See, e.g., *Perlmutter v. U.S. Gypsum Co.*, 54 F.3d 659, 662 (10th Cir. 1995) (“[A]lthough we are not obligated to follow the pronouncements of lower state courts, ‘in the absence of any compelling reason to disregard them,’ we follow decisions of the Colorado Court of Appeals as well.”). However, *Perlmutter* did not involve a choice between prior panel precedent and a state intermediate appellate court decision.

¹⁸ 404 F.3d 1297 (11th Cir. 2005).

¹⁹ *Id.* at 1307 n.15 (citing *United States v. Chubbuck*, 252 F.3d 1300, 1305 n.7 (11th Cir. 2001)).

Other circuits apparently are more willing to depart from their *Erie* predictions where there is a contrary decision from the relevant state intermediate appellate court, though these circuits apply a range of standards. While it acknowledges that it can and will follow state intermediate appellate court decisions over its own *Erie* predictions in some instances, the Fifth Circuit appears to follow a strong presumption in favor of following its own *Erie* predictions. In *FDIC v. Abraham*,²⁰ the Fifth Circuit explained:

We are, of course, a strict stare decisis court. One aspect of that doctrine to which we adhere without exception is the rule that one panel of this court cannot disregard, much less overrule, the decision of a prior panel. Adherence to this rule is no less immutable when the matter determined by the prior panel is the interpretation of state law: Such interpretations are no less binding on subsequent panels than are prior interpretations of federal law. . . .

We conclude then, that when our *Erie* analysis of controlling state law is conducted for the purpose of deciding whether to follow or depart from prior precedent of this circuit, and neither a clearly contrary subsequent holding of the highest court of the state nor a subsequent statutory authority, squarely on point, is available for guidance, we should not disregard our own prior precedent on the basis of subsequent intermediate state appellate court precedent unless such precedent comprises unanimous or near-unanimous holdings from several— preferably a majority— of the intermediate appellate courts of the state in question.²¹

The Ninth Circuit appears to take an approach opposite to the Fifth Circuit's approach. In *In re Watts*,²² the Ninth Circuit concluded that it would follow an intervening, state intermediate appellate court decision "unless there is convincing evidence that the highest court of the state would decide differently."²³ Thus, rather than applying a presumption in favor of following its own view of state law, as enunciated by the Fifth Circuit in *Abraham*, the Ninth Circuit appears to apply a presumption against following its view of state law in favor of that articulated by a state intermediate appellate court. Like the Ninth Circuit, the Sixth Circuit also appears to be more willing than the Fifth to follow an

²⁰ 137 F.3d 264 (5th Cir. 1998).

²¹ *Id.* at 268-69 (footnotes and citations omitted).

²² 298 F.3d 1077 (9th Cir. 2002).

²³ *Id.* at 1083 (quoting *Owen ex rel. Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983)).

intervening decision from a state intermediate appellate court, finding that a mere “indication” from a state intermediate appellate court that the federal court of appeals’ prior *Erie* prediction was incorrect would be sufficient to support the court of appeals’ departure from its own precedent.²⁴ The Fourth Circuit appears to be in general accord with this approach.²⁵

The Seventh Circuit does not consider itself bound by its own, prior *Erie* predictions, but it has not settled on a definitive approach to balancing those predictions with intervening decisions from a state intermediate appellate court. In *Taco Bell Corp. v. Continental Casualty Co.*,²⁶ the court refused to follow *Green v. J.C. Penney Auto Insurance Co.*,²⁷ its own then-eighteen-year-old *Erie* prediction, where the Illinois intermediate appellate court had unanimously rejected it since. The Seventh Circuit explained:

In light of the Illinois Appellate Court’s unanimity [contrary to *Green*] the best prediction differs from what it was when *Green* was decided, and so that decision is no longer authoritative, just as in a case in which a U.S. Supreme Court decision shows that a previous decision by a lower court was unsound, even though the Supreme Court doesn’t mention the decision.²⁸

Despite *Taco Bell*, the standard the Seventh Circuit applies in deciding whether to follow a state intermediate appellate court decision arguably remains unsettled. Some decisions from the Seventh Circuit indicate agreement with the Ninth Circuit’s presumption in favor of following intervening state intermediate appellate court decisions.²⁹ However, like *Taco Bell*, more recent decisions from the Seventh Circuit evince an approach less reflexively in favor of following state intermediate appellate court decisions. For example, in *Reiser v.*

²⁴ See *Blaine Constr. Co. v. Ins. Co. of N. Am.*, 171 F.3d 343, 350-51 (6th Cir. 1999) (panel is bound by prior panel’s decision predicting state law unless state courts have indicated that they would have decided the issue differently).

²⁵ See *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1003 (4th Cir. 1998) (“[F]ederal court can depart from an intermediate court’s fully reasoned holding as to state law only if ‘convinced’ that the state’s highest court would not follow that holding.”) (quoting *West v. AT&T Co.*, 311 U.S. 223, 237(1940)) (other citation omitted).

²⁶ 388 F.3d 1069 (7th Cir. 2004).

²⁷ 806 F.2d 759 (7th Cir. 1986).

²⁸ 388 F.3d at 1077 (citation omitted).

²⁹ See, e.g., *L.S. Heath & Son, Inc. v. AT&T Info. Sys., Inc.*, 9 F.3d 561, 574 (7th Cir. 1993) (“Decisions of intermediate appellate state courts generally control unless there are persuasive indications that the highest state court would decide the issue differently.”) (citation omitted).

Residential Funding Corp.,³⁰ the Seventh Circuit described intermediate appellate court decisions as “just prognostications” that “could in principle persuade us to reconsider and overrule our precedent[.]”³¹ Two intervening intermediate appellate court decisions had rejected the Seventh Circuit’s own view on the issue of state law before it. Calling its own prior decision on the matter “an educated guess about how the Supreme Court of Illinois will rule[.]” and refusing even to consider the merits of the intervening intermediate appellate court decisions, the *Reiser* court chose to follow its own decision, reasoning that “[i]nstead of guessing over and over, it is best to stick with one assessment until the state’s supreme court, which alone can *end* the guessing game, does so.”³²

The Second, Third and Eighth Circuits arguably have not settled firmly on an approach to this issue. The Second Circuit has expressed a variety of views. In *Roginsky v. Richardson-Merrell, Inc.*,³³ the Second Circuit explained that “when a federal court must determine state law, it should not slavishly follow lower or even upper court decisions but ought to consider all the data the highest court of the state would use.”³⁴ This view contemplates a predictive role largely, if not entirely, unbound by prior panel precedent on the state law issue, but the Second Circuit has not relied on it since. Two decades later, in *Woodling v. Garrett Corp.*,³⁵ the Second Circuit signaled greater deference to its own prior *Erie* predictions, reasoning that “[a] ruling of one panel of this Circuit on an issue of state law normally will not be reconsidered by another panel absent a subsequent decision of a state court or of this Circuit tending to cast doubt on that ruling.”³⁶

The Third Circuit’s approach also is arguably unsettled. In *Aceto v. Zurich Insurance Co.*,³⁷ the Third Circuit observed that “[n]o one may properly rely upon what we have held as more than persuasive on a question of Pennsylvania law so long as the Pennsylvania Supreme Court has not ruled upon that legal question.”³⁸ More recent Third Circuit decisions have cast substantial doubt on *Aceto*, though they have not explicitly overruled it. In *Ciba-Geigy Corp. v. Bolar Pharmaceutical Co.*

³⁰ 380 F.3d 1027 (7th Cir. 2004).

³¹ *Id.* at 1029.

³² *Id.*

³³ 378 F.2d 832 (2d Cir. 1967) (per curiam).

³⁴ *Id.* at 851.

³⁵ 813 F.2d 543 (2d Cir. 1987).

³⁶ *Id.* at 557 (citations omitted).

³⁷ 440 F.2d 1320 (3d Cir. 1971).

³⁸ *Id.* at 1322.

Inc.,³⁹ for example, the court considered itself bound by a prior panel decision on New Jersey law, observing that “[a]s a panel of this court, we are obligated to follow a prior panel’s construction of New Jersey law and as a panel we cannot reject those views simply because we think the prior case may have been wrongly decided.”⁴⁰ Relying on this passage from *Ciba-Geigy*, the Third Circuit stated in *Gruber v. Owens-Illinois Inc.*,⁴¹ “that, absent compelling distinctions, where one panel has interpreted a state statute, a subsequent panel may not reject that interpretation on the grounds that it believes the prior decision to be incorrect.”⁴² More recently, in *Debiec v. Cabot Corp.*,⁴³ the court, quoting from its opinion in *Smith v. Calgon Carbon Corp.*,⁴⁴ stated that “in the absence of a clear statement by the Pennsylvania Supreme Court to the contrary or other persuasive evidence of a change in the Pennsylvania law, we are bound by the holdings of previous panels of this court.”⁴⁵

Echoing the Third Circuit’s view in *Aceto* but going one step further, the Eighth Circuit, in *Peterson v. U-Haul Co.*,⁴⁶ explained that “[i]n a diversity case neither this Court nor the District Court make any declarations of law. . . . Federal court decisions in diversity cases have no precedential value as state law and only determine the issues between the parties.”⁴⁷ The Eighth Circuit does not appear to have cited this formulation from *Peterson* approvingly, though it recently opined in *AIG Centennial Ins. Co. v. Fraley-Landers*⁴⁸ that it had “never specifically determined the binding effect of a state law determination by a prior panel[.]”⁴⁹ Having deemed itself free to adopt a definitive approach to

³⁹ 747 F.2d 844 (3d Cir. 1984).

⁴⁰ *Id.* at 856 n.10.

⁴¹ 899 F.2d 1366 (3d Cir. 1990).

⁴² *Id.* at 1372 n.7 (citing *Ciba-Geigy*, 747 F.2d at 856 n.10).

⁴³ 352 F.3d 117 (3d Cir. 2003).

⁴⁴ 917 F.2d 1338 (3d Cir. 1990).

⁴⁵ 352 F.3d at 131 (quoting *Smith*, 917 F.2d at 1343) (internal citation and quotations omitted). Given the weight of more recent authority in the Third Circuit, it may be that the Third Circuit has abrogated *Aceto sub silentio*. As detailed below, however, many district courts in the Third Circuit still perceive an intra-circuit conflict and have adopted contrary positions on the precedential force of the Third Circuit’s *Erie* predictions. Moreover, if *Aceto*’s observation that Third Circuit *Erie* predictions are no more than persuasive can be characterized as its holding, the Third Circuit’s more recent decisions appearing to reject that view would not be controlling precedent. See *Ryan v. Johnson*, 115 F.3d 193, 198 (3d Cir. 1997) (“[W]hen two decisions of this court conflict, we are bound by the earlier decision.”) (citations omitted).

⁴⁶ 409 F.2d 1174 (8th Cir. 1969).

⁴⁷ *Id.* at 1177.

⁴⁸ 450 F.3d 761 (8th Cir. 2006).

⁴⁹ *Id.* at 767.

dealing with prior panel state law decisions, the Eighth Circuit in *AIG Centennial* proceeded to adopt the Fifth Circuit's (and other circuits') deference "to prior panel decisions absent a 'subsequent state court decision or statutory amendment that makes [the prior federal opinion] clearly wrong.'"⁵⁰

It is thus apparent that the federal courts of appeals take divergent approaches in weighing their own, prior *Erie* predictions against contrary decisions by the relevant state's intermediate appellate courts. Others have thoroughly analyzed the correctness of these varying approaches,⁵¹ and it is not the intention of this Article to rehash those analyses. It does bear noting, however, that those circuits who adhere more rigidly to their own, prior *Erie* predictions arguably transgress *Erie* and, more specifically, its progeny discussing the appropriate weight to accord intervening decisions from the relevant state's intermediate appellate court. The Supreme Court instructed rather clearly in *West* that a "rule of law" announced by an intermediate appellate state court "is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."⁵² The use of the word "convince" indicates a high threshold, suggesting that any doubts about whether the state's highest court would follow the view of the state intermediate appellate court ought to be resolved in favor of following the intermediate appellate court's decision. *West* also requires federal courts to identify "persuasive evidence" that the state's highest court would refuse to follow the view of the state intermediate appellate court—a federal court cannot simply reject a state intermediate appellate

⁵⁰ *Id.* at 767-68 (quoting *Broussard v. S. Pac. Transp. Co.*, 665 F.2d 1387, 1389 (5th Cir. 1982) (alteration in original) (other citations omitted)). The Eighth Circuit did acknowledge in *AIG Centennial* the existence of a contrary approach less deferential to prior panel determinations with a "*but see*" cite to that portion of Jed Bergman's Note, *supra* note 13, that discusses the argument for according less deference to circuit *Erie* precedent. *Id.* at 768. But it failed to cite and address its relatively recent decision in *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873 (8th Cir. 2000). There, the Eighth Circuit had noted that on the critical state law issue in the case, a more recent decision from the relevant state intermediate appellate court had rejected the Eighth Circuit's own prior *Erie* prediction on the state law issue. The court concluded:

While we are loath to reject the considered judgment of a prior panel decision of our court, our task is to apply state law, and while decisions of the "various intermediate appellate courts are not [binding on us], . . . they are persuasive authority, and we must follow them when they are the best evidence of what [state] law is."

Marvin Lumber, 223 F.3d at 883 (alteration in original) (citations omitted). Arguably, *AIG Centennial* conflicts with this aspect of *Marvin Lumber*.

⁵¹ See, e.g., Bergman, *supra* note 13.

⁵² *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940).

court decision out of hand and without explanation in favor of its own, prior *Erie* prediction. So understood, *West* would seem to preclude the approach the Fifth Circuit outlined in *Abraham*, where it concluded that it would adhere to its own *Erie* predictions notwithstanding intervening decisions from the state intermediate appellate court, and would only follow those decisions if they were unanimous or near-unanimous. The Supreme Court may eventually decide to resolve definitively the appropriate approach of federal courts of appeals to reconciling their own *Erie* predictions with intervening decisions from a state intermediate appellate court. Until then, practitioners would be wise to apprise themselves of the contrasting positions of the courts of appeals on this question.

C. Federal Courts of Appeals' Erie Predictions in the District Courts

One might instinctively surmise that entrenched principles of stare decisis compel district courts to follow the relevant court of appeals' *Erie* predictions. And, indeed, the state of the law throughout the country generally reflects this.⁵³ The Seventh Circuit recently reiterated this command in *Reiser* and *Taco Bell*. In *Reiser*, the court admonished the district court for refusing to follow prior Seventh Circuit precedent construing the state law at issue in favor of two state intermediate appellate court decisions post-dating that Seventh Circuit precedent:

By treating [the Seventh Circuit decision] as having no more than persuasive force, the district court made a fundamental error. In a hierarchical system, decisions of a superior court are authoritative on inferior courts. Just as the court of appeals must follow decisions of the Supreme Court whether or not we agree with them, so district judges must follow the decisions of this court whether or not they agree.⁵⁴

⁵³ See, e.g., *Schwarz v. Nat'l Van Lines, Inc.*, 375 F. Supp. 2d 690, 699 (N.D. Ill. 2005) (in *Erie* prediction mode, "the Court is bound by the Seventh Circuit's interpretation of the content of unsettled state law."); *In re Exxon Coker Fire*, 108 F. Supp. 2d 628, 629 (M.D. La. 2000) (in determining issue of Louisiana law in diversity case, "[t]his Court is also bound to follow the interpretations of Louisiana law by the United States Fifth Circuit Court of Appeals absent some change in state law by the legislature or the Louisiana Supreme Court."); *Perez v. Brown & Williamson Tobacco Corp.*, 967 F. Supp. 920, 926 (S.D. Tex. 1997) ("Adherence by a federal district court to a circuit court's '*Erie* guess' is appropriate, even when there exists a decision from the state's intermediate level appellate court that is inconsistent with the circuit court's resolution of the state law issue.") (citation omitted).

⁵⁴ *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004) (citations omitted).

Citing *Reiser*, the court in *Taco Bell* similarly chided the district court there for refusing to follow the Seventh Circuit's prior *Erie* prediction in favor of intervening state intermediate appellate court decisions, explaining in no uncertain terms "that the district court was bound by [our prior *Erie* prediction], as a lower court cannot overrule the decision of a higher one."⁵⁵

But not all district courts follow the strict directive of stare decisis articulated in *Reiser* and *Taco Bell*.⁵⁶ Some district courts follow the same rule followed by their superior federal court of appeals—that a federal court of appeals' *Erie* prediction is binding unless subsequent state court decisions or statutory amendments have rendered that prediction erroneous.⁵⁷ When making *Erie* predictions of New York law, Judge Weinstein of the Eastern District of New York views the Second Circuit as occupying the same position as a lower New York state court,

⁵⁵ *Taco Bell Corp. v. Cont'l Cas. Co.*, 388 F.3d 1069, 1077 (7th Cir. 2004) (citing *Reiser*, 380 F.3d at 1029-30).

⁵⁶ *See, e.g., Johnson v. Symantec Corp.*, 58 F. Supp. 2d 1107, 1111 (N.D. Cal. 1999) ("Although a circuit court's prediction of state law is not binding in the same way as is its definitive interpretation of federal law, as a practical matter a circuit court's interpretations of state law must be accorded great deference by district courts within the circuit."); *Stubl v. T.A. Sys., Inc.*, 984 F. Supp. 1075, 1093 (E.D. Mich. 1997) (observing that where two decisions of the Michigan intermediate appellate court on issue of Michigan law specifically contradict a prior Sixth Circuit decision on same issue, "federal district court should adopt the state court's interpretation.") (citations omitted); *Nussbaum v. Mortgage Serv. Am. Co.*, 913 F. Supp. 1548, 1555 (S.D. Fla. 1995) (refusing to slavishly follow Eleventh Circuit precedent on issue of Florida law where Florida intermediate appellate court had decided issue in the interim contrary to Eleventh Circuit's resolution); *In re N.Y. Asbestos Litig.*, 847 F. Supp. 1086, 1111 (S.D.N.Y. 1994) ("When a conflict exists between holdings of the Second Circuit and more recent determinations of state appellate courts, the interpretation of the Circuit is not binding on federal district courts.") (citation omitted). *Cf. Hollingsworth v. State Farm Fire & Cas. Co.*, No. 04-3733, 2005 WL 563414, at *6 n.2 (E.D. Pa. Mar. 9, 2005) (observing that it did not have to "consider the debatable question of whether a federal district court is strictly bound by its court of appeals' prediction of state law."); *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 847 (E.D.N.Y. 1999) (stating that "[i]t must be remembered that no federal court can speak to questions of state law with any certitude[,] and that 'for this reason . . . it has sometimes been suggested that in *Erie* matters the district courts need not follow as strictly as they would interpretations of federal law by federal courts of appeals[.]'" (citations omitted).

⁵⁷ *See, e.g., Ridglea Estate Condo. Ass'n v. Lexington Ins. Co.*, 309 F. Supp. 2d 851, 855 (N.D. Tex. 2004), *overruled on other grounds*, 398 F.3d 332 (5th Cir. 2005), *vacated and remanded*, 415 F.3d 474 (5th Cir. 2005) (reasoning that "if a panel of the Fifth Circuit has settled on the state law to be applied in a diversity case, that precedent should be followed 'absent a subsequent state court decision or statutory amendment that rendered the [the Fifth Circuit's] prior decision clearly wrong.'" (quoting *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 747 (5th Cir. 1995)).

and thus considers himself unbound by the Second Circuit's *Erie* predictions of New York law:

Where a conflict exists between holdings of the Second Circuit and more recent determinations of state appellate courts, this court will follow the outcome it believes the New York Court of Appeals would reach, without giving binding authority to the Second Circuit's construction of the state statute. The federal Court of Appeals is in the same position as a lower state court vis-à-vis the New York Court of Appeals in construing state substantive law under *Erie*.⁵⁸

The district court in *Westport Insurance Corp. v. Atchley, Russell, Waldrop & Hlavinka, L.L.P.*,⁵⁹ considered itself free to depart from the Fifth Circuit. The court concluded that “[i]nstead of relying exclusively on older [Fifth] circuit opinions, . . . [it would] look[] to recent trends in the jurisprudence of the Texas Supreme Court and Texas’ lower courts for guidance.”⁶⁰ After an exhaustive analysis of the relevant state and federal decisional authority, the district court determined that the correct view was that set forth in a concurring opinion in a state intermediate appellate court decision, despite the fact that that view contradicted the position adopted by the Fifth Circuit.⁶¹

The most fertile ground for disagreement among district courts in the same circuit is in the Third Circuit, particularly among district courts in Pennsylvania. In *Hittle v. Scripto-Tokai Corp.*,⁶² the court faced a question of Pennsylvania law on which the Third Circuit had already issued an *Erie* prediction, but that had not been resolved by the Pennsylvania Supreme Court. The *Hittle* court set forth the settled standards for making an *Erie* prediction, but observed that “[l]ess clear . . . is the extent to which a federal district court is bound by its court of appeals’ interpretation of state law, especially if a subsequent state appellate court contradicts the federal appellate court.”⁶³ The court noted that although the Third Circuit has indicated little about the topic, it “has suggested[, in *Aceto*,] that the only law that is binding on a federal court is the jurisprudence of the state supreme court, and that even a decision

⁵⁸ *In re E. & S. Dists. Asbestos Litig.*, 772 F. Supp. 1380, 1391 (E. & S.D.N.Y. 1991), *rev’d on other grounds*, *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831 (2d Cir. 1992).

⁵⁹ 267 F. Supp. 2d 601 (E.D. Tex. 2003).

⁶⁰ *Id.* at 615.

⁶¹ *Id.* at 621.

⁶² 166 F. Supp. 2d 159 (M.D. Pa. 2001).

⁶³ *Id.* at 162.

by a federal court of appeals does not bind a district court.”⁶⁴ *Hittle* acknowledged the division among district courts in the Third Circuit on the precedential force of the Third Circuit’s *Erie* predictions, but it ultimately concluded that it need not follow the Third Circuit’s view on the state law question before it.⁶⁵

Like *Hittle*, many district courts have considered themselves not bound by the Third Circuit’s *Erie* predictions.⁶⁶ A number of district courts have taken the contrary position, however.⁶⁷ Yet other district courts in the Third Circuit appear to adhere to a strict stare decisis approach, but ultimately endorse a district court’s freedom to depart from a court of appeals’ *Erie* prediction. In *Stepanuk v. State Farm Mut. Auto. Ins. Co.*,⁶⁸ for example, the district court, noting the Third Circuit’s reasoning in *Ciba-Geigy* and *Gruber* that a Third Circuit panel is bound

⁶⁴ *Id.* (citing *Aceto v. Zurich Ins. Co.*, 440 F.2d 1320, 1321 (3d Cir. 1971)).

⁶⁵ *Id.*

⁶⁶ See *Zimmer v. Cooperneff Advisors, Inc.*, No. 04-3816, 2004 WL 2933979, at *8 (E.D. Pa. Dec. 20, 2004) (refusing to follow Third Circuit holding on state law where contradicted by intervening, state intermediate appellate court decision); *Carrasquilla v. Mazda Motor Corp.*, 197 F. Supp. 2d 169, 173 (M.D. Pa. 2002) (the court, like *Swinton*, endorsed *Hittle* and considered itself free to depart from Third Circuit’s *Erie* prediction); *Chesapeake Utils. Corp. v. Am. Home Assurance Co.*, 704 F. Supp. 551, 558 n.18 (D. Del. 1989) (citing and discussing *Aceto* approvingly, and refusing to follow Fourth Circuit precedent predicting applicable state law because it had “perhaps even less reason than the trial court in *Aceto* to be bound by the circuit court’s prior interpretation of state law.”); *Largoza v. Gen. Elec. Co.*, 538 F. Supp. 1164, 1166 (E.D. Pa. 1982) (“[I]t is axiomatic that this court is bound by a decision of the Third Circuit predicting Pennsylvania law unless the state supreme court issues a contrary decision or it appears from a subsequent decision of the appellate courts that the court of appeals erred.”) (citations omitted); *In re Swinton*, 287 B.R. 634, 636-37 (Bankr. W.D. Pa. 2003) (noting that the Third Circuit “has not directly answered” the question of whether its *Erie* predictions bind district courts and that “district courts have come to different conclusions[;]” quoting and endorsing the analysis in *Hittle*, and thus deeming itself free to “consider [a Pennsylvania Commonwealth Court decision handed down after the applicable Third Circuit *Erie* prediction precedent] to determine whether the Court of Appeals’ earlier prediction of Pennsylvania law [] was in error.”).

⁶⁷ See, e.g., *Fremont v. E.I. DuPont DeNemours & Co.*, 988 F. Supp. 870, 875 (E.D. Pa. 1997) (“[A]ccording to the Third Circuit, whose predictions of state law this court is bound to follow.”); *Itzkoff v. F & G Realty of N.J., Corp.*, 890 F. Supp. 351, 356 (D.N.J. 1995) (“[T]he Court is of course bound by any Third Circuit decisions regarding how the New Jersey Supreme Court would rule.”) (citation omitted); *Fed. Ins. Co. v. Livelsberger, Inc.*, 868 F. Supp. 686, 689 (M.D. Pa. 1994) (“Our Court of Appeals has already made its prediction on this point [of state law], and that prediction is the only one that matters here.”) (citation omitted); *Sprague, Levinson & Thall v. Advest, Inc.*, 623 F. Supp. 11, 14 (E.D. Pa. 1985) (“Decisions of an intermediate appellate court are entitled to considerable weight but in the absence of a clear pronouncement by the Supreme Court of Pennsylvania, I believe I must follow” Third Circuit decisions predicting the issue of Pennsylvania law controlling the outcome).

⁶⁸ No. 92-6095, 1995 WL 553010 (E.D. Pa. Sept. 19, 1995).

by a prior panel's construction of state law, stated that it was "axiomatic that if another panel of the Court of Appeals for the Third Circuit is bound by a previous panel's construction of state law then district courts within the Third Circuit are also bound by that construction."⁶⁹ But the court still left open the possibility that a district court could depart from a federal court of appeals' *Erie* prediction "if later state court decisions indicate that the Court of Appeals' earlier predication [sic] of state law was in error."⁷⁰

As in the previous section, the question bears asking: Would a district court run afoul of *Erie* and its progeny, namely *West*, were it to adhere blindly to a federal court of appeals' *Erie* prediction despite an intervening, state intermediate appellate court decision disagreeing with that federal court of appeals' prediction? Recall that the directive in *West* concerning the treatment of state intermediate appellate court decisions in this context did not speak solely to federal courts of appeal—rather, it spoke to "federal court[s]," presumably including district courts as well. If *West* compels district courts to treat a state intermediate appellate court decision as "persuasive evidence" of what the state's highest court would do, and forbids them from deviating from the intermediate appellate court decision unless "convinced" that the state's highest court would reject it, then a district court may not blindly adhere to a federal court of appeals' *Erie* prediction.

However, *West*'s applicability to district courts faced with a federal court of appeals' *Erie* prediction must be analyzed by reference to the established principle of stare decisis that requires district courts to adhere to their superior federal court of appeals' decisions, a principle often referred to as "vertical" stare decisis. One might consider this principle of stare decisis to be based merely on sound or wise policy—as mere procedural scaffolding established by the federal courts of appeals and district courts to facilitate the decision making process. On this view, vertical stare decisis surely cannot circumscribe Supreme Court precedent which counsels, at least in some cases, departure from superior court precedent in the course of rendering an *Erie* prediction. But what if this stare decisis principle is of constitutional provenance, rooted, as some have suggested, in Article III of the United States Constitution?⁷¹

⁶⁹ *Id.* at *2.

⁷⁰ *Id.*

⁷¹ See, e.g., Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754 (1988) (suggesting that Article III may compel stare decisis generally); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2125 n.167 (2002) ("Vertical stare decisis is probably required by Article III, Section 1" of the United States Constitution) (citations omitted).

Whether “vertical” stare decisis is a constitutional command is an issue well beyond the scope of this Article, but many have tilled its soil.⁷² For purposes of this Article, it is at least worth asking whether, if vertical stare decisis is constitutionally mandated, district courts are nonetheless free or obligated by *Erie* and *West* to deviate from their circuit court of appeals’ *Erie* predictions.

II. FEDERAL COURT OF APPEALS’ PRONOUNCEMENTS ON FEDERAL LAW

This Article has focused exclusively on the precedential treatment by *federal* courts of decisions by federal courts of appeals construing *state* law. The focus now shifts to a converse scenario: how do *state* courts treat the federal courts of appeals’ *federal law* pronouncements?

As Professor Zeigler stated in his seminal treatment of the question, “[s]tate courts vary greatly in the weight they give to lower federal court decisions[.]”⁷³ The Supreme Court has never definitively resolved this question, but a handful of its opinions have addressed it on several occasions.⁷⁴ In *Lockhart v. Fretwell*, a review of a habeas petition seeking relief from a conviction rendered in the Arkansas state courts, Justice Thomas observed in his concurring opinion that the Eighth Circuit was “mistaken” in its apparent conclusion below “that the Arkansas trial court would have been compelled to follow” the Eighth Circuit’s own prior precedent on an issue of federal law.⁷⁵ He explained his reasoning:

The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court’s interpretation of federal

⁷² See, e.g., Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994); John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503 (2000); Rosenkranz, *supra* note 71; Bradley Scott Shannon, *May Stare Decisis Be Abrogated By Rule?*, 67 OHIO ST. L.J. 645, 646 n.2 (2006).

⁷³ Donald H. Zeigler, *Gazing Into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1143 (1999).

⁷⁴ See *Arizonans For Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997) (referring to Ninth Circuit’s suggestion below that federal court decisions on issue of federal law bind state courts as “remarkable”); *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring); *Steffel v. Thompson*, 415 U.S. 452, 482 (1974) (Rehnquist, J., concurring) (observing that “[s]tate authorities may choose to be guided by the judgment of a lower federal court, but they are not compelled to follow the decision by threat of contempt or other penalties.”).

⁷⁵ *Lockhart*, 506 U.S. at 375-76. (Thomas, J., concurring).

law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located. An Arkansas trial court is bound by this Court's (and by the Arkansas Supreme Court's and Arkansas Court of Appeals') interpretation of federal law, but if it follows the Eighth Circuit's interpretation of federal law, it does so only because it chooses to and not because it must.⁷⁶

Since publication of Professor Zeigler's Article seven years ago, there has been an obvious trend in the states toward the view that state courts are not in any way bound or controlled by federal court of appeals (or district court) decisions construing federal law. Presently, at least twenty-nine states expressly consider themselves unbound by federal court of appeals' decisions on issues of federal law.⁷⁷ These twenty-nine

⁷⁶ *Id.* at 376 (Thomas, J., concurring) (citations omitted).

⁷⁷ *Totemoff v. State*, 905 P.2d 954, 963 (Alaska 1995) ("We are not obliged to follow . . . a decision of the Ninth Circuit construing a federal statutory provision], since this court is not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law.") (citation omitted); *State v. Montano*, 77 P.3d 1246, 1247 n.1 (Ariz. 2003) ("We are not bound by the Ninth Circuit's interpretation of what the Constitution requires.") (citations omitted); *Etcheverry v. Tri-Ag Serv., Inc.*, 22 Cal. 4th 316, 320-21 (Cal. 2000) ("While we are not bound by decisions of the lower federal courts, even on federal questions, they are persuasive and entitled to great weight"; "Where lower federal precedents are divided or lacking, state courts must necessarily make an independent determination of federal law, but where the decisions of the lower federal courts on a federal question are 'both numerous and consistent,' we should hesitate to reject their authority.") (citations omitted); *Cnty. Hosp. v. Fail*, 969 P.2d 667, 672 (Colo. 1998) ("Although the Supremacy Clause demands that state law yield to federal law, neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a federal court's interpretation other than that of the United States Supreme Court. Thus, we are not bound by . . . decisions of the lower federal courts."); *Macon-Bibb County Hosp. Auth. v. Nat'l Treasury Employees Union*, 458 S.E. 2d 95, 96 (Ga. 1995) ("[T]he decisions of the federal courts of appeal are not binding on this court, but their reasoning is persuasive.") (citation omitted); *State v. Simeona*, 864 P.2d 1109, 1117 (Haw. 1993), *overruled on other grounds*, *State v. Ford*, 929 P.2d 78 (Haw. 1996) (concluding that it was not bound by Ninth Circuit decision construing United States Constitution) (citations omitted); *Dan Wiebold Ford, Inc. v. Universal Computer Consulting Holding, Inc.*, 127 P.3d 138, 143 (Idaho 2005) ("[T]he decisions of lower federal courts are not binding on state courts, even on issues of federal law.") (citation omitted); *Indiana Dept. of Pub. Welfare v. Payne*, 622 N.E. 2d 461, 468 (Ind. 1993) ("Although U.S. Supreme Court decisions pertaining to federal questions are binding on state courts, lower federal court decisions may be persuasive but have non-binding authority on state courts.") (citation omitted); *Top of Iowa Coop. v. Sime Farms, Inc.*, 608 N.W. 2d 454, 460 (Iowa 2000) ("Although we give respectful consideration to the decisions of federal district courts and federal courts of appeals on this issue [of federal law], we have the authority to decide this case based on our own interpretation of federal law.") (citations omitted); *Shell Oil Co. v. Secretary, Revenue and Taxation*, 683 So. 2d 1204, 1209-10 & n.11 (La. 1996) ("While

we may regard decisions of the federal Fifth Circuit as persuasive in certain cases, particularly cases addressing purely federal questions, we are not bound by its decision In matters involving federal law, state courts are bound only by decisions of the United States Supreme Court. Federal appellate court decisions are persuasive only.”); *Pope v. State*, 396 A.2d 1054, 1061 n.10 (Md. 1979) (“We note that unlike decisions of the Supreme Court of the United States, decisions of federal circuit courts of appeals construing the federal constitution and acts of the Congress pursuant thereto, are not binding upon us.”) (citations omitted); *Ace Prop. & Cas. Ins. Co. v. Comm’r of Revenue*, 770 N.E. 2d 980, 986 n.8 (Mass. 2002) (“Although we are not bound by decisions of Federal courts (other than the United States Supreme Court) on matters of Federal law, ‘we give respectful consideration to such lower Federal court decisions as seem persuasive.’”) (citations omitted); *Abela v. Gen. Motors Corp.*, 677 N.W. 2d 325, 327 (Mich. 2004) (“Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts.”) (citations omitted); *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W. 2d 13, 20 (Minn. Ct. App. 2003) (“We are not . . . bound by any other federal courts’ opinion, even when interpreting federal statutes.”) (citation omitted); *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W. 3d 907, 910 & n.4 (Mo. 2002) (“In construing a federal statute, lower federal court opinions construing a federal statute are examined respectfully for such aid and guidance as may be found therein”; but stating that to the extent the Missouri Court of Appeals’ decision in *Fox v. McDonnell Douglas Corp.*, 890 S.W. 2d 408, 410 (Mo. Ct. App. 1995) “suggests [lower federal court decisions construing federal statutes] are binding, it is overruled.”) (citation omitted); *State v. Robinson*, 82 P.3d 27, 30 (Mont. 2003) (“Supremacy Clause does not require state courts to follow precedent from the circuit courts of appeal interpreting the United States Constitution.”); *Strong v. Omaha Constr. Indus. Pension Plan*, 701 N.W. 2d 320, 328 (Neb. 2005) (overruling its earlier decisions suggesting that lower federal court decisions were binding on state courts, and concluding that “while Nebraska courts must treat U.S. Supreme Court decisions as binding authority, lower federal court decisions are only persuasive authority.”); *Custom Cabinet Factory of N.Y., Inc. v. Eighth Judicial Dist. Ct. of State of Nev.*, 62 P.3d 741, 742-43 (Nev. 2003) (“Decisions of the federal district court and panels of the federal circuit court of appeals are not binding upon this court. Even an en banc decision of a federal circuit court does not bind Nevada courts.”) (footnote omitted); *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1243-44 (N.J. 1990) (noting that “New Jersey precedent appears to hold that state courts are bound by the federal courts’ interpretations of federal statutes,” but clarifying that inferior federal court decisions on questions of federal law are not “‘binding’ per se[,]” and, pursuant to comity, should just “be accorded due respect, particularly where they are in agreement.”); *State v. McDowell*, 310 S.E.2d 301, 310 (N.C. 1984) (in performing obligation to protect defendants’ federal constitutional rights, “state court should exercise and apply its own independent judgment, treating, of course, decisions of the United States Supreme Court as binding and according to decisions of lower federal courts such persuasiveness as these decisions might reasonably command.”) (citation omitted); *State v. Burnett*, 755 N.E. 2d 857, 862 (Ohio 2001) (“[W]e are not bound by rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court.”); *Bogart v. Caprock Commc’ns Corp.*, 69 P.3d 266, 271 (Okla. 2003) (“[B]y virtue of the Supremacy Clause, we are bound by the decisions of the United States Supreme Court with respect to the federal constitution and federal law, and we must pronounce rules of law that conform to extant Supreme Court jurisprudence. We also recognize that nothing in the concept of supremacy or in any other principle of law requires subordination of state courts to the inferior federal courts.”); *Page v. Palmateer*, 84 P.3d 133, 139 (Or. 2004)

states' courts have generally echoed Justice Thomas's reasoning in *Lockhart* in concluding rather summarily that the Supremacy Clause simply does not compel adherence to "inferior" federal court conclusions of federal law.⁷⁸

While the majority of states do not consider themselves bound by the federal courts of appeals' holdings on federal law questions, there is authority in state appellate courts in Arkansas,⁷⁹ Delaware,⁸⁰

(federal court of appeals' decisions construing federal constitution "not binding in this court") (citation omitted); *Hall v. Pa. Bd. of Prob. & Parole*, 851 A.2d 859, 865 (Pa. 2004) ("[W]e are not obligated to follow the decisions of the Third Circuit on issues of federal law."); *Strouth v. State*, 999 S.W.2d 759, 765 n.9 (Tenn. 1999) (refusing to follow Sixth Circuit decision on federal constitutional issue, stating that it was "not bound by decisions of the federal district and circuit courts."); *Penrod Drilling Corp. v. Williams*, 868 S.W. 2d 294, 296 (Tex. 1993) (in federal maritime action, stating that "[w]hile Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are *obligated* to follow only higher Texas courts and the United States Supreme Court") (citations omitted) (emphasis in original); *State v. Austin*, 685 A.2d 1076, 1079 (Vt. 1996) (noting it is "axiomatic that the decision of the federal district court is not binding precedent upon this Court.") (citations omitted); *In re Grisby*, 853 P.2d 901, 907 (Wash. 1993) ("While we always give careful consideration to Ninth Circuit decisions, we are not obligated to follow them, and do not do so in this case."); *Elections Bd. of Wis. v. Wis. Mfrs. & Commerce*, 597 N.W. 2d 721, 731 n.19 (Wis. 1999) ("On federal questions, this court is bound only by the decisions of the United States Supreme Court. The value of the opinions of federal courts of appeals and district courts is limited to their persuasiveness.") (citations omitted).

⁷⁸ See, e.g., *Cnty. Hosp. v. Fail*, 969 P.2d 667, 671 (Colo. 1998) ("[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a federal court's interpretation other than that of the United States Supreme Court."); *State v. Robinson*, 82 P.3d 27, 30 (Mont. 2003) ("Supremacy Clause does not require state courts to follow precedent from the circuit courts of appeal interpreting the United States Constitution."); *Bogart v. Caprock Comm'ns Corp.*, 69 P.3d 266, 271 (Okla. 2003) ("[N]othing in the concept of [federal] supremacy or in any other principle of law requires subordination of state courts to the inferior federal courts.").

⁷⁹ *Malvern Gravel Co. v. Mitchell*, 385 S.W. 2d 144 (Ark. 1964). *Malvern* involved the application of the Federal Employers' Liability Act and whether the defendant gravel company and railroad was a "common carrier" under that Act. The Arkansas Supreme Court stated that it was "bound by the decisions of the Federal Courts" in construing the scope of the FELA and proceeded to discuss and rely upon multiple decisions from federal district courts and the Sixth Circuit considering the meaning of "common carrier" under the FELA. *Id.* at 147-48.

⁸⁰ *Atlas Mut. Ben. Ass'n v. Portscheller*, 46 A.2d 643 (Del. 1945). In *Atlas Mutual*, the Delaware Supreme Court stated that "questions relating to due process of law under the Federal Constitution should be resolved in accordance with decisions of the Supreme Court of the United States and other federal courts . . ." *Id.* at 646 (citations omitted). The court went on to discuss and rely on a host of lower federal court decisions in deciding the due process issues before it. *Id.* at 646-50. See also *Klein v. Sunbeam Corp.*, 93 A.2d 732, 733 (Del. Super. Ct. 1951) (citing *Atlas Mutual* for the proposition that federal due process questions "should be resolved in accordance with decisions of the

Mississippi,⁸¹ New Hampshire,⁸² South Carolina⁸³ and Utah⁸⁴ suggesting that courts in those states adhere to the rule that they *are* bound by those holdings.⁸⁵

A number of other states appear to be divided on the issue. For example, Florida appellate courts have taken contradictory positions. In *Humphreys v. State*, the Florida Supreme Court, after setting forth a particular proposition of federal constitutional law, stated that “such is the holding of the unbroken current of decisions of the [S]upreme Court of the United States and of other [f]ederal [c]ourts, by which decisions we are bound, when called upon to adjudicate questions of constitutional law arising under section 10 of Article I of the [C]onstitution of the United States.”⁸⁶ The Florida District Court of Appeal adhered to this view several decades later in *Ratner v. Arrington*,⁸⁷ citing *Humphreys* for the proposition that “we are not free to place upon the federal statute the interpretation thus contended for by appellants, as we must give effect to the construction given it by the federal appellate courts[,]” and, relying on several decisions from federal courts of appeals and district courts construing a federal statute, rejected an argument that testimony was

Federal Courts” and similarly discussing and relying on lower federal court decisions for its holding).

⁸¹ *King v. Grand Casinos of Miss., Inc.*, 697 So. 2d 439, 440 (Miss. 1997) (“This Court’s task in the present case is simplified greatly by the fact that there is a Fifth Circuit Court of Appeals decision on point, which this Court considers to be controlling with regard to the present issue of federal law.”).

⁸² *Desmarais v. Joy Mfg. Co.*, 538 A.2d 1218 (N.H. 1988). *Desmarais* involved a claim under the federal Employment Retirement Income Security Act (ERISA). At the outset of the court’s analysis, it observed that “in exercising our jurisdiction with respect to what is essentially a federal question, we are guided and bound by federal statutes and decisions of the federal courts interpreting those statutes.” *Id.* at 1220. The court went on to cite liberally to decisions from various federal courts of appeals and district courts. *Id.* at 1220-23.

⁸³ *South Carolina v. Ford Motor Co.*, 38 S.E.2d 242, 247 (S.C. 1946) (in case involving federal constitutional challenges to application of state statute, stating that federal court authorities “are controlling of the meaning and effect of the Federal Constitution.”).

⁸⁴ *Kuchenmeister v. Los Angeles & Salt Lake R.R. Co.*, 172 P. 725, 727 (Utah 1918) (“If . . . there is a decision from a federal court which is decisive of the [federal] question here [i.e., scope of FELA], and especially if the federal decision is one that is more recent than the one cited from a state court, it is our duty to follow the federal court rather than the state court, since the question involved is one upon which the federal courts have the ultimate right to speak.”).

⁸⁵ While these decisions have not been expressly overruled, many of them are obviously quite old. The general trend in the state courts gives good reason to believe that if the courts that rendered these decisions considered the issue today, they would join the trend and conclude that federal courts’ federal law holdings do not bind them.

⁸⁶ 145 So. 858, 861 (Fla. 1933) (citation omitted).

⁸⁷ 111 So. 2d 82 (Fla. Dist. Ct. App. 1959).

inadmissible under that federal statute.⁸⁸ In *State v. Dwyer*,⁸⁹ the Florida Supreme Court, without even citing *Humphreys* or its reasoning concerning the force of federal court of appeals' federal law holdings, concluded that "[e]ven though lower federal court rulings may be in some instances persuasive, such rulings are not binding on state courts."⁹⁰ But just a year later, the Florida Supreme Court, this time without mentioning *Dwyer* or *Humphreys*, but instead citing *Ratner*, stated in dicta that "[w]e recognize, of course, that state courts are bound by federal court determinations of federal law questions."⁹¹ State appellate courts in Kansas,⁹² Kentucky,⁹³ South Dakota⁹⁴ and West Virginia⁹⁵ appear to be similarly divided in their approaches to applying federal court of appeals' federal law holdings.

⁸⁸ *Id.* at 84-85 (citations omitted).

⁸⁹ 332 So. 2d 333 (Fla. 1976).

⁹⁰ *Id.* at 335.

⁹¹ *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 375 n.9 (Fla. 1977) (citing *Ratner*, 111 So. 2d 82).

⁹² *Compare* *Krouse v. Lowden*, 109 P.2d 138, 143 (Kan. 1941) ("[A]s to federal statutes the interpretation placed upon them by federal courts, and particularly by the United States [S]upreme Court, is controlling upon state courts.") (citation omitted), *with* *Local Lodge No. 774 v. Cessna Aircraft Co.*, 352 P.2d 420, 424 (Kan. 1960) ("as to national policy the decisions of the federal courts are entitled to great weight in cases construing the [federal] Labor Management Relations Act.").

⁹³ *Compare* *Stephenson v. CSX Transp., Inc.*, No. 2002-CA-001796-MR., 2003 WL 22113458, at *6 n.4 (Ky. Ct. App. Sept. 12, 2003) (concluding that trial court's belief that decision of the United States Court of Appeals for the First Circuit was controlling was "erroneous" because "the decisions of the lower federal courts, although persuasive, are not binding.") (citations omitted), *with* *Louisville & N.R. Co. v. Home Fruit & Produce Co.*, 220 S.W. 2d 558, 560 (Ky. Ct. App. 1949) (discussing federal court of appeals' decision construing federal Interstate Commerce Act ("ICA") and stating that because shipment at issue in the case fell under the ICA, "rulings of the Federal court thereon are persuasive if not binding on this court.").

⁹⁴ *Compare* *St. Cloud v. Leapley*, 521 N.W. 2d 118, 122 (S.D. 1994) (in case involving question of federal criminal jurisdiction that United States District Court for the District of South Dakota had previously resolved, stating that "with respect to what is essentially a federal question, we are guided and bound by federal statutes and decisions of the federal courts interpreting those statutes."), *and* *Fall River County v. S.D. Dep't of Revenue*, 552 N.W. 2d 620, 628 (S.D. 1996) (quoting *St. Cloud's* view of binding effect of federal court precedent construing federal law), *with* *State v. Greger*, 559 N.W.2d 854, 859 (S.D. 1997) (refusing to consider itself bound by Eighth Circuit's decision on federal jurisdictional issue in case, and noting, but not expressly overruling, the principle in *St. Cloud*).

⁹⁵ *Compare* *Abrams v. W. Va. Racing Comm'n*, 263 S.E. 2d 103, 106 (W. Va. 1980) ("Nor can there be doubt that an interpretation of the United States Constitution by a federal court will override that of a state court.") (citation omitted), *with* *Cook v. Lilly*, 208 S.E. 2d 784, 786 (W. Va. 1974) (in case raising Fourteenth Amendment due process clause challenge to state statute, following as persuasive the "unanimous holding of all United States Circuit Courts" on the particular issue, but stating that "this Court is not bound by lower federal court rulings.").

Several states appear to have adopted a hybrid approach, concluding that they will follow federal court precedent but only when it is uniform, i.e., when all federal courts that have addressed a point of federal law have reached the same conclusion. In *Ex parte Bozeman*,⁹⁶ the Alabama Supreme Court stated that “[i]f the United States Supreme Court had already ruled on [the particular issue concerning interpretation of the Interstate Agreement on Detainers], or if all federal circuits were in agreement on this issue, we would accept” such view, thus suggesting that it would, in effect, consider itself bound by uniform federal court of appeals decisions on federal law.⁹⁷

In *Investment Co. of the Southwest v. Reese*,⁹⁸ the Supreme Court of New Mexico expressly stated that its conclusion on the issue of federal law before it was “guided by the unanimity of opinion among the federal courts.”⁹⁹ In so doing, it quoted approvingly the New Hampshire Supreme Court’s statement in *Desmarais* that “we are guided and bound by federal statutes and decisions of the federal courts interpreting those statutes.”¹⁰⁰ Thus, *Investment Co. of the Southwest* can be read to suggest that the Supreme Court of New Mexico will follow uniform federal court decisions on federal law, i.e., that the Supreme Court of New Mexico will consider itself bound by that uniform federal decisional authority. The Court of Appeals of New York appears to follow a similar approach when federal decisional law is uniform on an issue of federal law.¹⁰¹

Connecticut has staked an approach somewhere between the two extremes, treating Second Circuit pronouncements on federal law as strongly persuasive. Like many other states, Connecticut’s earlier view was unequivocal that the rulings of federal district courts and courts of appeals on the meaning of federal law bound them when faced with federal law questions.¹⁰² A recent line of decisions from the Connecticut

⁹⁶ 781 So. 2d 165 (Ala. 2000).

⁹⁷ *Id.* at 168.

⁹⁸ 875 P.2d 1086 (N.M. 1994).

⁹⁹ *Id.* at 1090 (citing *Desmarais v. Joy Mfg. Co.*, 538 A.2d 1218, 1220 (N.H. 1988)).

¹⁰⁰ *Id.*

¹⁰¹ See *Flanagan v. Prudential-Bache Sec., Inc.*, 495 N.E. 2d 345, 348 (N.Y. 1986) (“When there is neither decision of the Supreme Court nor uniformity in the decisions of the lower Federal courts, however, a State court required to interpret the Federal statute has the same responsibility as the lower Federal courts and is not precluded from exercising its own judgment or bound to follow the decision of the Federal Circuit Court of Appeals within the territorial boundaries of which it sits.”) (citations omitted).

¹⁰² See *Brownell v. Union & New Haven Trust Co.*, 124 A.2d 901, 906 (Conn. 1956) (citing numerous decisions from federal district courts and courts of appeals and stating that “[i]t is needless to say that the interpretation given to federal legislation by the federal courts is binding upon state courts.”).

Supreme Court, however, reflects that Connecticut courts generally¹⁰³ no longer consider Second Circuit decisions on federal law binding, though they will treat them as strongly persuasive. In *Red Maple Properties v. Zoning Commission of Brookfield*,¹⁰⁴ the Connecticut Supreme Court observed that:

“The decisions of the federal circuit in which a state court is located are entitled to great weight in the interpretation of a federal statute. This is particularly true in 42 U.S.C. § 1983 cases, where the federal statute confers concurrent jurisdiction on the federal and state courts. It would be a bizarre result if this court [adopted one interpretation] when in another courthouse, a few blocks away, the federal court, being bound by the Second Circuit rule, [adopted a different one].”¹⁰⁵

In *Turner v. Frowein*,¹⁰⁶ the court endorsed the *Red Maple Properties* approach and, for the first time, specifically stated that Second Circuit decisions on federal law did not bind the court.¹⁰⁷ In *Szewczyk v. Department of Social Services*,¹⁰⁸ the Connecticut Supreme Court reiterated its view “that, while persuasive, decisions of the Second Circuit are not necessarily binding upon us.”¹⁰⁹ But in the same breath, it stated that “[d]eparture from Second Circuit precedent on issues of federal law . . . should be constrained in order to prevent the plaintiff’s decision to file an action in federal District Court rather than a state court located ‘a few blocks away’ from having the ‘bizarre’ consequence of being outcome determinative.”¹¹⁰ The Supreme Judicial Court of Maine appears to apply a similar rule of strong deference to its federal circuit court’s holdings on matters of federal law.¹¹¹

¹⁰³ But see *Eacott v. Ins. Co. of N. Am.*, 673 A.2d 587, 590 (Conn. App. Ct. 1996) (in deciding a question of federal preemption, holding that “[b]ecause the issue of preemption is a matter of federal law, we are bound by the decision [of the Second Circuit] in *Bleiler v. Cristwood Constr., Inc.*, 72 F.3d 13 (2d Cir. 1995)] under the supremacy clause of article six of the United States Constitution.”).

¹⁰⁴ 610 A.2d 1238 (Conn. 1992).

¹⁰⁵ *Id.* at 1242 n.7 (citation omitted).

¹⁰⁶ 752 A.2d 955 (Conn. 2000).

¹⁰⁷ *Id.* at 971.

¹⁰⁸ 881 A.2d 259 (Conn. 2005).

¹⁰⁹ *Id.* at 266 n.11 (citation omitted).

¹¹⁰ *Id.* (citation omitted).

¹¹¹ See *Littlefield v. Maine Dep’t of Human Servs.*, 480 A.2d 731, 737 (Me. 1984) (stating that “in the interests of existing harmonious federal-state relationships, it is a wise policy that a state court of last resort accept, so far as reasonably possible, a decision of its federal circuit court on such a federal question.”) (citation omitted).

Illinois has adopted what appears to be a unique approach to dealing with federal courts' federal law holdings. Illinois courts consider themselves free to depart from federal court decisions on federal *constitutional* issues.¹¹² However, the Illinois Supreme Court appears to have issued inconsistent pronouncements on the precedential force of federal court decisions on federal *statutory* issues. In *Busch v. Graphic Color Corp.*,¹¹³ the Illinois Supreme Court considered whether the Federal Hazardous Substances Act ("FHSA") preempted a state common law failure to warn claim against a product manufacturer. The court stated "preliminarily" in its analysis of this question "that the decisions of the Federal courts interpreting a Federal act such as the FHSA are controlling upon Illinois courts, 'in order that the act be given uniform application.'"¹¹⁴ After discussing numerous decisions from the federal courts of appeals addressing the same or similar issues, the court followed those decisions and found the state law claim preempted.

In *Weiland v. Telectronics Pacing Systems, Inc.*,¹¹⁵ the Illinois Supreme Court appeared to narrow the breadth of the principle enunciated in *Busch* while considering whether the Medical Device Amendments of 1976 to the Federal Food, Drug, and Cosmetic Act preempted state common law claims for breach of warranty and defective design and construction. A few years earlier, the Seventh Circuit had reached a conclusion critical to resolving this preemption issue contrary to the one ultimately reached by the court in *Weiland*. The *Weiland* court acknowledged this, but rejected defendant's assertion that it was bound by the Seventh Circuit's holding. It noted that while "[u]niformity is an important consideration when state courts interpret federal statutes[,] . . . a concern for uniformity does not command this court's adherence to the Seventh Circuit's precedent in this case."¹¹⁶ Moreover, the court reasoned, the Seventh Circuit "exercises no appellate jurisdiction over this court."¹¹⁷ The court then stated that it "need not follow Seventh Circuit precedent interpreting a federal statute where, as here, the Supreme Court has not ruled on the question presented, there is a split of

¹¹² See *People v. Williams*, 641 N.E.2d 296, 321 (Ill. 1994) ("[D]ecisions of lower Federal courts on Federal constitutional questions are not binding on State courts.") (citation omitted).

¹¹³ 662 N.E.2d 397 (Ill. 1996).

¹¹⁴ *Id.* at 403 (citations omitted).

¹¹⁵ 721 N.E.2d 1149 (Ill. 1999).

¹¹⁶ *Id.* at 1154.

¹¹⁷ *Id.*

authority among the federal circuit courts of appeals, and, we believe, the case from the Seventh Circuit was wrongly decided.”¹¹⁸

Two federal statutory preemption decisions by the Illinois Supreme Court in 2001 appeared to adopt contradictory approaches to the issue. In *Sundance Homes, Inc. v. County of DuPage*,¹¹⁹ the court once again observed in dicta that “federal court decisions interpreting a federal act are actually *binding* upon our Illinois courts”¹²⁰ Several months later, in *Sprietsma v. Mercury Marine*,¹²¹ the court, without even mentioning *Sundance Homes*, reasoned that “[a]lthough we have stated in the past that the decisions of federal courts interpreting a federal statute are controlling on Illinois courts,” this view “overstates the degree of deference this court must pay to federal decisions.”¹²² It then emphasized that uniformity in the application of federal law was the animating principle in deciding whether to follow federal court precedent, particularly where “the federal statute relates to a product that is inherently mobile and thus likely to move from state to state.”¹²³ In the case before the court, this interest in a uniform application of federal statutes led it to “give considerable weight to the decisions of federal courts of appeals and federal district courts”¹²⁴

The most recent pronouncements from the Illinois Supreme Court appear to maintain the inconsistency that has marked the court’s treatment of federal court of appeals precedent. In *Borowiec v. Gateway 2000, Inc.*,¹²⁵ the court considered whether breach of warranty claims under the federal Magnuson-Moss Warranty—Federal Trade Commission Improvement Act were arbitrable under the Federal Arbitration Act. After discussing three federal court of appeals decisions construing Magnuson-Moss, the court quoted its statement in *Busch* that “decisions of the Federal Courts interpreting a Federal Act . . . are controlling upon Illinois courts, ‘in order that the act be given uniform application.’”¹²⁶ Because the federal court of appeals decisions construing Magnuson-Moss were uniform, the court in *Borowiec* followed those decisions. More recently, however, in *Bowman v.*

¹¹⁸ *Id.* (citation omitted).

¹¹⁹ 746 N.E.2d 254 (Ill. 2001).

¹²⁰ *Id.* at 266 (citing *Busch v. Graphic Color Corp.*, 662 N.E.2d 397, 335 (Ill. 1996)).

¹²¹ 757 N.E.2d 75 (Ill. 2001), *rev’d on other grounds*, 537 U.S. 51 (2002).

¹²² *Id.* at 80 (citing *Busch*, 662 N.E.2d 397).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ 808 N.E.2d 957 (Ill. 2004).

¹²⁶ *Id.* at 970 (citations omitted).

American River Transportation Co.,¹²⁷ the court unequivocally “reject[ed] plaintiff’s claim that we are bound by federal court decisions on this issue [of federal statutory interpretation].”¹²⁸ It concluded that “federal circuit and district court decisions were recognized in *Sprietsma* as merely being persuasive.”¹²⁹

Some federal courts of appeals have addressed the force of federal court decisions on issues of federal law in state courts and, unlike most of the state court decisions discussed above, have done so in fairly substantial depth. In *United States ex rel. Lawrence v. Woods*,¹³⁰ the Seventh Circuit analyzed the “sole reason” advanced by a habeas petitioner in support of the issuance of a writ—that the Supreme Court of Illinois’ affirmance of his conviction and rejection of his federal constitutional challenge to the state law under which he was convicted contradicted the decision of a federal district court finding the statute unconstitutional.¹³¹ The Seventh Circuit observed that state courts were divided on the question of whether they were bound by federal court decisions on issues of federal law, and sided with the view that those courts were not so bound. The court explained that both state courts of last resort and federal courts of appeal were, with respect to federal law questions, “coordinate courts” subject to the “supervisory jurisdiction of the Supreme Court of the United States.”¹³² But “because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.”¹³³

In *Yniguez v. Arizona*,¹³⁴ however, the Ninth Circuit expressed “serious doubts” that state courts could ignore the decisions of federal courts of appeal on federal questions.¹³⁵ It reasoned that “[h]aving chosen to create the lower federal courts, Congress may have intended that just as state courts have the final word on questions of state law, the federal courts ought to have the final word on questions of federal law.”¹³⁶ “The contrary view[.]” the Ninth Circuit noted, “could lead to considerable friction between the state and federal courts as well as duplicative litigation.”¹³⁷ Moreover, the court concluded, “if decisions of the federal

¹²⁷ 838 N.E.2d 949 (Ill. 2005).

¹²⁸ *Id.* at 958.

¹²⁹ *Id.* (citation omitted).

¹³⁰ 432 F.2d 1072 (7th Cir. 1970).

¹³¹ *Id.* at 1075.

¹³² *Id.*

¹³³ *Id.* at 1076.

¹³⁴ 939 F.2d 727 (9th Cir. 1991).

¹³⁵ *Id.* at 736.

¹³⁶ *Id.*

¹³⁷ *Id.*

courts of appeals invalidating state laws carry no authority, it would be difficult to comprehend why for so many years a right of appeal to the Supreme Court was provided in all cases in which federal circuit courts held state statutes unconstitutional.”¹³⁸

Despite the fact that most states have taken definitive positions on the precedential force of “inferior” federal courts’ federal law decisions, they have, by and large, failed to offer much in the way of substantive analysis in support of their adopted positions. There are certainly arguments supporting both views. For one, though the Supreme Court has thus far only construed the Supremacy Clause of the United States Constitution’s reference to “laws of the United States” to encompass its own federal law decisions¹³⁹ (of course, the phrase also includes “Treaties” and federal statutes “made pursuant to the United States Constitution”), the Court has *not* rejected the extension of the Supremacy Clause to federal courts of appeals’ decisions. Indeed, one can easily interpret the plain text of the Supremacy Clause to include federal courts of appeals’ and district court opinions as well.¹⁴⁰

But how could or would a court delimit such a reading of the Supremacy Clause? Would just federal court of appeals’ opinions be controlling by virtue of the Supremacy Clause, or would federal district court opinions be as well? If only the former would be controlling, why? And which federal court of appeals’ decisions would be controlling? Just those from the circuit in which the particular state is located, i.e., would the Supreme Court of Pennsylvania only be bound by Third Circuit decisions? If so, why? If federal court of appeals’ decisions outside the geographical circuit in which a particular state is located can be deemed controlling, how might a state court select from such out-of-circuit decisions when they conflict?

These questions highlight the problems with the view that federal courts of appeals’ decisions are controlling. But there are also problems with the majority view that federal courts of appeals’ are not controlling. First, how can one justify that federal courts must strongly defer to state intermediate appellate courts when ascertaining state law under *Erie*, while state courts are free to ignore intermediate federal appellate courts

¹³⁸ *Id.* at 737. As indicated above, on appeal, the Supreme Court reacted skeptically to the Ninth Circuit’s views in *Yniguez*, referring to the Ninth Circuit’s suggestion that state courts were bound by federal court decisions on issues of federal law as “remarkable.” *See Arizonans For Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997).

¹³⁹ *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

¹⁴⁰ *See, e.g., State v. Burnett*, 755 N.E.2d 857, 861 (Ohio 2001) (noting that the “language of the Supremacy Clause is sufficiently broad (‘the Laws of the United States’) to encompass all federal court decisions.”).

when ascertaining federal law? The lack of parallelism at least gives some pause. More pragmatically, leaving state courts unconstrained in their adjudication of federal law questions only increases the likelihood and scope of discord among state and federal courts. We have come to accept disagreement between and among federal district courts and courts of appeals on issues of federal law. But disagreement on federal issues between and among federal courts and the courts of the fifty states presents an entirely different level of disunity. Moreover, federal court disagreement is, at least theoretically, generally not intra-circuit—as discussed above, it is elementary that district courts are bound by their federal circuit’s federal law pronouncements, and a panel of a federal court of appeals is bound by a prior panel’s federal law pronouncements.¹⁴¹ But disagreement between states and federal court of appeals can create two different standards under the same legal principle within the same state, the applicability of which depends solely on the court – state or federal – in which one finds him or herself.

All of this tends to support the view set forth by Professor Zeigler—“that state courts adopt a single standard that is analogous to the rule the federal courts follow for ascertaining state law. State courts should decide federal questions the way they believe the Supreme Court would decide them.”¹⁴² Although this approach will not eliminate uncertainty and unpredictability, it would provide a uniform rule for all state courts and limit the frequency of state-federal disagreements on issues of federal law in the absence of a Supreme Court pronouncement.

III. CONCLUSION

The federal courts of appeals decide thousands of cases each year addressing questions of both state and federal law. Depending on the

¹⁴¹ Of course, our system does tolerate intra-circuit disagreement among federal district courts when, for example, their superior federal court of appeals has not spoken on an issue of federal law in a controlling fashion. Under these circumstances, federal district courts within the circuit are free to disagree with each other. Moreover, because federal district courts generally do not consider themselves bound by their own precedent, see *In re Executive Office of the President*, 215 F.3d 20, 24 (D.C. Cir. 2000) (*per curiam*) (“District Court decisions do not establish the law of the circuit, nor, indeed, do they even establish ‘the law of the district.’”) (citing, *inter alia*, *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991)) (other citation omitted); *G.M. Sign, Inc. v. Global Shop Solutions, Inc.*, 430 F. Supp. 2d 826, 830 n.4 (N.D. Ill. 2006) (“Decisions of district courts are not binding precedent, even on the same court.”) (citations omitted). There may also be disagreement within a particular federal district where the relevant federal court of appeals has not yet ruled on a particular federal question.

¹⁴² See Zeigler, *supra* note 73, at 1177.

state or federal jurisdiction, these decisions can be powerful weapons for litigants asserting or defending state and federal law claims. Accordingly, knowing how federal court of appeals' decisions might be received in a particular state or federal court is essential to practitioners, and could be the difference between winning and losing. By highlighting state and federal courts' contrasting approaches to applying federal court of appeals' precedent, this Article should only reinforce the potential importance of federal court of appeals' precedent and how it might apply to help (or hurt) one's case.