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GAZING INTO THE CRYSTAL BALL: REFLECTIONS ON THE STANDARDS STATE JUDGES SHOULD USE TO ASCERTAIN FEDERAL LAW

DONALD H. ZEIGLER*

INTRODUCTION

Federal and state courts routinely interpret and apply each other's law. Federal courts must apply state law under the Rules of Decision Act¹ as construed in *Erie Railroad Co. v. Tompkins*² and its progeny. State courts must apply federal law under the Supremacy Clause.³ Federal courts use a single approach for ascertaining state law in cases in which it applies: they decide issues of state law the way they think the state supreme court would decide them.⁴ State courts, by contrast, do not use a uniform approach for ascertaining federal law. Instead, they use a wide variety of approaches.

Virtually all state courts agree that they are bound by U.S. Supreme Court⁵ decisions interpreting federal law. When the Supreme Court has not spoken, however, there is little agreement on how to proceed. State courts vary greatly in the weight they give to lower federal court decisions: some consider them-

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1. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1652 (1994)).

2. 304 U.S. 64 (1938).

3. See U.S. CONST. art. VI, cl. 2.

4. See *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (noting that federal courts are bound by the decisions of a state's highest court in determining questions of state law and must ascertain what the state law should be after giving "proper regard" to lower state court holdings); *infra* notes 211-17 and accompanying text.

5. Subsequent references to the U.S. Supreme Court in this Article will be denoted as "Supreme Court"; references to the highest court of an individual state will use the state name as a modifier.

selves bound by such decisions; others ignore them entirely. Most state courts take a position somewhere between these two extremes. State courts generally give only brief, conclusory reasons for the approaches they follow. Courts deciding that they are not bound by lower federal court decisions almost never go on to articulate or explain the standards they use to ascertain federal law. Scholarly treatment of this issue is similarly brief and conclusory.⁶

This Article fills the need for a comprehensive analysis of the standards that state courts use to ascertain federal law. I propose that state courts adopt a uniform approach for ascertaining federal law that is analogous to the approach the federal courts

6. The two main works on the subject are quite short and were written years ago. See Andrew A. Matthews, Jr., Comment, *The State Courts and the Federal Common Law*, 27 ALB. L. REV. 73 (1963); Note, *Authority in State Courts of Lower Federal Court Decisions on National Law*, 48 COLUM. L. REV. 943 (1948). Several scholars have made brief mention of the issue in articles that focus on other matters. Most of these scholars assert in conclusory fashion that the state courts must obey the Supreme Court but are not bound by lower federal court decisions on federal issues. A few acknowledge that a split of authority exists on this question. See, e.g., Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 825 n.32 (1994) (arguing that state courts are not bound by lower federal court interpretations of federal law, but noting that there is precedent to the contrary); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1053 (1977) (asserting that "state courts are not bound to respect the doctrinal statements of the inferior federal tribunals insofar as they understand those statements not to be compelled by the Supreme Court"); Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399, 1422 n.94 (1983) (noting the split of authority on this issue); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1236 n.495 (1986) (stating that decisions of lower federal courts on issues of federal law are only persuasive precedent for state courts); Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 742 & n.254 (1995) (contending that state courts are not bound by lower federal court decisions on issues of federal law because state court decisions are not appealed to the lower federal courts); William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1746-48 (1992) (asserting that most state courts do not consider themselves bound by lower federal court decisions on federal law issues, but also noting the existence of a contrary school of thought); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 771 (1979) (asserting that lower federal court decisions are not binding as a matter of federal supremacy on state courts, and that "federal courts are no more than coordinate with the state courts on issues of federal law").

use in ascertaining state law: state courts should decide questions of federal law the way they think the Supreme Court would decide them. This approach would best further the goals of correct and uniform interpretation of federal law. As a corollary, I contend that categorical rules concerning the effect of lower federal court decisions are neither necessary nor appropriate. Instead, state courts should determine pragmatically what weight to give lower federal court decisions.⁷

Part I begins by explaining why the question of state court standards for ascertaining federal law is inherent in the basic governmental structure established by the Framers and the First Congress. It also offers some surmises about why the issue did not arise in the early years of the Republic. Part I then traces the myriad of approaches that state courts use to ascertain federal law and briefly discusses federal court opinion on the matter. It concludes by reviewing the policy reasons state and federal courts give for the diverse positions they take.

Part II makes the case for my proposal. It begins by exploring whether the Constitution or historical practice requires or precludes any particular approach to ascertaining federal law. It concludes that state courts are free to choose any approach they wish as long as it is not a subterfuge for ignoring federal law. Part II next identifies and discusses the goals that the standards should seek to achieve. It contends that the standards should help state courts interpret federal law correctly and help achieve national uniformity in the interpretation of that law. Finally, it explains why the approach I suggest would bring us closest to achieving those goals.

Part III explains how this proposal would apply in practice. If state judges are to decide issues of federal law the way they think the Supreme Court would decide them, these judges must have some idea of the process that the Supreme Court follows. Describing this process is not easy; there is no official handbook explaining it. Several judges and scholars have written about the art of judging,⁸ yet the process remains mysterious. Part III

7. Congress or the Supreme Court probably could require state courts to use particular standards for ascertaining federal law. *See infra* note 201. Neither institution has shown any inclination to do so.

8. Classic works include BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PRO-*

discusses what Judge Frank Coffin calls "craft skills"⁹—that is, the day-to-day practices that the Supreme Court follows in applying the rules of stare decisis and statutory construction. It then offers some general suggestions to assist state judges in making predictions. Finally, Part III discusses five different situations that state judges routinely face in ascertaining federal law and makes specific suggestions as to how they should proceed.

I. THE MANY APPROACHES TO ASCERTAINING FEDERAL LAW

A. *Early History*

The issue of what standards state courts should use to ascertain federal law is inherent in the governmental structure established by the Framers and the First Congress. Against the backdrop of the state courts, the Framers created a Supreme Court¹⁰ and extended the new federal judicial power to, inter alia, all cases in law and equity arising under the Constitution, laws, and treaties of the United States.¹¹ During both the Constitutional Convention and the state ratification conventions that followed, delegates generally agreed that state courts could also decide issues of federal law.¹²

CESS (1921); JEROME FRANK, *LAW AND THE MODERN MIND* (1930); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Ernst Freund, *Interpretation of Statutes*, 65 U. PA. L. REV. 207 (1917); and Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641 (1923). For excellent recent works, see FRANK M. COFFIN, *ON APPEAL: COURTS, LAWYERING, AND JUDGING* (1994); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* (1996).

9. See FRANK M. COFFIN, *THE WAYS OF A JUDGE* 195-96 (1980).

10. See U.S. CONST. art. III, § 1.

11. See *id.* § 2. In accord with common practice, throughout this Article I will refer to such jurisdiction as "arising under" jurisdiction. Although the delegates to the Constitutional Convention initially voted not to create lower federal courts, they subsequently approved the famous "Madisonian Compromise" that deferred the issue for later decision by Congress. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 125 (Max Farrand ed., 1966) [hereinafter RECORDS]; 2 *id.* at 38-39. The introductory language of Article III reads: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

12. Delegates who opposed the creation of lower federal courts specifically argued that state courts could hear all cases initially, with possible Supreme Court review

When the First Congress created the lower federal courts¹³ and gave them a portion of the subject matter jurisdiction allowed by Article III,¹⁴ the stage was set for the issue to emerge. Two court systems existed, state and federal, both with power to hear and decide cases raising issues of federal law. The Supremacy Clause required state courts to follow federal law in cases in

to insure a uniform interpretation of national law. *See, e.g.*, 1 RECORDS, *supra* note 11, at 124 (statement of John Rutledge) ("[T]he State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts . . ."); 2 *id.* at 45 (statement of Pierce Butler) (arguing that lower federal courts were unnecessary and that the state courts "might do the business"); 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 155 (Jonathon Elliot ed., 2d ed. 1836) (statement of Mr. Spencer) (arguing that lower federal courts should be jettisoned and cases arising under federal law left to the state courts with possible Supreme Court review). Those favoring the creation of lower federal courts stressed the need for a national judiciary, *see, e.g.*, 4 *id.* at 158 (statement of Mr. Davie) (pointing out that the arising under jurisdiction provided the central means for enforcing federal law), minimized the scope of its jurisdiction, *see, e.g.*, 3 *id.* at 553 (statement of John Marshall) (noting that the arising under jurisdiction would be limited to matters about which Congress could legislate), and asserted that jurisdiction would be concurrent with the state courts in most cases. *See, e.g.*, 3 *id.* at 554 (statement of John Marshall) (noting that the state courts "have a concurrence of jurisdiction with the [lower] federal courts in those cases in which the latter have cognizance"); 4 *id.* at 141 (statement of Gov. Johnston) ("[T]he opinion which I have always entertained is, that they will, in these cases, as well as in several others, have concurrent jurisdiction with the state courts, and not exclusive jurisdiction.").

13. *See* Judiciary Act of 1789, ch. 20, §§ 2-4, 1 Stat. 73, 73-75 (creating federal district and circuit courts).

14. Congress did not give the lower federal courts any original arising under jurisdiction in civil cases. Thus, litigants were forced to bring these cases in state court. *See* *Zwickler v. Koota*, 389 U.S. 241, 245 (1967); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 430 (1866); PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 960 (3d ed. 1988). Congress gave the lower federal courts almost all of the original criminal arising under jurisdiction possible under Article III. *See* Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76-79. Congress conferred no arising under removal jurisdiction. Congress also granted the circuit courts original jurisdiction, "concurrent with the courts of the several States," of all civil cases in which the matter in dispute exceeded \$500 and "an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State." *Id.* § 11, 1 Stat. at 78. The 1789 Act also granted removal jurisdiction in diversity cases. *See id.* § 12, 1 Stat. at 79-80. For an account of the development of the arising under jurisdiction, *see* Donald H. Zeigler, *Twins Separated at Birth: A Comparative History of the Civil and Criminal Arising Under Jurisdiction of the Federal Courts and Some Proposals for Change*, 19 VT. L. REV. 673 (1995).

which it applied.¹⁵ In time, the state courts would face issues of federal law that already had been decided by either the Supreme Court or lower federal courts. The questions became: What standards should state courts use to ascertain federal law? What effect should they give to decisions of the Supreme Court and the lower federal courts?

Although these questions might have arisen soon after the country was formed, apparently no early cases addressed them.¹⁶ Several factors may have kept these questions from surfacing. In the early days of the country, Congress enacted few federal statutes.¹⁷ Thus, there were few federal statutory rights to enforce in state or federal court, and few issues of statutory interpretation on which state and federal courts might differ. In addition, the Supreme Court held in *Barron v. Mayor of Baltimore*¹⁸ that the Bill of Rights applied only to the federal government and not to the states,¹⁹ thus eliminating an important area in which federal and state courts might have disagreed as to the proper meaning of federal law.

Although the First Congress created lower federal courts, it did not confer any general civil arising under jurisdiction on them.²⁰ Almost all civil cases arising under federal law had to be brought in state court.²¹ Consequently, the lower federal courts

15. The Clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

16. The earliest statement on the subject I have found is in an old treatise. The author states, without citation, that "[i]n cases in which the construction of the United States statutes is involved, it is the duty of the State courts to follow the decisions of the United States courts." GEORGE C. HOLT, *THE CONCURRENT JURISDICTION OF THE FEDERAL AND STATE COURTS* 160 (1888).

17. See Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1020 (1977) (discussing the limited use of the federal government's powers during the first one hundred years of the country).

18. 32 U.S. (7 Pet.) 243 (1833).

19. See *id.* at 247.

20. See *supra* note 14.

21. See *id.*

had little opportunity to develop a body of decisions interpreting federal law except in those relatively rare instances in which Congress gave them subject matter jurisdiction.²² The First Congress did confer almost all of the general criminal arising under jurisdiction on the lower federal courts,²³ and later Congresses routinely shared jurisdiction over federal statutory crimes with the state courts.²⁴ Although state courts might have considered how to ascertain federal law in such cases, it is unclear how often federal prosecutors actually proceeded in state court.²⁵

Several developments in the second half of the nineteenth century ensured that the issue addressed in this Article would finally capture judges' attention. The Civil War and Reconstruction fundamentally altered the balance of federal and state pow-

22. The district courts were given limited powers in proceedings to revoke wrongfully obtained patents. See Act of April 10, 1790, ch. 7, § 5, 1 Stat. 109, 111. Later, they were authorized to hear some patent infringement suits. See Act of Feb. 21, 1793, ch. 11, § 6, 1 Stat. 318, 322. The federal courts were also given jurisdiction, concurrent with the state courts, over claims by Canadian refugees dispossessed for aiding the colonies during the Revolutionary War. See Act of April 7, 1798, ch. 26, § 3, 1 Stat. 547, 548. Another Act imposed a duty on both federal and state courts to issue writs of habeas corpus to secure release of federal soldiers arrested for nonpayment of debt or breach of contract. See Act of May 28, 1798, ch. 47, § 14, 1 Stat. 558, 560-61. It seems unlikely that major differences of opinion between federal and state judges would emerge in such cases.

One would not expect the grant of diversity jurisdiction to bring the issue of which standards state courts should utilize when interpreting federal law to the fore. Although federal issues may arise in diversity cases, such actions generally center on state-created rights and duties.

23. See *supra* note 14.

24. See Zeigler, *supra* note 14, at 709-13.

25. During the early years of the Republic, the states appeared to spend more time openly challenging federal authority than meekly attempting to ascertain and apply federal law. For example, in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), the Virginia Supreme Court refused to obey the mandate of the Supreme Court in a case involving interpretation of a federal treaty, claiming that the Supreme Court had no power to review state court judgments and that section 25 of the Judiciary Act of 1789 was unconstitutional. See *id.* at 305-06. Not surprisingly, the Supreme Court rejected Virginia's challenge to its authority. See *id.* at 333-52. In addition, several state courts refused to hear cases brought under federal criminal statutes. They held that it was unconstitutional for Congress to authorize state courts to hear federal criminal cases, relying on a principle of international law that one country will not enforce the penal laws of another. See, e.g., *Ely v. Peck*, 7 Conn. 239, 242-43 (1828); *State v. Pike*, 15 N.H. 83, 84-85 (1844); *Jackson v. Rose*, 4 Va. (2 Va. Cas.) 124, 128 (1815). Courts openly defying federal judicial and legislative authority were not likely to address the present issue.

er. The federal government moved to consolidate its power and to expand national authority.²⁶ Congress protected federal rights against state infringement by passing the Thirteenth,²⁷ Fourteenth,²⁸ and Fifteenth Amendments,²⁹ and by enacting waves of enforcement legislation.³⁰ Congress finally conferred the general original civil arising under jurisdiction on the lower federal courts and made it concurrent with the state courts,³¹ and the Supreme Court made it clear that Congress can require the state courts to hear both civil and criminal cases arising under federal law.³² As the century drew to a close, Congress enacted significant regulatory legislation.³³

All of these developments combined to create the modern framework in which the question of what standard state judges should use to ascertain federal law was almost certain to arise on a regular basis. The state courts were bound to hear federal claims and to apply federal law in many instances. The grant of general original civil arising under jurisdiction to the lower federal courts allowed them to begin to develop a general body of

26. See *Zwickler v. Koota*, 389 U.S. 241, 246-47 (1967); FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 57-58, 65 (1928); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 507-11 (1928).

27. U.S. CONST. amend. XIII (abolishing slavery in the United States).

28. *Id.* amend. XIV (defining U.S. citizenship and establishing rights of due process and equal protection for all citizens).

29. *Id.* amend. XV (establishing right to vote for U.S. citizens).

30. See *Patsy v. Board of Regents*, 457 U.S. 496, 502 (1982); *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972); FRANKFURTER & LANDIS, *supra* note 26, at 65. See generally William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333, 336-52 (1969) (examining grant of various jurisdictional powers by Congress to the federal courts during Reconstruction); Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 989, 992-1020 (examining Congressional enactment of "wave after wave of enforcement legislation").

31. See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

32. See *Clafin v. Houseman*, 93 U.S. 130, 135-37, 140 (1876); Zeigler, *supra* note 14, at 751-53.

33. See, e.g., Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.); Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1994)). Congress enacted more regulatory legislation in the early years of the twentieth century. See Friendly, *supra* note 17, at 1022.

decisional law construing federal enactments.³⁴ The steady stream of federal regulatory legislation also created many federal rights that could be enforced in either state or federal court.³⁵

B. State Court Approaches to Finding Federal Law

State courts finally began to address the standards for ascertaining federal law at the turn of the century. Early decisions held that state court judges were bound by Supreme Court cases interpreting federal law.³⁶ The state courts promptly split on whether they were bound by lower federal court decisions interpreting federal law.³⁷ Discussions tended to be wholly

34. See *supra* notes 31-33 and accompanying text.

35. Congress does not always specifically state whether jurisdiction over particular claims is exclusive or concurrent with the state courts. Since *Clafin*, jurisdiction is presumed to be concurrent unless Congress specifically says otherwise, or unless concurrent jurisdiction would seriously compromise federal interests. See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962).

36. See, e.g., *Southern Ry. Co. v. Harrison*, 24 So. 552, 557 (Ala. 1898) (stating that if a national law "has received a construction from the highest national tribunal, its decision is supreme, and by it the state courts are bound"); *Stock v. Plunkett*, 183 P. 657, 657 (Cal. 1919) ("The decisions of [the Supreme Court] are binding on this court . . ."); *Burnham v. Ft. Dodge Grocery Co.*, 123 N.W. 220, 221 (Iowa 1909) ("So far as the general construction to be put upon an act of federal legislation is concerned, the Supreme Court of the United States is final authority . . ."); *Walters v. Commonwealth*, 250 S.W. 839, 841 (Ky. 1923) ("[A]t least until [the Supreme Court] passes upon the question, we are not willing to surrender our own judgment . . ."), *overruled in part by Henson v. Commonwealth*, 347 S.W.2d 546 (Ky. 1961); *State v. Intoxicating Liquors*, 49 A. 670, 671 (Me. 1901) ("[W]e must certainly recognize the authority of [the Supreme Court] in passing upon a provision of the federal constitution and upon congressional legislation thereunder, and be governed by the result."); *McDonald v. Pennsylvania R.R.*, 136 N.E. 894, 895 (Ohio 1922) ("[I]n the construction and application of such federal laws the decisions of our highest federal court must necessarily control."); *Noble v. Dibble*, 205 P. 1049, 1049 (Wash. 1922) ("[T]he highest court of a state is . . . bound by the decisions of . . . the Supreme Court of the United States."); *Stuart v. Farmers' Bank of Cuba City*, 117 N.W. 820, 823 (Wis. 1908) ("[I]f the Supreme Court had finally spoken on [the construction of the Bankruptcy Act] we should, of course, be guided by such utterance.").

37. For state courts holding themselves bound by lower federal court decisions, see, for example, *Handy v. Goodyear Tire & Rubber Co.*, 160 So. 530, 530 (Ala. 1935) (recognizing that a state court is bound by a federal circuit court decision construing and applying a federal statute); *Mackenzie v. Hare*, 134 P. 713, 714 (Cal. 1913) (recognizing that state courts are "bound by the interpretation put upon [the Constitution and federal statutes] by the courts of the United States"), *decree aff'd*,

conclusory. Courts simply stated that they were bound—or were not bound—and generally provided neither citation nor analysis.³⁸ State courts holding that they were not bound by lower federal court decisions gave no indication of how they would ascertain federal law.³⁹

Today, virtually all state courts agree that they are bound by Supreme Court decisions construing federal law,⁴⁰ but they agree

239 U.S. 299 (1915); *Atlas Mut. Ben. Ass'n v. Portscher*, 46 A.2d 643, 646 (Del. 1945) (recognizing that state courts should resolve due process issues in accordance with decisions of the Supreme Court "and other federal courts"); *Luken v. Lake Shore & M.S. Ry. Co.*, 94 N.E. 175, 178 (Ill. 1911) (holding that state courts are bound by the construction placed on a federal statute by federal courts); *Bocian v. Union Pac. R. Co.*, 289 N.W. 372, 374 (Neb. 1939) (holding that "pertinent opinions of the federal courts are binding on state courts" in the administration of a federal statute); *Brenen v. Dahlstrom Metallic Door Co.*, 178 N.Y.S. 846, 848 (App. Div. 1919) (recognizing that states should follow decisions of the federal courts in construing the Bankruptcy Act, "even if they are in conflict with our decisions"); *Jones v. Erie R.R.*, 140 N.E. 366, 368 (Ohio 1922) (recognizing that Ohio courts should follow "the construction of federal statutes which have been made by federal courts"); *State v. Ford Motor Co.*, 38 S.E.2d 242, 248 (S.C. 1946) (recognizing that certain issues in the case were "subject for their final solution to the United States Constitution and the interpretative decisions of the Federal Courts").

For cases in which state courts determined that they were not bound by lower federal court decisions, see, e.g., *Stock v. Plunkett*, 183 P. 657, 657 (Cal. 1919) (recognizing that federal circuit court decisions are entitled only to "great weight" in determining a federal question); *Lewis v. Braun*, 191 N.E. 56, 59 (Ill. 1934) (recognizing that a federal circuit court decision "is not binding upon this court"); *Iowa Nat. Bank v. Stewart*, 232 N.W. 445, 454 (Iowa 1930) (recognizing that state courts are "not concluded by" decisions of lower federal courts), *rev'd on other grounds sub nom. Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931); *Brown v. Palmer Clay Prods. Co.*, 195 N.E. 122, 123 (Mass. 1935) (recognizing that state courts are "not concluded by" decisions of lower federal courts on questions involving federal statutes), *aff'd*, 297 U.S. 227 (1936); *State ex rel. St. Louis B. & M. Ry. Co. v. Taylor*, 251 S.W. 383, 388 (Mo. 1923) (recognizing that state courts are not bound by federal district court decisions), *aff'd*, 266 U.S. 200 (1924); *New York Rapid Transit Corp. v. City of New York*, 9 N.E.2d 858, 860 (N.Y. 1937) (noting that a federal court determination, while entitled to great weight, is not binding on a state court), *aff'd on the merits*, 303 U.S. 573 (1938); *Harrison v. Barngrover*, 72 S.W.2d 971, 974 (Tex. Civ. App. 1934) (stating that a federal circuit court's holding is "not binding upon us here"); *Noble v. Dibble*, 205 P. 1049, 1049 (Wash. 1922) (holding state court not bound by decisions of any federal court except the Supreme Court).

38. See, e.g., *Handy*, 160 So. at 530; *Mackenzie*, 134 P. at 779; *New York Rapid Transit*, 9 N.E.2d at 860.

39. See, e.g., *New York Rapid Transit*, 9 N.E.2d at 860.

40. See, e.g., *Stallworth v. City of Evergreen*, 680 So. 2d 229, 234 (Ala. 1996) ("Alabama Courts must apply Federal constitutional law as enunciated by the United

on little else. The state courts take an extraordinary number of different positions on the "elusive" question of the effect of lower federal court decisions.⁴¹ The positions fall on a spectrum ranging from "slavishly follow" to "totally disregard" and include just about every position imaginable in between.

In the absence of Supreme Court precedent, some state courts consider themselves bound by lower federal court decisions when the lower federal courts are in agreement.⁴² When the lower fed-

States Supreme Court"); *Rohr Aircraft Corp. v. County of San Diego*, 336 P.2d 521, 524 (Cal. 1959) ("[W]e are bound by interpretations of federal statutes by the United States Supreme Court."); *rev'd on other grounds*, 362 U.S. 628 (1960); *People v. Barber*, 799 P.2d 936, 940 (Colo. 1990) (holding that Supreme Court "decisions on federal law bind all lower state and federal courts"); *Indiana Dep't of Pub. Welfare v. Payne*, 622 N.E.2d 461, 468 (Ind. 1993) ("Supreme Court decisions pertaining to federal questions are binding on state courts."); *Littlefield v. State*, 480 A.2d 731, 737 (Me. 1984) ("[A] decision of the Supreme Court of the United States is the supreme law of the land on a federal issue"); *Commonwealth v. Hill*, 385 N.E.2d 253, 255 (Mass. 1979) ("We are of course bound by decisions of the Supreme Court on questions of Federal law"); *Bargas v. Warden*, 482 P.2d 317, 318 (Nev. 1971) ("We are bound by the decisions of the United States Supreme Court."); *State v. Coleman*, 214 A.2d 393, 402 (N.J. 1965) ("We, of course, recognize that the United States Supreme Court is the final arbiter on all questions of federal constitutional law."); *Flanagan v. Prudential-Bache Sec., Inc.*, 495 N.E.2d 345, 348 (N.Y. 1986) ("[W]e are bound to apply the statute as interpreted by Supreme Court decision"); *Shaw v. PACC Health Plan, Inc.*, 908 P.2d 308, 314 n.8 (Or. 1995) ("[F]ederal court decisions . . . issued by the Supreme Court, are . . . binding on this court."); *Barstow v. State*, 742 S.W.2d 495, 501 n.2 (Tex. App. 1987) ("On questions of federal law—such as the proper interpretation of a federal statute—all courts in every state owe obedience to the Supreme Court of the United States."); *State v. Mechtel*, 499 N.W.2d 662, 666 (Wisc. 1993) ("Certainly, the United States Supreme Court's determinations on federal questions bind state courts."). *But see* *Wimberly v. Labor Indus. Relations Comm'n*, 688 S.W.2d 344, 350 (Mo. 1985) (Donnelly, J., concurring in result) (suggesting that state courts are bound by Supreme Court decisions interpreting federal statutes but not by Supreme Court decisions interpreting the federal constitution), *aff'd on the merits*, 479 U.S. 511 (1987). Consider also the following colloquy between a Queens County, New York, Criminal Court Judge and Professor Donald Doernberg of Pace University Law School, then an attorney for the New York City Legal Aid Society. Professor Doernberg was arguing a suppression motion, and cited *Wong Sun v. United States*, 371 U.S. 471 (1963). The Judge asked, "What court decided that, counselor?" Doernberg answered, "That was the United States Supreme Court, Your Honor." The Judge responded, "Well, that doesn't mean anything down here." Telephone Conversation with Donald L. Doernberg, Professor, Pace University Law School (Mar. 13, 1998).

41. See *People v. Stansberry*, 268 N.E.2d 431, 433 (Ill. 1971).

42. See, e.g., *People v. Riggs*, 568 N.W.2d 101, 106 (Mich. Ct. App. 1997) ("Michigan adheres to the rule that a state court is bound by the authoritative holdings of

eral courts disagree, some state courts consider themselves bound by the better reasoned rule.⁴³ Most state courts facing this situation consider themselves free to make their own independent determination.⁴⁴ State courts will sometimes go to great lengths to find a conflict in federal court decisions so that they may decide the federal question as they wish.⁴⁵

federal courts regarding federal questions when there is no conflict."); *Flanagan*, 495 N.E.2d at 348 ("[W]e are bound to apply the [federal] statute as interpreted by Supreme Court decision or, absent such, in accordance with the rule established by lower Federal courts if they are in agreement."); *Alvez v. American Export Lines, Inc.*, 389 N.E.2d 461, 463 (N.Y. 1979) ("[W]ere there a uniform Federal rule, albeit one established by lower Federal courts, we would be bound . . . to apply it."), *aff'd on the merits*, 446 U.S. 274 (1980). Wisconsin sometimes takes this position. *Compare Thompson v. Village of Hales Corners*, 340 N.W.2d 704, 712-13 (Wis. 1983) ("If there were no difference of opinion among [the federal] courts, or indeed if the supreme court had finally spoken on that subject, we should of course be guided by such utterance." (quoting *Stuart v. Farmers' Bank*, 117 N.W. 820, 823 (Wis. 1908)), with *State v. Mechtel*, 499 N.W.2d 662, 666 (Wis. 1993) ("It is clear, however, that determinations on federal questions by either the federal circuit courts of appeal or the federal district courts are not binding upon state courts." (citing *Thompson*, 340 N.W.2d at 712-13)).

43. See, e.g., *Hagler v. Ford Motor Credit Co.*, 381 So. 2d 80, 82 (Ala. Civ. App. 1980) ("[W]hen the [federal] decisions are in conflict we believe that we are free to follow and apply the better reasoned decision."); *Stallings v. Spring Meadows Apartment Complex*, 886 P.2d 1373, 1377 (Ariz. Ct. App. 1994) (finding, when faced with conflicting precedents from the Fifth and Ninth Circuits, that "the interpretation adopted by the Ninth Circuit [is] the better reasoned rule and binding on us"), *vacated*, 913 P.2d 496 (Ariz. 1996).

44. See, e.g., *Schueler v. Weintrob*, 105 N.W.2d 42, 48 (Mich. 1960) ("[W]here the Federal circuit courts of appeals themselves are in disagreement upon the proper interpretation of a Federal act, we feel free to choose the view which seems most appropriate to us."); *Flanagan*, 495 N.E.2d at 348 (holding that when there is no uniformity in the decisions of the lower federal courts, a state court "has the same responsibility as the lower Federal courts and is not precluded from exercising its own judgment"); *Stuart*, 117 N.W. at 823 ("[W]here variant views are entertained [in the lower federal courts], it is the duty of this court to decide for itself").

45. For example, in *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239 (N.J. 1990), plaintiff sued defendant for failing to warn of the dangers of smoking its product and for fraud and misrepresentation in advertising. See *id.* at 1239. The defendant argued that the Federal Cigarette Labeling and Advertising Act preempted the plaintiff's state law claims. See *id.* at 1241. Five federal circuit courts had ruled on the issue, including the Third Circuit, which encompasses New Jersey. See *id.* at 1246. All found preemption. See *id.* Two of the circuit court decisions, however, reversed district court decisions that had found no preemption. See *id.* In addition, a Minnesota intermediate appellate court found no preemption, although that decision, like the federal district court decisions, had been reversed on appeal. See *id.* at 1246-47. The New Jersey Supreme Court found the overturned decisions more per-

Courts often say that they are bound by lower federal court decisions interpreting federal statutes,⁴⁶ suggesting that they might follow a different rule in cases raising federal constitutional issues. The Illinois Supreme Court explicitly follows this dual approach, holding itself bound by lower federal court decisions interpreting federal statutes⁴⁷ but not bound by such decisions interpreting the Federal Constitution.⁴⁸ The court gives no

suasive and followed them in finding no preemption. See *id.* at 1247.

46. See, e.g., *Stallings*, 886 P.2d at 1376 ("[W]e are bound by the decisions of the federal courts interpreting federal statutes."); *Busch v. Graphic Color Corp.*, 662 N.E.2d 397, 403 (Ill. 1996) ("[D]ecisions of the Federal courts interpreting a Federal act . . . are controlling upon Illinois courts."); *Fox v. McDonnell Douglas Corp.*, 890 S.W.2d 408, 410 (Mo. Ct. App. 1995) ("Because this court is construing a federal statute, the decisions of the United States Supreme Court and of the federal courts interpreting that statute are binding."); *Anderson v. Wagner*, 296 N.W.2d 455, 458 (Neb. 1980) ("[I]n the administration and interpretation of federal legislative acts, pertinent opinions of the federal courts are binding upon the state courts."); *Hobbs Lumber Co. v. Shidell*, 326 N.E.2d 706, 709 (Ohio Ct. C.P. Belmont County 1974) ("It is well-settled law that this court is bound by the construction of federal statutes as determined by federal courts.").

47. See, e.g., *Busch*, 662 N.E.2d at 403 ("[D]ecisions of the federal courts interpreting a Federal act . . . are controlling upon Illinois courts."); *Arnold v. Babcock & Wilcox Co.*, 507 N.E.2d 218, 222 (Ill. 1987) ("[T]he decisions of the federal courts are controlling upon our court in the interpretation of a federal statute." (quoting *Golden Bear Family Restaurants v. Murray*, 494 N.E.2d 581, 584 (Ill. 1986))); *Boyer v. Atchison, Topeka & Santa Fe Ry. Co.*, 230 N.E.2d 173, 176 (Ill. 1967) ("In construing the Federal Safety Appliance Act, as with other Federal statutes, we must look to the Federal decisions for its interpretation."); *Elgin, Joliet & E. Ry. Co. v. Industrial Comm'n*, 138 N.E.2d 553, 555 (Ill. 1956) ("The decisions of the Federal courts are controlling upon our court in the interpretation of a Federal statute."); *Ernhart v. Elgin, Joliet & E. Ry. Co.*, 92 N.E.2d 96, 98-99 (Ill. 1950) (same).

48. See, e.g., *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."); *People v. Barrow*, 549 N.E.2d 240, 267 (Ill. 1989) ("Until the Supreme Court of the United States has spoken, State courts are not precluded from exercising their own judgments on Federal constitutional questions."); *People v. Sanchez*, 546 N.E.2d 574, 579 (Ill. 1989) (declining to follow federal decisions allegedly establishing a due process right to immunity), *dismissal of post-conviction relief aff'd*, 662 N.E.2d 1199 (1996); *Chicago v. Groffman*, 368 N.E.2d 891, 894 (Ill. 1977) (agreeing with federal circuit court that local ordinance was unconstitutional, with the caveat that a state court can consider "the issue independent of the decisions of the Federal courts"); *People ex rel. Illinois Fed'n of Teachers v. Lindberg*, 326 N.E.2d 749, 754 (Ill. 1975) ("But even if [a federal circuit court decision] is to be considered as affording a Federal constitutional basis for plaintiffs' challenge, this court is not bound by that case."); *People v. Stansberry*, 268 N.E.2d 431, 433 (Ill. 1971) (holding that when the Supreme Court has not spoken and the lower federal courts disagree,

reason for making this distinction; indeed, the court never actually discusses it. It simply follows different rules in the two situations.⁴⁹ Maine and Vermont, by contrast, give more deference to lower federal court decisions that interpret the Constitution than to those that interpret federal statutes.⁵⁰ New Jersey and New York firmly refuse to differentiate, giving equal weight to both.⁵¹

Some state courts choose to give greater weight to opinions of their own federal circuit than to decisions of other circuits.⁵²

decisions of the lower federal courts on a Fourth Amendment question are "certainly not binding on State courts").

49. The Illinois Supreme Court cannot be unaware of its different approaches in statutory and constitutional cases. In 1987, an Illinois intermediate appellate court wrote a long opinion carefully tracing the two lines of authority. *See* *Netzel v. United Parcel Serv.*, 520 N.E.2d 665, 668-71 (Ill. App. Ct. 1987). The Illinois Supreme Court subsequently reversed on the merits in a supervisory order without addressing the question. *See* *Netzel v. United Parcel Serv.*, 537 N.E.2d 1348, 1349 (Ill. App. Ct. 1989).

50. *See, e.g.*, *State v. Knowles*, 371 A.2d 624, 628 (Me. 1977) ("[I]t 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 a federal constitutional question]" (quoting *State v. Lafferty*, 309 A.2d 647, 667 (Me. 1973) (Wernick, J., concurring))); *State v. Austin*, 685 A.2d 1076, 1080 (Vt. 1996) ("[A] state court . . . should give due respect to the decisions of the lower federal courts, particularly on questions involving the United States Constitution.").

51. *See, e.g.*, *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1244 (N.J. 1990) (noting that past precedent did not distinguish "between the binding effect of decisions involving constitutional interpretation and those involving statutory interpretation Consequently, we reject any such distinction, and clarify that in neither situation are the decisions of the lower federal courts 'binding' *per se*."); *Flanagan v. Prudential-Bache Sec., Inc.*, 495 N.E.2d 345, 348 (N.Y. 1986) (noting the court's past willingness to disagree with federal circuit courts on both federal statutory and constitutional questions). *Cf.* *Pope v. State*, 396 A.2d 1054, 1062 n.10 (Md. 1979) ("[D]ecisions of federal circuit courts of appeals construing the federal constitution and acts of the Congress pursuant thereto, are not binding upon us.")

52. *See, e.g.*, *Red Maple Properties v. Zoning Comm'n*, 610 A.2d 1238, 1242 n.7 (Conn. 1992) ("[D]ecisions of the federal circuit in which a state court is located are entitled to great weight in the interpretation of a federal statute."); *Pignato v. Great W. Bank*, 664 So. 2d 1011, 1015 (Fla. Dist. Ct. App. 1995) ("[A]ccording unusual weight to a decision on an issue rendered by a federal circuit in which the state is located is an appropriate method for deciding federal questions where there is no Supreme Court authority."); *Littlefield v. State*, 480 A.2d 731, 737 (Me. 1984) ("[I]n 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 . . . a federal question."); *Abbott v. Goodwin*, 804 P.2d 485, 490 (Or. Ct. App. 1991) (stating that although not bound by lower federal court

Others, however, explicitly decline to do so.⁵³ Some courts are particularly reluctant to follow their own circuit when it is in the minority.⁵⁴ In addition, examples abound of state courts refusing to follow a lone district court ruling.⁵⁵

decisions, "under principles of federalism, we not only defer to federal court precedents, we should give weight to those of the Ninth Circuit, in which Oregon lies"), *modified on other grounds*, 809 P.2d 716 (Or. 1991); *Chiropractic Nutritional Assocs. v. Empire Blue Cross and Blue Shield*, 669 A.2d 975, 980 (Pa. Super. Ct. 1995) ("When possible, it is appropriate for the Superior Court of Pennsylvania to follow the Third Circuit's ruling on federal questions to which the United States Supreme Court has not yet provided the ultimate answer.").

53. See, e.g., *Debtor Reorganizers v. State Bd. of Equalization*, 130 Cal. Rptr. 64, 67 (Ct. App. 1976) ("As between the decisions of the Ninth Circuit and that of the Fifth Circuit, no primacy inheres in the former, so the persuasiveness of the conflicting views must depend upon the validity of the arguments made therein."); *Kraus v. Board of Educ.*, 492 S.W.2d 783, 786 (Mo. 1973) (refusing to follow an Eighth Circuit precedent in favor of an opinion from the Ninth Circuit); *Flanagan*, 495 N.E.2d at 348 (stating that when lower federal courts disagree, a state court is not "bound to follow the decision of the Federal Circuit Court of Appeals within the territorial boundaries of which it sits"); *Barstow v. State*, 742 S.W.2d 495, 500-01 (Tex. Ct. App. 1987) (noting that other circuits differ from the Fifth Circuit, and "[w]e are not bound to follow [Fifth Circuit precedent] merely because Texas lies within the geographical limits of the Fifth Circuit"); *Thompson v. Village of Hales Corners*, 340 N.W.2d 704, 712-13 (Wis. 1983) (rejecting argument that the trial court erred in following the Third Circuit rather than the Seventh Circuit).

54. See, e.g., *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, 627 So. 2d 367, 372-73 (Ala. 1993) (declining to follow the Eleventh Circuit's "approach that, in this Court's view, is inconsistent with the principles of maritime law and has no support among the rest of the federal circuits that have addressed this issue"); *Thomas v. Miller*, 906 S.W.2d 260, 261-62 (Tex. App. 1995) (declining to follow a Fifth Circuit decision with which only the Federal Circuit agreed and seven other federal circuit courts, as well as the Texas Supreme Court disagreed); *Turner v. PV Int'l Corp.*, 765 S.W.2d 455, 468-70 (Tex. App. 1988) (refusing to follow a Fifth Circuit decision because it is against the weight of federal authority).

State courts tend to give district court decisions somewhat less weight than circuit court decisions, although they rarely explicitly differentiate between the two. See, e.g., *State ex rel. St. Louis B. & M. Ry. Co. v. Taylor*, 251 S.W. 383, 388 (Mo. 1923) (declining to follow a federal district court decision, but strongly implying it would follow "an authoritative expression from the federal appellate courts"), *aff'd on the merits*, 266 U.S. 200 (1924). Cf. *Yniquez v. Arizona*, 939 F.2d 727, 736-37 (9th Cir. 1991) (suggesting that state courts should give federal circuit court decisions more weight than district court decisions).

55. See, e.g., *Seibold v. State*, 253 So. 2d 302, 309 (Ala. 1970); *People v. Barber*, 799 P.2d 936, 939-40 (Colo. 1990); *Bradshaw v. State*, 286 So. 2d 4, 6-7 (Fla. 1973); *People v. Del Vecchio*, 544 N.E.2d 312, 327 (Ill. 1989); *Hanch v. K.F.C. Nat'l Management Corp.*, 615 S.W.2d 28, 32-33 (Mo. 1981); *Blanton v. North Las Vegas Mun. Court*, 748 P.2d 494, 499-500 (Nev. 1987), *aff'd on the merits sub nom. Blanton v.*

Special problems arise when a criminal defendant seeks federal habeas corpus review of a state conviction. When a criminal defendant cites a constitutional ruling from a federal district or circuit court that would entitle him to habeas relief,⁵⁶ some state courts consider themselves bound by the ruling. For example, in *Commonwealth v. Negri*,⁵⁷ the defendant confessed to police after he was arrested and while he was without counsel.⁵⁸ The defendant had not been advised of his right to remain silent or to have counsel, but he also had not affirmatively requested counsel.⁵⁹ After the defendant's conviction, the Supreme Court decided *Escobedo v. Illinois*,⁶⁰ which could have been read to make the defendant's confession inadmissible.⁶¹ The Pennsylvania Supreme Court initially read *Escobedo* narrowly,⁶² but the Third Circuit interpreted *Escobedo* to require that counsel be afforded unless waived.⁶³ The Pennsylvania Supreme Court concluded that it should follow the Third Circuit rule until the Supreme Court spoke further.⁶⁴ Other state courts have given lower federal court decisions great deference when habeas review is possible,⁶⁵ or have made practical accommodations to avoid a federal-state conflict.⁶⁶

City of North Las Vegas, 489 U.S. 538 (1989). Courts are particularly reluctant to follow a district court decision when that decision conflicts with the state court's own precedent. See, e.g., *Barber*, 799 P.2d at 939; *Bradshaw*, 286 So. 2d at 7; *People v. Terrell*, 547 N.E.2d 145, 166-67 (Ill. 1989).

56. This situation is less likely to occur after the Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), its progeny, and the recent congressional changes to habeas procedure. See *infra* notes 349-75 and accompanying text.

57. 213 A.2d 670 (Pa. 1965).

58. See *id.* at 671.

59. See *id.*

60. 378 U.S. 478 (1964).

61. See *Negri*, 213 A.2d at 671.

62. See *id.* (citing *Commonwealth v. Patrick*, 206 A.2d 295 (Pa. 1965); *Commonwealth ex rel. Linde v. Maroney*, 206 A.2d 288 (Pa. 1965)).

63. See *id.* (citing *United States ex rel. Russo v. New Jersey*, 351 F.2d 429 (3d Cir. 1965), *vacated by New Jersey v. Russo*, 384 U.S. 889 (1966)).

64. See *id.* at 672.

65. See, e.g., *Commonwealth v. Masskow*, 290 N.E.2d 154, 157 (Mass. 1972); see also *Commonwealth v. Montanez*, 447 N.E.2d 660, 661-62 (Mass. 1983) (stating that the court would assume that the federal circuit court reached the "correct result" in a case where the court's decision was reviewable in habeas corpus proceeding); *Commonwealth v. Hill*, 385 N.E.2d 253, 255 (Mass. 1979) (same).

66. See, e.g., *State v. Coleman*, 214 A.2d 393, 402-04 (N.J. 1965) (disagreeing

On the other hand, state courts in criminal cases sometimes refuse to follow lower federal court rulings, even though the defendant can seek federal habeas review. The Illinois death penalty cases provide a dramatic example. On April 29, 1989, a federal district court held the Illinois death penalty statute unconstitutional.⁶⁷ In *People v. Del Vecchio*,⁶⁸ decided June 19, 1989, the Illinois Supreme Court refused to follow the federal district court decision, holding that state courts are not bound by lower federal court decisions on constitutional questions.⁶⁹ In three cases decided on October 25, 1989, the court reiterated the rationale of *Del Vecchio* and explained that it had considered and rejected in previous cases the claims that the federal court found meritorious.⁷⁰ The court stuck to its guns in subsequent cases.⁷¹ Finally, on May 2, 1990, the Seventh Circuit reversed the federal district court decision,⁷² thus vindicating the Illinois Supreme Court's stand on the constitutionality of the state death penalty statute.⁷³

with Third Circuit about the meaning of *Escobedo*, but directing that when practicable, prosecutors must try cases without confessions or postpone trials until the Supreme Court clarified the law).

67. See *United States ex rel. Silagy v. Peters*, 713 F. Supp. 1246 (C.D. Ill. 1989), *aff'd in part, rev'd in part*, 905 F.2d 986 (7th Cir. 1990). The court held that the statute violated the Eighth Amendment because it did not contain adequate guidelines for when prosecutors might seek the death penalty, thus inevitably leading to arbitrary and capricious action, and because it denied defendants the right to effective counsel and to basic due process because it lacked adequate notice provisions for when death would be sought. See *id.* at 1258-60.

68. 544 N.E.2d 312 (Ill. 1989).

69. See *id.* at 327.

70. See *People v. Barrow*, 549 N.E.2d 240, 266-67 (Ill. 1989); *People v. Kokoraleis*, 547 N.E.2d 202, 228-30 (Ill. 1989); *People v. Terrell*, 547 N.E.2d 145, 166-67 (Ill. 1989).

71. See, e.g., *People v. Bean*, 560 N.E.2d 258, 292-93 (Ill. 1990) (declining to follow the federal district court and noting that the court had previously rejected the defendants' challenges to the death penalty statute); *People v. Fields*, 552 N.E.2d 791, 817-18 (Ill. 1990) (same).

72. See *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir. 1990).

73. *State v. Austin*, 685 A.2d 1076 (Vt. 1996), *overruled by State v. Austin*, 685 A.2d 1076 (Vt. 1996), provides another example of a state court declining to follow a lower federal court ruling despite the fact that the defendant might seek federal habeas review. In *State v. Finch*, 569 A.2d 494 (Vt. 1989), the Vermont Supreme Court held that reliable hearsay could be admitted at a probation revocation hearing without violating the probationer's confrontation rights. See *id.* at 495. Subsequently,

In addition to having to decide whether they should give their own circuit court (or local district court) more deference than other federal courts, lower state courts face a further dilemma. When the state's highest court and the lower federal courts disagree about the meaning of federal law, lower state courts must decide whose interpretation they should follow. Once again, the courts split. Many choose to follow their state's highest court.⁷⁴

the U.S. District Court for the District of Vermont granted Finch habeas relief, holding that the judge at the revocation hearing must also specifically find good cause for not allowing confrontation. See *Finch v. Vermont Dist. Court*, No. 90-09, 1990 WL 312576, at *5 (D. Vt. Sept. 24, 1990). In *Austin*, the Vermont Supreme Court recognized that the reasons for following the federal district court decision in *Finch* were "especially strong" because the difference of opinion arose "through the federal-state habeas corpus process." *Austin*, 685 A.2d at 1080. Nonetheless, the court refused to follow the federal district court because it thought the district court's view was not shared by at least five federal circuit courts of appeals. See *id.*

Sometimes state courts initially defer to the federal courts, but then lose patience. Consider the following saga from Maryland. A state statute provided that, in criminal cases, 16 and 17 year olds were to be treated as adults in the City of Baltimore but as juveniles in the rest of the state. See *Long v. Robinson*, 316 F. Supp. 22, 23-24 (D. Md. 1970), *aff'd*, 436 F.2d 1116 (4th Cir. 1971). On August 6, 1970, a federal district court held the statute unconstitutional on equal protection grounds. See *id.* at 30. The court made the decision applicable to all cases not finally decided on May 15, 1969, the day the suit was filed. See *id.* at 31. The Fourth Circuit affirmed without disturbing the effective date set by the district court. See *Long v. Robinson*, 436 F.2d 1116 (4th Cir. 1971). In *Franklin v. State*, 285 A.2d 616 (Md. 1972), the Maryland Court of Appeals accepted *Long*, including the effective date, to avoid adding to the confusion in the processing of juveniles in Baltimore. See *id.* at 617-19. Subsequently, the Fourth Circuit decided that *Long* should be retroactively applied. See *Woodall v. Pettibone*, 465 F.2d 49, 50 (4th Cir. 1972). The Maryland Court of Appeals had heard enough. When asked to go along with the Fourth Circuit, it refused, stating that: "the holding of that court in this matter is not binding upon us. We shall decline most respectfully to accede to the point of view there expressed since we believe it to be in error." *Wiggins v. State*, 344 A.2d 80, 81 (Md. 1975).

74. See, e.g., *Harrison v. State*, 791 P.2d 359, 363 (Alaska Ct. App. 1990) ("In the absence of a controlling decision by the United States Supreme Court, it would appear that this court would be bound to follow a decision of the Alaska Supreme Court on an issue of federal law despite conflicting lower federal court decisions."); *State v. McCandless*, 461 A.2d 1205, 1207 (N.J. Super. Ct. App. Div. 1983) (stating that despite a contrary Third Circuit decision, "[w]e are . . . bound in such circumstances by the pronouncements of our State Supreme Court"); *People v. Brown*, 653 N.Y.S.2d 544, 544 (App. Div. 1997) ("[W]here there is a conflict between the decisional law of the [New York] Court of Appeals and that of an intermediate Federal appellate court, the ruling of the state Court of Appeals should be followed."); *Zurich Gen. Accident & Liab. Ins. Co. v. Lackawanna Steel Co.*, 299 N.Y.S. 862, 868 (Sup.

For example, in *Benford v. State*,⁷⁵ the Georgia Court of Appeals determined that it was not necessary even to consider the persuasiveness of lower federal court decisions because the Georgia courts had ruled on the issue.⁷⁶ In *Thomas v. Miller*,⁷⁷ the Texas Court of Appeals sidestepped a split in the lower federal courts on the meaning of recent amendments to the Bankruptcy Code by holding that it was obliged to follow the Texas Supreme Court's position on the issue.⁷⁸ The lower courts in Missouri believe that the Missouri state constitution compels them to follow the Missouri Supreme Court over the lower federal courts.⁷⁹

Other state courts follow the lower federal courts.⁸⁰ In *Netzel v. United Parcel Service*,⁸¹ for example, the Appellate Court of Illinois faced a conflict between Illinois Supreme Court precedent and a recent Seventh Circuit decision on whether federal law preempted a state retaliatory discharge claim.⁸² The Appel-

Ct. 1937) (noting that trial courts follow intermediate state appellate courts over lower federal courts). Justice Thomas of the U.S. Supreme Court adheres to this view. See *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("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.").

75. 377 S.E.2d 530 (Ga. Ct. App. 1989).

76. See *id.* at 531. The Court went on to deny defendant's claim based on several Georgia Supreme Court cases. See *id.* at 531-32.

77. 906 S.W.2d 260 (Tex. App. 1995).

78. The Texas Supreme Court followed the clear majority position. See *id.* at 261-62.

79. See *State v. Wilkinson*, 861 S.W.2d 746, 749 (Mo. Ct. App. 1993); *Trimble v. State*, 693 S.W.2d 267, 276 (Mo. Ct. App. 1985).

80. See *Stallings v. Spring Meadows Apartment Complex*, 886 P.2d 1373, 1376-77 (Ariz. Ct. App. 1994), *vacated on other grounds*, 913 P.2d 496 (Ariz. 1996) (stating that the court is bound by federal court decisions interpreting federal statutes and noting that the state supreme court concurs in that view); *Penbrook Hauling Co. v. Sovereign Constr. Co.*, 319 A.2d 277, 280 (N.J. Super. Ct. Law Div. 1974), *aff'd*, 346 A.2d 433 (N.J. Super. Ct. App. Div. 1975) (stating that the state supreme court's different result was not dispositive because "[i]n interpreting and applying federal statutes we are bound by federal and not state decisional law"); *Washington v. Hoke*, 544 N.Y.S.2d 942, 943 (Sup. Ct. 1989) (recognizing that state courts are bound by federal district courts rather than state intermediate appellate courts on issues of federal law).

81. 520 N.E.2d 665 (Ill. App. Ct. 1987).

82. See *id.* at 667-68.

late Court resolved the conflict by citing Illinois Supreme Court cases holding that state courts are bound to follow lower federal court interpretations of federal statutes.⁸³ The Court concluded: "We believe this analysis reveals that we are bound, at the direction of the Illinois Supreme Court itself, to follow the Seventh Circuit's *Lingle* decision that the Illinois tort of retaliatory discharge is preempted by section 301 of the [National Labor Management Relations Act]. Accordingly, we so hold."⁸⁴

Courts holding that they are not technically bound by lower federal court decisions also vary widely in the effect they give those decisions. Some courts are very deferential, saying that lower federal court decisions are "persuasive and entitled to great weight,"⁸⁵ or "entitled to substantial deference,"⁸⁶ or are "highly respectable and persuasive authority."⁸⁷ Courts making such statements usually follow the federal cases,⁸⁸ although exceptions to this pattern do occur.⁸⁹ State courts often say that

83. See *id.* at 668-69.

84. *Id.* at 671. The Supreme Court subsequently reversed the Seventh Circuit on the merits, holding that such claims were not preempted. See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988). The Illinois Supreme Court then reversed the Appellate Court decision in *Netzel* in a supervisory order. See *Netzel v. United Parcel Serv., Inc.*, 537 N.E.2d 1348, 1349 (Ill. App. Ct. 1989).

85. *People v. Bradley*, 460 P.2d 129, 132 (Cal. 1969); see also *Conrad v. Bank of America*, 53 Cal. Rptr. 2d 336, 347 (Ct. App. 1996) ("entitled to great weight"); *York v. Gaasland Co.*, 250 P.2d 967, 971 (Wash. 1952) (same).

86. *Yee v. City of Escondido*, 274 Cal. Rptr. 551, 552 (Ct. App. 1990), *aff'd on the merits*, 503 U.S. 519 (1992).

87. *Delaney v. Lakeside Villa, Ltd.*, 440 S.E.2d 668, 670 (Ga. Ct. App. 1993); see also *Phillips v. Williams*, 608 P.2d 1131, 1135 (Okla. 1980) ("highly persuasive").

88. See, e.g., *Conrad*, 53 Cal. Rptr. 2d at 346-47 (following federal cases on the effect to be accorded plaintiffs' bankruptcy proceedings in subsequent litigation with creditors); *State v. Sebastian*, 701 A.2d 13, 27-35 (Conn. 1997) (following a Ninth Circuit decision in holding that defendant was not an "Indian" entitled to dismissal of state criminal charges because he was not a member of a federally acknowledged tribe); *Phillips*, 608 P.2d at 1135 (following federal cases in holding that the Due Process Clause did not require the parole board to give reasons for removing inmate's name from its docket); *Bruce v. Evertson*, 68 P.2d 95, 97 (Okla. 1937) (modifying prior ruling to yield to the judgment of the Tenth Circuit); *Cellucci v. General Motors Corp.*, 676 A.2d 253, 255 n.1 (Pa. Super. Ct. 1996) (overruling two prior cases in order to follow a Third Circuit decision, and noting that it is appropriate to follow that court when it has spoken on a federal issue), *aff'd*, 706 A.2d 806 (Pa. 1998); *York*, 250 P.2d at 971 (following federal cases construing an executive order as a declaration of public policy).

89. See, e.g., *Bradley*, 460 P.2d at 131-32 (distinguishing a Ninth Circuit case

they should follow federal decisions when a number of federal courts are in agreement. As the California Court of Appeal put it, "[w]e should be hesitant to reject the authority of federal decisions on questions of federal law where those decisions are numerous and consistent."⁹⁰ State courts also tend to be particularly deferential when federal precedent is precisely on point⁹¹ and when they wholeheartedly agree with a federal court on the merits.⁹²

despite recognizing that federal precedent is "persuasive and entitled to great weight"); *Yee*, 274 Cal. Rptr. at 551-52 (declining to modify court's own prior ruling on a constitutional issue in light of an intervening Ninth Circuit decision, finding the federal court's reasoning "unpersuasive," even though federal decisions are "entitled to substantial deference"); *Delaney*, 440 S.E.2d at 670 (stating that federal court decisions are "highly respectable and persuasive authority," but distinguishing a harmful jury charge in a Fifth Circuit case from the charge in the instant case); *People ex rel. Ray v. Martin*, 60 N.E.2d 541, 547 (N.Y. 1945) (giving "due and great respect" to federal court constructions of federal statutes, but "feel[ing] constrained to make [its] own independent decision" in the instant case), *aff'd*, 326 U.S. 496 (1946).

90. *Conrad*, 53 Cal. Rptr. 2d at 347; *see also* *Wimberly v. Labor & Indus. Relations Comm'n*, 688 S.W.2d 344, 347-48 (Mo. 1985) ("In some circumstances it may be appropriate for a state court to defer to long established and widely accepted federal court interpretations of federal statutes."), *aff'd on the merits*, 476 U.S. 511 (1987); *Cherry Hill Township v. Oxford House, Inc.*, 621 A.2d 952, 966 (N.J. Sup. Ct. App. Div. 1993) (adhering to the interpretation of a federal statute reached in three federal cases); *Shaw v. PACC Health Plan, Inc.*, 908 P.2d 308, 314 n.8 (Or. 1995) ("When the federal courts are well-settled on a specific interpretation, this court may choose to follow that interpretation."); *Maritime Overseas Corp. v. Ellis*, 886 S.W.2d 780, 798 (Tex. App. 1994) (finding "no such division of opinion" among federal courts on issue of prejudgment interest in Jones Act cases, and following the numerous decisions of the Fifth Circuit), *aff'd on the merits*, 971 S.W.2d 402 (Tex. 1998). *But see* *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1245-47 (N.J. 1990) (rejecting uniform holding of five federal circuits that the Federal Cigarette Labeling & Advertising Act preempts common-law remedies).

91. *See, e.g., Sebastian*, 701 A.2d at 27 ("Because [a Ninth Circuit decision] is the only federal precedent that is precisely on point, its holding, although not binding on us, is entitled to significant weight."); *Abdur-Ra'ooof v. Department of Corrections*, 562 N.W.2d 251, 253 (Mich. Ct. App. 1997) ("In the present case, where [the Sixth Circuit decision] involved . . . the same Department of Corrections, the same religion, and the same challenged policy, we consider the ruling highly persuasive and deserving of great deference."); *Cellucci*, 676 A.2d at 255 n.1 ("Because [a Third Circuit case] involves the identical question raised here, we find its holding to be particularly compelling.").

92. *See, e.g., Lomax v. Fiedler*, 554 N.W.2d 841, 849 (Wis. Ct. App. 1996) (following *Martin v. Rison*, 741 F. Supp. 1406 (N.D. Cal. 1990), and stating that "we have not hesitated to adopt the reasoning of federal lower-court decisions that we consider persuasive on a particular question. We think *Martin* is such a case." (cita-

Many state courts, by contrast, are much less effusive about their respect for lower federal court decisions. Many of these courts treat such decisions as merely persuasive.⁹³ Thus, if state courts go along with federal decisions, it "is the product of substantive agreement on the merits rather than perfunctory deference."⁹⁴ Many courts simply say that federal decisions are entitled to "respect."⁹⁵ Use of this word generally signals that federal precedent will not be followed.⁹⁶ Sometimes state courts abandon any pretense of deference to the lower federal courts. When federal precedent is cited, these courts brusquely state that they are "not bound,"⁹⁷ or vehemently disagree on the merits.⁹⁸ For

tions omitted)); *Streff v. Town of Delafield*, 526 N.W.2d 822, 825 (Wis. Ct. App. 1994) (following Ninth Circuit decision applying ripeness doctrine to takings claim because "[t]he ripeness requirement serves an important public policy consideration").

93. See, e.g., *In re Tyrell*, 876 P.2d 519, 524 (Cal. 1994) ("persuasive but not controlling"); *Rohr Aircraft Co. v. County of San Diego*, 336 P.2d 521, 524 (Cal. 1959) ("merely persuasive"), *rev'd on other grounds*, 362 U.S. 628 (1960); *People v. Stansberry*, 268 N.E.2d 431, 433 (Ill. 1971) ("no more than persuasive"); *Shell Oil Co. v. Secretary, Revenue & Taxation*, 683 So. 2d 1204, 1210 n.11 (La. 1996) ("persuasive only"); *State v. Strickland*, 683 So. 2d 218, 230 (La. 1996) ("no more than persuasive authority"); *Chiropractic Nutritional Assocs. v. Empire Blue Cross and Blue Shield*, 669 A.2d 975, 980 (Pa. Super. Ct. 1995) ("persuasive authority"); *Derby v. Brenner Tank, Inc.*, 522 N.W.2d 274, 276 n.4 (Wis. Ct. App. 1994) ("[W]e may adopt federal court decisions we find persuasive.").

94. *Indiana Dep't of Pub. Welfare v. Payne*, 622 N.E.2d 461, 468 (Ind. 1993); see also *Shaw*, 908 P.2d at 314 n.8 ("[T]his court may choose to follow [federal court precedent] if the underlying reasoning is persuasive."); *Barstow v. State*, 742 S.W.2d 495, 501 (Tex. App. 1987) (stating that a federal decision "is as persuasive as its logic").

95. See, e.g., *Dugas v. State*, 277 A.2d 620, 621 (Md. Ct. Spec. App. 1971) ("entitled to respect"); *Brown v. Palmer Clay Prods. Co.*, 195 N.E. 122, 123 (Mass. 1935) ("[r]espectful consideration"), *aff'd*, 297 U.S. 227 (1936); *Hanch v. K.F.C. Nat'l Management Corp.*, 615 S.W.2d 28, 33 (Mo. 1981) (stating that the court "look[s] respectfully to such opinions for such aid and guidance as may be found therein").

96. See, e.g., *Dugas*, 277 A.2d at 167; *Brown*, 195 N.E. at 123.

97. See, e.g., *Seibold v. State*, 253 So. 2d 302, 309 (Ala. 1970) ("It is well settled that the decisions of federal courts other than the Supreme Court are not binding on a state court of last resort."); *Lamb v. Railway Express Agency*, 320 P.2d 644, 646 (Wash. 1958) ("We have held that [federal circuit court] decisions are not binding on us in Washington."). In *City of Chicago v. Groffman*, 368 N.E.2d 891 (Ill. 1977), the Illinois Supreme Court pointedly ignored lower federal court precedent in ruling on the constitutionality of a Chicago ordinance. The court ultimately agreed with a Seventh Circuit decision holding the ordinance unconstitutional, but was determined to "consider the issue independent of the decisions of the Federal courts." *Id.* at 894.

98. See, e.g., *Central Bank, Nat'l Ass'n v. Superior Court*, 106 Cal. Rptr. 912,

example, in brushing aside a Ninth Circuit case that conflicted with its own previous case law, the Alaska Supreme Court made clear that it considers itself every bit the equal of the lower federal courts:

Where a federal question is involved, the courts of Alaska are not bound by the decisions of a federal court other than the United States Supreme Court. The converse is also true; federal courts in Alaska are not bound by decisions of Alaska state courts on questions of federal law.⁹⁹

Similarly, in *People v. Memro*¹⁰⁰ the California Supreme Court seemed to relish disregarding two federal circuit court decisions: "Federal circuit court opinions do not bind us. They may serve as persuasive authority, of course, but only when they are just that—persuasive. Having carefully considered the reasoning of both opinions, we find that neither one is so."¹⁰¹

Last, but not least, some state courts follow the approach for ascertaining federal law that is suggested in this Article: they attempt to decide the federal question the way they believe the Supreme Court would decide it. Only a few courts explicitly

915 (Ct. App. 1973) ("In our view [a federal circuit decision] and its progeny read the statute erroneously, ignore the realities of modern commercial practices and violate congressional intent."); *Strickland*, 683 So. 2d at 230 (stating that a Fifth Circuit case "fails entirely to persuade"); *Kraus v. Board of Educ.*, 492 S.W.2d 783, 786 (Mo. 1973) ("It would serve no useful or proper purpose for us to comment on the holding in [an Eighth Circuit] case. It is enough to say . . . that we do not agree with it . . .").

99. *In re F.P., W.M., & A.M.*, 843 P.2d 1214, 1215 n.1 (Alaska 1992).

100. 905 P.2d 1305 (Cal. 1995).

101. *Id.* at 1359 (citations omitted). While some courts may relish rejecting federal cases, other courts appear uneasy about it. Often when state courts claim that they are not bound by federal decisions, they buttress their position by finding some additional reason for rejecting the federal precedent. For example, a state court may distinguish a federal decision on its facts. *See, e.g., People v. Bradley*, 460 P.2d 129, 132 (Cal. 1969); *Delaney v. Lakeside Villa, Ltd.*, 440 S.E.2d 668, 670 (Ga. Ct. App. 1993); *Bartholomey v. State*, 273 A.2d 164, 173 (Md. 1971), *vacated in part*, 408 U.S. 938 (1972); *State v. Kelly*, 753 S.W.2d 71, 73 (Mo. Ct. App. 1988). It also may find the federal claim to be waived by a procedural default. *See, e.g., State v. Crenshaw*, 852 S.W.2d 181, 187 (Mo. Ct. App. 1993) (holding a Sixth Circuit case "inapposite in that the claim of error there was preserved by timely objection at trial" and also not binding on state court). A state court also may decide that the lower federal court decision did not announce a new constitutional principle. *See, e.g., Futrell v. State*, 667 S.W.2d 404, 407 (Mo. 1984).

state that they are using this approach. In *La Bonte v. New York, New Haven & Hartford Railroad Co.*,¹⁰² a Federal Employers' Liability Act (FELA) case, the plaintiff claimed that the defendant was estopped from asserting a three-year statute of limitations.¹⁰³ The Supreme Judicial Court of Massachusetts stated:

There appear to be no decisions of the [U.S.] Supreme Court that shed any light on estoppel in FELA cases, and not very much law has thus far been developed by the lower Federal courts. . . . Since the Supreme Court has not spoken on this subject, we are obliged to decide the question as we think that court would decide it.¹⁰⁴

When deciding issues of federal law, the Texas Supreme Court visualizes itself as an intermediate appellate court that must anticipate how the Supreme Court would rule. The court recognized its unusual position in *City of Lancaster v. Chambers*:¹⁰⁵ "When deciding issues of federal law, we find ourselves in the unique role—as a court of last resort on all other issues within our jurisdiction—of an intermediate appellate court, anticipating the manner in which the United States Supreme Court would decide the issue presented."¹⁰⁶ The Vermont Supreme Court adopted a similar perspective for issues of federal law in *State v. Hamlin*.¹⁰⁷ "[I]n reviewing a claim of error under the Fifth Amendment we place ourselves in the position of a federal court of appeals."¹⁰⁸ Accordingly, the court believed it should "analyze the alleged error in light of the relevant decisions of the United States Supreme Court."¹⁰⁹

These courts, however, only hint at exactly how they go about determining what the Supreme Court would do when there is no precedent on point. In *Paddock v. Siemoneit*,¹¹⁰ the Texas Supreme Court tried to determine the meaning of the applicable

102. 167 N.E.2d 629 (Mass. 1960).

103. *See id.* at 631-32.

104. *Id.* at 632.

105. 883 S.W.2d 650 (Tex. 1994).

106. *Id.* at 658-59.

107. 499 A.2d 45 (Vt. 1985).

108. *Id.* at 49.

109. *Id.*

110. 218 S.W.2d 428 (Tex. 1949).

federal statute from Supreme Court opinions "in more or less analogous cases."¹¹¹ In *Hamlin*, the Vermont Supreme Court looked to federal circuit court cases,¹¹² and in *La Bonte*, the Massachusetts high court looked to "such lower Federal Court decisions as seem persuasive," as well as to its own prior decisions.¹¹³

A larger number of courts appear to be trying to determine how the Supreme Court would decide the issue without explicitly stating that they are engaged in such an analysis.¹¹⁴ Sometimes state courts refuse to follow a lower federal court decision because they believe the federal decision misreads or is inconsistent with Supreme Court precedent.¹¹⁵ Seemingly, then, these courts are attempting to decide the case the way they believe the Supreme Court would decide it. For example, in *Stallworth v. City of Evergreen*,¹¹⁶ the plaintiff claimed he was denied due process when fired from his job.¹¹⁷ Despite the plaintiff's blatantly unfair pretermination hearing,¹¹⁸ the trial court relied on a recent Eleventh Circuit case holding that any procedural deficiencies in pretermination hearings could be remedied by an

111. *Id.* at 434.

112. *See Hamlin*, 499 A.2d at 50.

113. *LaBonte v. New York, New Haven, & Hartford R.R.*, 167 N.E.2d 629, 632 (Mass. 1960).

114. *See, e.g., City of Chicago v. Groffman*, 368 N.E.2d 891, 894-96 (Ill. 1977) (holding a Chicago ordinance unconstitutional and supporting its decision with an extensive discussion of Supreme Court cases); *Flanagan v. Prudential-Bache Sec., Inc.*, 495 N.E.2d 345, 347-49 (N.Y. 1986) (finding a split in the lower federal courts and turning to Supreme Court cases for guidance).

115. *See, e.g., Yee v. City of Escondido*, 274 Cal. Rptr. 551, 552-56 (Ct. App. 1990) (refusing to follow a recent Ninth Circuit decision because the court thought an even more recent decision of the Supreme Court undercut that decision), *aff'd on the merits*, 503 U.S. 519 (1992); *Bradshaw v. State*, 286 So. 2d 4, 6-7 (Fla. 1973) (refusing to follow federal district court decision holding a disorderly conduct statute unconstitutional because the court did not think the Supreme Court would agree with district court holding); *State v. Harmon*, 685 P.2d 814, 817-19 (Idaho 1984) (declining to follow a federal district court decision holding state criminal statute void for vagueness because the court thought the statute was constitutional under existing Supreme Court precedent).

116. 680 So. 2d 229 (Ala. 1996).

117. *See id.* at 233.

118. *See id.* The hearing officer was plaintiff's supervisor and the person who had initiated the complaint. *See id.* Moreover, the hearing officer was a material witness at the hearing. *See id.*

adequate post-termination hearing, and denied relief.¹¹⁹ The Alabama Supreme Court thought the Eleventh Circuit improperly relied on the Supreme Court's decision in *Parratt v. Taylor*¹²⁰ in reaching this conclusion.¹²¹ In *Parratt*, the Supreme Court held that a state prisoner did not have a due process right to a hearing before prison officials negligently lost his property.¹²² Given that a predeprivation hearing is plainly impossible in such circumstances, the prisoner was entitled only to a postdeprivation remedy in state court.¹²³ Unlike in *Parratt*, however, Stallworth could be afforded meaningful pretermination proceedings.¹²⁴ Instead of following *Parratt*, the Alabama Supreme Court chose to follow the Supreme Court decision in *Cleveland Board of Education v. Loudermill*,¹²⁵ which recognized that pretermination hearings were practicable in the employment context.¹²⁶ The Alabama Supreme Court went on to conclude that a post-termination hearing could not remedy the constitutional defects in Stallworth's pretermination hearing.¹²⁷ In sum, the Alabama Supreme Court appeared to be attempting to ascertain how the Supreme Court would decide the case, although it never specifically said it was following this approach.¹²⁸

C. Federal Court Opinions on the Issue

All-in-all, the state courts follow an extraordinarily wide range of conflicting and inconsistent rules for ascertaining federal

119. See *id.* at 234 (citing *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994)).

120. 451 U.S. 527 (1981).

121. See *Stallworth*, 680 So. 2d at 234-35.

122. See *Parratt*, 451 U.S. at 543-44.

123. See *id.* at 538-43.

124. See *Stallworth*, 680 So. 2d at 233-34 (suggesting that an unbiased and impartial decisionmaker could have cured Stallworth's problems prior to his termination).

125. 470 U.S. 532 (1985).

126. See *id.* at 547-48.

127. See *Stallworth*, 680 So. 2d at 235.

128. Cf. *Blanton v. North Las Vegas Mun. Court*, 748 P.2d 494, 500 (Nev. 1987), *aff'd on the merits by Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989) (declining to follow a federal district court decision mandating jury trials in Nevada "driving under the influence" cases because the court thought the federal decision was "an unnecessary and unwarranted expansion" of Supreme Court precedent).

law. Federal courts have relatively little opportunity to advise the state courts as to how they should proceed.¹²⁹ When federal courts do speak, it is often as an aside or in dictum.¹³⁰ The federal courts agree that state courts are bound by Supreme Court decisions interpreting federal law.¹³¹ Early in our history, the Supreme Court said that "the construction given by this Court to the constitution and laws of the United States is received by all as the true construction,"¹³² and the Court often has reaffirmed that rule.¹³³

The federal courts disagree, however, as to the effect that state courts should give to lower federal court decisions when the Supreme Court has not spoken.¹³⁴ On at least two occasions, the Supreme Court suggested that state courts are bound by lower federal court constructions of the FELA. In *Southern Railway Co. v. Gray*,¹³⁵ the Court said: "As the action is under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law as inter-

129. See *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970).

130. In 1970, Chief Judge Swygert of the Seventh Circuit stated he could not find any federal court decisions dealing directly with the effect that lower federal court decisions should be given in state court. See *id.* at 1075.

131. See, e.g., *id.* at 1075-76.

132. *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 160 (1825).

133. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land . . . [and] of binding effect on the States."); *Chesapeake & Ohio Ry. Co. v. Kuhn*, 284 U.S. 44, 47 (1931). In *Kuhn*, the Court wrote that the Ohio intermediate appellate court

acted upon the erroneous theory that it should follow the views of the Supreme Court of the State rather than those of this Court in respect of questions arising under the [Federal Employers'] Liability Act. That statute, as interpreted by this Court, is the supreme law to be applied by all courts, federal and state.

Kuhn, 284 U.S. at 47.

Lower federal courts also have affirmed that state courts are bound by Supreme Court decisions. See, e.g., *Lawrence*, 432 F.2d at 1075-76 (affirming that Supreme Court decisions "on national law have binding effect on all lower courts whether state or federal"); *Owsley v. Peyton*, 352 F.2d 804, 805 (4th Cir. 1965) (asserting that "Supreme Court decisions . . . are necessarily binding upon the states").

134. See *Lawrence*, 432 F.2d at 1075-76.

135. 241 U.S. 333 (1916).

preted and applied in Federal courts."¹³⁶ Similarly, in *Urie v. Thompson*,¹³⁷ the Court stated that the statute

does not define negligence, leaving that question to be determined, as the Missouri Supreme Court said, "by the common law principles as established and applied in the federal courts." . . . What constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs.¹³⁸

One can argue that these decisions require state courts to follow lower federal court decisions interpreting federal law. The Court's language seems quite clear. State courts are to follow federal law "as interpreted and applied in Federal courts"¹³⁹ and "[f]ederal decisional law . . . governs."¹⁴⁰ If the Court had meant to make only Supreme Court precedent binding, it would have said so.

On the other hand, *Gray* and *Urie* probably should not be considered determinative. In both cases, the Court's primary point was that federal rather than state law should govern.¹⁴¹ The reference to federal case law is contained in one or two sentences, and neither opinion explicitly addresses the distinction between Supreme Court and lower federal court precedent. Moreover, in both cases, the decisions the Supreme Court cited as authority did not support the proposition that state courts are bound by lower federal court decisions interpreting federal law. Finally, the Supreme Court has not subsequently relied upon *Gray* or *Urie* to support this proposition. Several individual Supreme Court Justices have stated instead that state courts are *not* bound by lower federal court decisions.¹⁴²

136. *Id.* at 338-39.

137. 337 U.S. 163 (1949).

138. *Id.* at 174 (citations omitted).

139. *Gray*, 241 U.S. at 338-39.

140. *Urie*, 333 U.S. at 174.

141. See *Gray*, 241 U.S. at 338-39; *Urie*, 337 U.S. at 165.

142. See *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("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

The lower federal courts are split regarding whether state courts are bound by lower federal court decisions interpreting federal law. In *United States ex rel. Lawrence v. Woods*,¹⁴³ the Seventh Circuit opted for "not bound": "Until the Supreme Court of the United States has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law. They are not concluded by, though they should give respectful consideration to, the decisions of the federal Circuit Courts of Appeals and District Courts."¹⁴⁴ The Ninth Circuit, by contrast, has expressed "serious doubts as to the wisdom of this view . . . [which] could lead to considerable friction between the state and federal courts."¹⁴⁵

interpretation of federal law give way to a (lower) federal court's interpretation."); *Steffel v. Thompson*, 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., concurring) ("Although [a] state court would not be compelled [by stare decisis] to follow [a] federal holding, the opinion might, of course, be viewed as highly persuasive.").

143. 432 F.2d 1072 (7th Cir. 1970).

144. *Id.* at 1075 (quoting *Iowa Nat. Bank v. Stewart*, 232 N.W. 445, 454 (Iowa 1930), *rev'd* by *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931). Other circuits have reached similar conclusions. *See Bromley v. Crisp*, 561 F.2d 1351, 1354 (10th Cir. 1977) ("We agree . . . that the Oklahoma Courts may express their differing views on . . . federal questions until we are all guided by a binding decision of the Supreme Court."); *Owsley v. Peyton*, 352 F.2d 804, 805 (4th Cir. 1965) ("Though state courts may for policy reasons follow the decisions of the Court of Appeals whose circuit includes their state . . . they are not obliged to do so.").

145. *Yniguez v. Arizona*, 939 F.2d 727, 736 (9th Cir. 1991). Other circuits have reached similar conclusions. *See Fretwell v. Lockhart*, 946 F.2d 571, 577 (8th Cir. 1991), *rev'd on other grounds*, 506 U.S. 364 (1993) (presuming that the Arkansas trial court would follow an Eighth Circuit decision because state courts are bound by the Supremacy Clause). *Babbitz v. McCann*, 320 F. Supp. 219 (E.D. Wis. 1970), *vacated*, 402 U.S. 903 (1971), demonstrates the sort of friction that can arise. In *Babbitz*, a three-judge district court declared portions of Wisconsin's abortion statute unconstitutional. *See id.* at 293. The court did not issue an injunction, relying on state authorities to stop enforcing the statute based on comity. *See id.* at 221. The state authorities, however, promptly made clear that they would only honor a decision by the Supreme Court. *See id.* at 221-22. An angry three-judge court then issued an injunction. *See id.* at 223. Although the court realized that "it is arguable that our judgment may not be literally 'binding' on the state," *id.* (citing *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970)), the court was upset that "[i]n the case at bar, comity has proved to be a one-way street." *Id.* at 222.

D. Underlying Policy Reasons

Very few courts, state or federal, give any reasons for the position they take. When courts do give reasons, such rationales generally are conclusory.¹⁴⁶ The few courts that explain why Supreme Court decisions are binding on state courts point to the Supremacy Clause¹⁴⁷ and to the Supreme Court's power to review federal issues in state court decisions.¹⁴⁸ As *Lawrence* suggests, "[t]he Supreme Court of the United States has appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal."¹⁴⁹

State courts holding themselves bound by lower federal court interpretations of federal statutes may do so by analogy to the traditional federal court practice of following state court interpretations of state statutes. In 1825, the Supreme Court noted that there is a "principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government."¹⁵⁰ The Court cited this maxim in relying upon state court decisions construing a Kentucky statute,¹⁵¹ and, of course, *Swift v. Tyson*¹⁵² read it into section 34 of the Judiciary Act of 1789¹⁵³ by requiring the federal courts to

146. See, e.g., *supra* notes 95-101 and accompanying text.

147. See *Lockhart*, 506 U.S. at 376.

148. See *Lawrence*, 432 F.2d at 1075-76.

149. *Id.*; see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States."). In *Barstow v. State*, 742 S.W.2d 495 (Tex. App. 1987), the Texas Court of Appeals stated that the duty to obey the Supreme Court results from the principle that "a court's construction of a statute becomes an integral part of the statute itself," and from the Supremacy Clause, which makes the laws of the United States the "supreme law of the land" binding on "the Judges in every State." *Id.* at 501 n.2. The New Jersey Supreme Court put it more simply: "[T]o disregard or evade the decisions of the Supreme Court . . . would indeed disserve the interests of our country." *Schlemm v. Schlemm*, 158 A.2d 508, 516 (N.J. 1960).

150. *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159 (1825).

151. See *id.* at 160.

152. 41 U.S. (16 Pet.) 1 (1842).

153. Ch. 20, § 34, 1 Stat. 73, 92 (1789).

follow "state laws, strictly local, that is to say . . . the positive statutes of the state, and the construction thereof adopted by the local tribunals."¹⁵⁴ In holding themselves bound by lower federal court constructions of federal statutes, state judges may simply be following the converse of this long-established practice in the federal courts. Only one state court decision, however, could be found that expressed this rationale.¹⁵⁵

Courts that give reasons why they should not be bound by lower federal court decisions make both structural and practical arguments. These courts base the structural argument on the institutional framework chosen by the Founding Fathers:¹⁵⁶ Lower federal courts and state courts exist side-by-side; both sets of courts can decide federal questions. Although both are subject to Supreme Court review, they do not sit in review of each other. Consequently, state courts are not bound by lower federal court decisions on issues of federal law.¹⁵⁷ Some courts suggest that

154. *Swift*, 41 U.S. at 18.

155. See *Jones v. Erie R.R.*, 140 N.E. 366, 367-68 (Ohio 1922). As the *Jones* court stated:

The federal courts in all cases involving the construction of state statutes have uniformly followed the rule that the construction given to such statutes in the state of their enactment shall control, and this court has always with equal deference followed the constructions of federal statutes which have been made by federal courts.

Id. One federal court suggests that, having chosen to create lower federal courts, Congress may have intended that these lower federal courts have the final word on the meaning of federal law. See *Yniguez v. Arizona*, 939 F.2d 727, 736 (9th Cir. 1991); see also *HOLT*, *supra* note 16, at 160 (juxtaposing duty of federal courts to follow construction of state statutes by state courts and duty of state courts to follow construction of federal statutes by federal courts).

156. See *supra* notes 10-15 and accompanying text.

157. See, e.g., *People v. Barber*, 799 P.2d 936, 940 (Colo. 1990) ("Lower federal courts do not have appellate jurisdiction over state courts and their decisions are not conclusive on state courts, even on questions of federal law."); *Iowa Nat. Bank v. Stewart*, 232 N.W. 445, 454 (Iowa 1930) (stating that lower federal and state courts are, "as to the laws of the United States, co-ordinate courts" and that "[f]inality of determination in respect to the laws of the United States rests in the Supreme Court"), *rev'd on other grounds sub nom.*, *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931); *Barstow v. State*, 742 S.W.2d 495, 500 n.2 (Tex. App. 1987). As the court in *Barstow* wrote:

Congress limited [federal court of appeals] jurisdiction to appeals taken from the final decisions of *federal district courts*. . . . Consequently, the decisions of one federal Court of Appeals on a question of law do not

state courts have an independent responsibility to interpret federal law. As the New Jersey Supreme Court stated in *State v. Coleman*:¹⁵⁸

In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court.

. . . .
 . . . [If we were to follow the federal court decision] we would be . . . abdicating our undoubted responsibility to pass on issues of constitutionality and justice as we see them.¹⁵⁹

Courts base the practical argument on the fact that the lower federal courts often disagree on the meaning of federal law. Obviously, a state court cannot follow two conflicting opinions.¹⁶⁰ Some state courts give a similar reason in explaining why they do not grant their own circuit particular deference when other circuits disagree. No federal decision is definitive, and their own circuit may be wrong.¹⁶¹

bind any other federal Court of Appeals under the doctrine of *stare decisis*. Nor do they bind *any* Texas court, *even on federal questions*

Id. Several scholars agree with this reasoning. *See, e.g.,* Caminker, *supra* note 6, at 825 ("But the state and territorial judges are not bound by precedents established by courts that do not have the authority to review those judges' decisions. . . . Thus a state court need not follow the holdings of any inferior federal court."); Shapiro, *supra* note 6, at 771 ("[I]t seems . . . plain that [lower federal court] precedent would not be binding as a matter of federal supremacy on an issue of federal law. . . . [O]nly the Supreme Court sits atop the state courts in the national hierarchy. Other federal courts are no more than coordinate"); Note, *supra* note 6, at 946.

158. 214 A.2d 393 (N.J. 1965).

159. *Id.* at 403-04; *see also* *People v. Del Vecchio*, 544 N.E.2d 312, 327 (Ill. 1989) ("In passing on Federal constitutional questions, State courts and lower Federal courts have the same responsibility."); *Flanagan v. Prudential-Bache Sec., Inc.*, 495 N.E.2d 345, 348 (N.Y. 1986) (recognizing that a state court "has the same responsibility as the lower Federal courts and is not precluded from exercising its own judgment" when there is no uniformity in the decisions of the lower federal courts); Schwarzer et al., *supra* note 6, at 1747 (arguing that by ceding interpretation of federal law to a federal court, "the state court would appear to be abdicating its responsibility to the litigants before it").

160. *See* *People v. Stansberry*, 268 N.E.2d 431, 433 (Ill. 1971) (stating that when lower federal courts disagree, "there can be no definitive ruling by which a State court can be bound").

161. In *Amerada Hess Corp. v. Owens-Corning Fiberglass*, 627 So. 2d 367 (Ala.

State courts give several reasons for following lower federal decisions, whether they consider themselves technically bound or not. They wish to avoid forum shopping between state and federal courts¹⁶² and to maintain good relations with the federal courts.¹⁶³ They also seek to reduce confusion in the administration of justice,¹⁶⁴ guarantee judicial certainty,¹⁶⁵ and help insure the uniformity of federal law.¹⁶⁶

Some state courts believe that these reasons for following lower federal court decisions have particular force when a defendant

1993), the Alabama Supreme Court refused to follow an Eleventh Circuit ruling that was inconsistent with case law from several other circuits even though forum shopping might result. *See id.* at 372. The court stated that "our concern over the potentiality of forum shopping is insufficient to override our reluctance to follow an approach that, in this Court's view, is inconsistent with the principles of maritime law and has no support among the rest of the federal circuits that have addressed this issue." *Id.* at 372-73.

State courts give federal district court decisions less weight than circuit court decisions because a district court decision is not binding on other federal district courts, *see Barber*, 799 P.2d at 940 n.3, or even on the same judge in a later case, *see Yniguez v. Arizona*, 939 F.2d 727, 736-37 (9th Cir. 1991).

162. *See, e.g., Amerada Hess Corp.*, 627 So. 2d at 372-73 ("We share . . . [the] concern over the potentiality of forum shopping . . ."); *Red Maple Properties v. Zoning Comm'n*, 610 A.2d 1238, 1242 n.7 (Conn. 1992) ("We do not believe that when Congress enacted the concurrent jurisdiction provision of § 1983 that it intended to create such a disparate treatment of plaintiffs depending on their choice of a federal or state forum."); *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1244 (N.J. 1990) ("[L]ower federal-court decisions . . . should be accorded due respect . . . [because] judicial comity discourages forum shopping.").

163. *See, e.g., State v. Lafferty*, 309 A.2d 647, 667 (Me. 1973) (Wernick, J., concurring) (stating that it is a "wise policy" to accept federal constitutional rulings of the circuit court in which the state is situated "in the interests of developing harmonious federal-state relationships").

164. *See, e.g., Franklin v. State*, 285 A.2d 616, 617 (Md. 1972) (stating that rendering a decision contrary to that of the federal courts would "simply add to the confusion"); *Bruce v. Evertson*, 68 P.2d 95, 97 (Okla. 1937) ("[I]n the interest of a harmonious administration of the law, we are prone to yield to the judgment of [the] Circuit Court of Appeals.").

165. *See Cherry Hill Township v. Oxford House*, 621 A.2d 952, 966 (N.J. Super. Ct. App. Div. 1993) (holding that lower federal court decisions must be accorded due respect to "guarantee judicial certainty").

166. *See id.*; *see also Dewey*, 577 A.2d at 1244 (noting importance of uniformity between state courts and lower federal courts); *State v. Austin*, 685 A.2d 1076, 1080 (Vt. 1996) (same). In all of the opinions I have read, only one mentions the greater expertise of federal courts in interpreting federal law as a reason to defer to lower federal court decisions. *See Emmens v. Johnson*, 923 S.W.2d 705, 709 (Tex. App. 1996).

can seek federal habeas corpus review of a state conviction.¹⁶⁷ As a practical matter, the lower federal courts exercise appellate jurisdiction over the state courts in such cases.¹⁶⁸ Thus, if the state courts refuse to acquiesce in federal court decisions, a defendant can obtain relief in federal court. This frustrates state judges, annoys federal judges, and creates more work for everyone. As the Supreme Court of Pennsylvania explained in *Commonwealth v. Negri*, in discussing recent Third Circuit case law at odds with Pennsylvania precedent:

Obviously, [these] decision[s] creat[e] a serious problem for this Court, and jeopardiz[e] the finality of our judgments in relevant cases. . . . [T]he decision of the Third Circuit Court of Appeals is on this matter, for all practical purposes, the ultimate forum in Pennsylvania. If [we] refuse to abide by its conclusions, then the individual to whom we deny relief need only to "walk across the street" to gain a different result. Such an unfortunate situation would cause disrespect for the law. It would also result in adding to the already burdensome problems of the Commonwealth's trial courts, which look to us for guidance. Finality of judgments would become illusory, disposition of litigation prolonged for years, the business of the courts unnecessarily clogged, and justice intolerably delayed and frequently denied.¹⁶⁹

It is thus no wonder that the *Negri* court decided to go along with Third Circuit case law until the Supreme Court resolved the dispute.¹⁷⁰

167. See *Commonwealth v. Masskow*, 290 N.E.2d 154, 157 (Mass. 1972).

168. See Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 254 (1988) (asserting that "through habeas review," the lower federal courts "were to act as surrogates for the United States Supreme Court . . . in effect, exercising appellate jurisdiction over state criminal proceedings"); Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103, 107 (1998) (stating that federal courts, by hearing habeas cases, have acted as appellate courts "for at least forty years").

169. *Commonwealth v. Negri*, 213 A.2d 670, 672 (Pa. 1965); see also *Masskow*, 290 N.E.2d at 157 ("It would be undesirable for us to affirm the conviction of a defendant if the inevitable consequence were that he would be released on a writ of habeas corpus.").

170. See *Negri*, 213 A.2d at 672.

II. *A Proposed Standard for Ascertaining Federal Law*

State courts use diverse and conflicting standards for ascertaining federal law when there is no Supreme Court precedent directly on point. This Article proposes 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. Part II begins by examining whether there is anything in the Constitution or in historical practice that mandates a particular approach, and concludes that, within reason, state courts are free to choose whatever standard they wish. It then identifies and discusses the goals the standards should seek to further, and finally explains why the proposed approach would best achieve those goals.

A. *Constitutional and Historical Considerations*

Neither the Constitution nor history requires or precludes any particular approach to ascertaining federal law. The Constitution does not directly address the issue. The Supremacy Clause bears most closely on the matter, and states that “[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.”¹⁷¹ Thus, the Supremacy Clause makes federal law binding on the states in cases where federal law applies.¹⁷² It does not, however, mandate any particular approach to ascertaining that law. Courts have held that the Supremacy Clause requires state courts to follow Supreme Court decisions that

171. U.S. CONST. art. VI, cl. 2.

172. See *Claffin v. Houseman*, 93 U.S. 130, 136 (1876) (“The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are.”); see also *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361-62 (1952) (noting the applicability of federal law in a case involving FELA); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942) (noting the applicability of federal law in a case involving admiralty law); *McDonald v. Pennsylvania R.R.*, 136 N.E. 894, 895 (Ohio 1922) (stating that “the law is settled that when Congress acts upon [interstate commerce] all state laws are superseded by reason of the supremacy of the national authority”).

interpret federal law.¹⁷³ It might be argued that the Supremacy Clause also requires state courts to follow lower federal court decisions when the Supreme Court has not spoken, but no authority can be found for this proposition, even in state court decisions holding state courts bound by lower federal court rulings. Richard Matasar argues that the Supremacy Clause actually requires the state courts to follow their own view of federal law.¹⁷⁴ Although weighty arguments support the position that state courts are not bound by lower federal court decisions,¹⁷⁵ citing the Supremacy Clause in support of this position seems a bit odd. The fairest reading is that the Supremacy Clause does not require the states either to follow or to disregard lower federal court decisions,¹⁷⁶ or to adopt any particular approach to ascertain federal law.¹⁷⁷

Courts and commentators favoring a categorical "not bound" rule often use a structural argument based on the institutional framework chosen by the Founders to support their position.¹⁷⁸ This argument has some force: because the Founders envisioned a central and independent role for state courts in the implementation and enforcement of federal law—with no direct review by the lower federal courts¹⁷⁹—one can infer that state courts should not be bound by lower federal court decisions interpreting federal law.

173. See *supra* note 147 and accompanying text.

174. See Matasar, *supra* note 6, at 1422 n.94 ("The principle of stare decisis is subordinate to the principle of the supremacy of federal law . . . under which the state and lower federal courts are bound to follow their own view of what the federal law means, in spite of conflicting decisions by other lower courts.").

175. See *supra* notes 156-61 and accompanying text.

176. See Caminker, *supra* note 6, at 837 (stating that neither the Supremacy Clause nor any other constitutional provision "demands that state courts defer to a particular actor's interpretation of federal law"); Shapiro, *supra* note 6, at 771 (asserting that lower federal court precedent is not binding on state courts as a matter of federal supremacy).

177. The Supremacy Clause may impose some limits on state court discretion in choosing standards. If a state court adopted an approach for ascertaining federal law that seemed intentionally designed to ascertain federal law incorrectly or was merely a subterfuge for ignoring federal law, the Supremacy Clause might preclude that approach.

178. See *supra* notes 156-61 and accompanying text.

179. See *supra* text accompanying note 12.

Although the argument from history has force, it is not ultimately decisive. There is no indication that the Constitutional Convention, the state ratification conventions, or the First Congress ever explicitly considered the issue this Article addresses. In addition, it does not necessarily follow that just because the Founders thought state courts should decide issues of federal law if there were no lower federal courts or if jurisdiction were not extended to those courts, they would also have thought that state courts should ignore decisions of the lower federal courts once they were created and empowered to decide the full range of federal claims. As the Ninth Circuit argued in *Yniguez v. Arizona*: "Having 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."¹⁸⁰

Finally, there are exceptions to the basic rule of *stare decisis* that a court is bound to follow only those courts that can directly reverse it.¹⁸¹ For example, under *Erie Railroad Co. v. Tompkins*¹⁸² and its progeny, federal courts are bound to follow state law as announced by the highest state court in cases in which it applies¹⁸³ even though federal decisions on the meaning of state law are not directly reviewable by the state courts.

B. Goals that the Standards Should Seek to Further

Assuming that the state courts are free to choose standards for ascertaining federal law, what standards should they use? The standards they choose should further two interrelated goals. First, the standards should help state courts correctly interpret federal law; second, they should help achieve national uniformity in the interpretation of federal law. The first goal seems self-

180. 939 F.2d 727, 736 (9th Cir. 1991).

181. See *United States v. Mitlo*, 714 F.2d 294, 298 (3d Cir. 1983) (stating that higher court precedents are binding on courts lower in the judicial hierarchy).

182. 304 U.S. 64 (1938).

183. See *Commissioner v. Estate of Bosch*, 387 U.S. 456, 464-65 (1967); *Nolan v. Transocean Air Lines*, 365 U.S. 293, 295-96 (1961); *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 661 (3d Cir. 1980).

evident: when the Supremacy Clause requires state courts to apply federal law, they should apply the correct federal law, not some mistaken version. Simply put, standards for ascertaining federal law ought to help state judges get it right.

The second goal is related to the first because the more accurate judges are, the more uniform the law will be. Ideally, federal law should be uniform because it is one government's law.¹⁸⁴ State rules may vary, but federal law should mean the same thing in Alabama as it does in Idaho. That is not to say that federal law must be applied in exactly the same manner everywhere. Local differences may justify different results in particular cases, but, to the extent possible, the basic meaning of federal law should be the same nationwide. Uniform interpretation of federal law furthers several important policies. First, it promotes equal protection of the laws. Treating like cases alike is basic to the American notion of fairness.¹⁸⁵ Second, uniform interpretation of law also promotes evenhanded, predictable, consistent development of legal principles. People can plan better, and can rely on the law with greater confidence.¹⁸⁶ Third, uniform interpretation of law also discourages forum shopping. Americans take instinctive offense when the outcome of litiga-

184. The Supreme Court has long recognized the importance of the uniform interpretation of federal law. See, e.g., *Taflin v. Levitt*, 493 U.S. 455, 465 (1990) ("[P]etitioners' concern with the need for uniformity and consistency of federal criminal law is well taken . . ."); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (stating that the use of diverse state laws governing federal commercial paper "would subject the rights and duties of the United States to exceptional uncertainty . . . [and] lead to great diversity in results . . . [thus making t]he desirability of a uniform [federal] rule . . . plain"); *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 350 (1855) (noting that the country "would be incomplete and altogether insufficient for the great ends contemplated, unless a constitutional arbiter was provided to give certainty and uniformity, in all of the States, to the interpretation of the constitution and the legislation of congress"); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (stating "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution").

185. See Caminker, *supra* note 6, at 852.

186. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987) (arguing that "[t]he ability to predict what a decisionmaker will do helps us plan our lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown").

tion is determined by the court the plaintiff chooses rather than the underlying merits of the case.¹⁸⁷

Some writers contend that state courts should develop their own, independent interpretations of federal law.¹⁸⁸ This argument has some merit, provided that it is not carried too far. For example, William W. Schwarzer, Nancy E. Weiss, and Alan Hirsch point to "the value of fifty laboratories in which approaches to federal law can be tested."¹⁸⁹ Professor Paul M. Bator suggests that we "derive enormous benefits from having a variety of institutional 'sets' within which issues of federal constitutional law are addressed."¹⁹⁰ Professors Robert Cover and Alexander Aleinikoff argue that both federal and local perspectives are particularly important in the criminal justice system.¹⁹¹ Federal judges often have a more utopian perspective because they view the state criminal process in habeas corpus proceedings, which involve only substantial constitutional claims. State judges, by contrast, often are much more aware of the enormous practical problems in the day-to-day administration of state criminal justice. Thus, they realize how difficult it may be to implement new constitutional rulings.¹⁹²

To the extent that these writers suggest a cooperative federalism in which both state and federal judges participate in a mutual endeavor to interpret and apply federal law, I have no argument. State judges are entitled to an opportunity to say what federal law *should* be, within accepted bounds constraining judges in such an endeavor.¹⁹³ Put another way, they are entitled to assert their opinion as to what the "right" interpretation is without constantly having to look over their shoulders. There

187. See, e.g., Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 782-83 (1995) (providing reasons to dislike forum shopping).

188. See Schwarzer et al., *supra* note 6, at 1746.

189. *Id.*

190. Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 634 (1981).

191. See Cover & Aleinikoff, *supra* note 6, at 1050-52.

192. See *id.*

193. See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("[W]e have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under [federal law].").

is reason for caution, however. Cooperative federalism is one thing; many different eccentric or parochial interpretations of federal law is quite another. Encouraging multiple interpretations of the same law may undercut the important policies that uniformity supports. Like cases would not be treated alike, law would be less predictable, planning more difficult, and surprise more common.

The writers arguing for an independent state role refer to the states as "laboratories."¹⁹⁴ This suggests that they are arguing by analogy to Justice Brandeis's famous observation in his dissent in *New State Ice Co. v. Liebmann*¹⁹⁵ that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."¹⁹⁶ The analogy, though, is strained at best.¹⁹⁷ While uniformity of state law between states is neither expected nor even necessarily desirable, federal law should be uniform. Justice Brandeis likely would not have suggested that every county in a state should adopt a different version of state law. Finally, the argument that there is value in independent state court determinations of federal law assumes that the Supreme Court is available to resolve conflicts and correct mistakes.¹⁹⁸ This assumption, however, is unrealistic because the Supreme Court cannot review very many cases.¹⁹⁹ Consequently, instead of rich discussions ending in timely, reasoned resolution, wholly independent state court readings of federal law would result in

194. See Bator, *supra* note 190, at 608; Schwarzer et al., *supra* note 6, at 1746.

195. 285 U.S. 262 (1932).

196. *Id.* at 311 (Brandeis, J., dissenting); see also *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 577-80 (1933) (Brandeis, J., dissenting) (noting, in action involving discriminatory state licensing fees for corporate chain stores, the freedom of individual states to enact regulation as "masters of their destiny").

197. As Professor Bator admits, the applicability of the "multiple laboratories of social experimentation" argument to the question of "the proper role of state judges in deciding issues of federal law . . . seems, at least at first glance, doubtful." Bator, *supra* note 190, at 608.

198. See *id.* at 635 ("I intend to cast no doubt on the need for federal appellate review of state court judgments on questions of federal law. Provision must be made for uniform and authoritative pronouncements of federal law.").

199. See *id.* at 636 n.68.

discord, forum shopping, and other practical problems in the administration of justice.²⁰⁰

C. Achieving the Goals of Correct and Uniform Interpretation of Federal Law Through the Suggested Approach

Preliminarily, federal law would be more uniform if all state courts followed the same clearly expressed standards for ascertaining it. At present, the state courts follow a wide range of approaches and often fail to explain precisely what they are doing. When a state court holds that it is not bound by lower federal court decisions interpreting federal law, it merely tells us what it is *not* doing. It seems logical that if all state courts followed one set of expressed standards for ascertaining federal law, they would be more likely to come to the same results.²⁰¹

200. See Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991, 1000 (1987) ("As we learned in *Swift v. Tyson*, the price of legal cacophony is considerable, so considerable that I don't think a serious argument can be made in its favor.").

201. The issue of what standards states should use to ascertain federal law is probably itself a federal question. This supports adoption of one standard because federal law should be uniform. See *supra* notes 184-87 and accompanying text. On the other hand, one might argue that the standards are a matter of state procedure, and therefore that individual state standards are appropriate. This argument, however, ignores the fact that the procedure is being used to determine the parameters of federal law, thus giving the issue an undeniable federal element. Nonetheless, Congress and the Supreme Court often allow the use of state law to "fill up" federal law, rather than imposing a uniform federal standard. See BATOR ET AL. *supra* note 14, at 861-62 (explaining that state law often operates as the rule of decision because federal legislation or a federal court decision has determined that "state law furnishes an appropriate and convenient measure of the content of . . . federal law"). There are, however, important implications in using state law this way. First, the courts will not use state law if it undercuts important federal interests. See, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 736 n.37 (1979) ("Adopting state law as an appropriate federal rule does not preclude federal courts from excepting local laws that prejudice federal interests."). Second, if the issue is fundamentally federal, Congress or the Supreme Court can choose to impose a uniform federal standard. See, e.g., *Egelhoff v. Egelhoff*, 968 P.2d 924, 927-28 (Wash. Ct. App. 1998) (noting intent of Congress to provide uniformity in the administration of benefit programs under ERISA); James W. Hambright & Robert J. Hambright, *Labor and Employment Law, Fifth Circuit Survey, June 1986-May 1987*, 19 TEX. TECH L. REV. 731, 759 (1988) (noting congressional enactment of the Employment Retirement Income Security Act (ERISA) as a set of "uniform federal standards . . . designed to displace certain piecemeal federal and state laws").

There are several reasons why the proposed approach would best help achieve the correct and uniform interpretation of federal law. We recognize today that law does not exist except in a written text and in the opinions of the judges who construe that text.²⁰² Ultimately, law means what the court that has the last word on its meaning says it means.²⁰³ That is the "correct" meaning unless the legislature changes the law or the court with the last word changes its interpretation. The Supreme Court has the final word on the meaning of federal law—thus its interpretation of a federal statutory or constitutional provision is the "correct" construction until Congress changes the statute, the people amend the Constitution, or the Supreme Court changes its interpretation.²⁰⁴ A state court therefore has the best chance of construing federal law correctly if it tries to make an intelligent prediction of how the Supreme Court would construe the law.

Interpretation of federal law would be more uniform if all state courts attempted to imitate the same authoritative source.²⁰⁵ This is particularly true when there is little law on an issue or when the lower federal courts are divided. When the state courts must decide a novel federal question or choose among conflicting decisions of the lower federal courts, considering how the Supreme Court would decide the issue should provide a unifying perspective. State courts are more likely to reach

202. As Burt Neuborne once put it, "[w]e now understand that constitutional law does not consist of an objective set of rules waiting to be discovered, but of the complex institutional interplay between an ambiguous text and the institution vested with responsibility to declare its meaning." Neuborne, *supra* note 200, at 999; see also Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 4 (1966) (stating that lawyers "no longer consider that what the judge does is to make a selection from an inexhaustible warehouse of pre-existing, ready-made legal principles").

203. See COFFIN, *supra* note 9, at 53 (arguing that "[h]igher courts are 'right' because they are 'superior,' not superior because they are right").

204. See, e.g., Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1636 (1998) (noting that the Supreme Court has the final word on federal law and cases); Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 909 n.49 (1996) (arguing that the Supreme Court has the final word on federal common law).

205. See Earl M. Maltz, *The Concept of the Doctrine of the Court in Constitutional Law*, 16 GA. L. REV. 357, 400 (1982).

consistent results if they ask how the Supreme Court would evaluate conflicting lower court decisions.

The categorical approaches are less likely to achieve a correct result. State courts that consider themselves bound by lower federal court decisions rely on second-hand authority. The lower federal courts sometimes misinterpret federal law and are reversed by the Supreme Court. To rely entirely on secondary sources seems less reliable than to predict what the Supreme Court would do. Similarly, to ignore lower federal court opinions also increases the chances of error. Lower federal courts have expertise in interpreting federal law and make their decisions with an eye to the Supreme Court.²⁰⁶ Consequently, state courts that follow one of the categorical approaches are less likely to reach a correct result than if they attempt to predict what the Supreme Court would hold, using lower federal court decisions for guidance.

Categorical approaches also tend to impede uniformity. For example, courts that consider themselves bound (or nearly so) by decisions of their own circuit²⁰⁷ may sometimes make national uniformity more difficult to achieve. This is ironic because the main reason the state courts follow their own circuits is to achieve uniformity between the state and federal courts within their states.²⁰⁸ In some cases, however, achieving intrastate uniformity may interfere with the goal of national uniformity. Consider a situation in which the local circuit disagrees with eight other circuits. For a state court to follow the local circuit and ignore the other eight does not further the goal of national uniformity. This is not to say that intrastate uniformity is an undesirable goal. In this context, however, when a court has to choose between furthering intrastate uniformity and national uniformity, it should choose national uniformity.²⁰⁹

206. The Supreme Court directs lower federal courts to follow its rules, though the rules may be flexible. See Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1026 n.118 (1994).

207. See *supra* note 52 and accompanying text.

208. See *supra* note 166 and accompanying text.

209. Courts that choose to follow their own circuit over other circuits to achieve intrastate uniformity may do so by analogy to the policies underlying the *Erie* doctrine. A primary reason for requiring the federal courts to apply the law of the state

State courts that go to the other extreme and virtually disregard the decisions of the lower federal courts also may impede the quest for uniformity. If the Supreme Court has not spoken, but the lower federal courts speak with one voice, disregarding that precedent destroys uniformity. When the lower federal courts disagree, charting a wholly independent course may lead to further splintering of federal law.²¹⁰

Finally, the proposed approach is directly analogous to the approach that the federal courts follow for finding state law in cases where state law governs. When state law is unclear, a federal court is to decide the state issue the way it believes the state high court would.²¹¹ If the federal courts think this is the best way to find state law, the proposed approach, by analogy, is the best way for state courts to find federal law.

When a federal court decides that state law governs, it must determine what state law is. Shortly after the Supreme Court decided *Erie Railroad Co. v. Tompkins*,²¹² it held that in the

in which they sit is to avoid forum shopping between federal and state courts within a state. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 74-77 (1938); see also *Hanna v. Plumer*, 380 U.S. 460, 467-68 (1965) (noting the goal of discouraging forum shopping). Thus, by analogy, state courts may apply federal law as interpreted by the local federal courts to achieve the same end.

The analogy is inapposite, however, because the context is different. In the *Erie* context, national uniformity is at best a secondary value. Indeed, *Erie* does nothing at all to discourage interstate forum shopping: if state laws vary, litigants may choose one state venue over another. When state courts apply federal law, however, national uniformity is of primary importance, and intrastate uniformity becomes a secondary goal. Thus, if the state courts that follow their own federal circuit to achieve intrastate uniformity rely on *Erie*, that reliance is misplaced.

210. Some state court approaches do further the goal of uniformity when there is a consistent body of federal authority upon which to rely. Thus, the states that consider themselves bound by lower federal court decisions when the federal courts agree, or those that generally follow those decisions when they are numerous and consistent, help maintain uniform interpretation of federal law. See *supra* note 90 and accompanying text. In such circumstances, going along with the lower federal courts may help achieve uniformity at least as well as trying to determine what the Supreme Court would do. If the lower federal court decisions are numerous and consistent, chances are quite good that the Supreme Court would rule the same way. Moreover, the Supreme Court is less likely to grant review when the lower courts agree than when they disagree, and therefore, the Supreme Court may never review the issue.

211. See *infra* notes 216-17 and accompanying text.

212. 304 U.S. 64 (1938).

absence of a state supreme court ruling, the federal courts were bound to apply state law as declared by intermediate state appellate courts.²¹³ In time, the Court modified its position. In *King v. Order of United Commercial Travelers of America*,²¹⁴ the Court stated that decisions of lower state courts should be "attributed some weight," but were "not controlling" when the highest state court had not spoken.²¹⁵ Finally, in *Commissioner v. Estate of Bosch*,²¹⁶ the Court directed federal judges to decide state law issues the way they believe the state supreme court would:

This is but an application of the rule of *Erie R. Co. v. Tompkins* . . . where state law as announced by the highest court of the State is to be followed. . . . [T]he 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, sitting as a state court.²¹⁷

The Supreme Court did not explain why it chose this approach for ascertaining state law. The Court probably thought it would best lead to a correct and uniform interpretation of state law and would help federal courts give appropriate weight to lower state court decisions. By analogy, the goals of correct and uniform interpretation of federal law can best be furthered if

213. See *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 468 (1940); *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236-37 (1940); *Six Cos. v. Joint Highway Dist. No. 13*, 311 U.S. 180, 188 (1940). In one frequently criticized case, the Supreme Court held that the federal courts were bound by a decision of the New Jersey Court of Chancery, a court of original jurisdiction, even though the Chancery Court's ruling made little sense when applied to the merits. See *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 178-79 (1940).

214. 333 U.S. 153 (1948).

215. *Id.* at 160-61.

216. 387 U.S. 456 (1967).

217. *Id.* at 465 (citation omitted). For lower federal court decisions following this approach, see, e.g., *Fields v. Farmers Ins. Co.*, 18 F.3d 831, 834 (10th Cir. 1994); *Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114, 119 (2d Cir. 1994); *Carvin v. Arkansas Power & Light Co.*, 14 F.3d 399, 403-04 (8th Cir. 1993); *L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc.*, 9 F.3d 561, 574 (7th Cir. 1993); *Nieves v. University of Puerto Rico*, 7 F.3d 270, 274-75 (1st Cir. 1993); *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 661-62 (3d Cir. 1980).

state courts decide federal questions the way they think the Supreme Court would decide them.

Ultimately, of course, there are limits in the quest for correct and uniform interpretation of federal law. No approach will set the state courts marching in harmonious lockstep. Honest differences of opinion will continue to exist, and some judges may have such strong feelings on some issues that they will accept only an explicit Supreme Court declaration. Nonetheless, for the reasons outlined, if state judges try to decide federal questions the way they believe the Supreme Court would, it will lead to a more correct and uniform interpretation of federal law.

III. APPLYING THE PROPOSED STANDARD

Part II of the Article explained why state court judges should decide federal questions the way they believe that the Supreme Court would decide them. Part III discusses how judges might put this approach into effect. How does the Supreme Court decide cases? How should state judges go about predicting what the Supreme Court would decide? On one level, it is relatively easy to answer these questions: The Supreme Court decides cases by applying the rules of *stare decisis* and statutory interpretation. State judges should pretend they are sitting on the Supreme Court and decide accordingly. On another level, however, it is virtually impossible to answer these questions. Parsing precedents and statutes is an art, not a science.²¹⁸ All the hard issues demand not only keen analysis, but judgment, discretion, and wisdom. How does one determine whether the Supreme Court would interpret the holding of one of its prior cases narrowly or broadly? Was the prior case meant to be the first step in opening an expansive new thoroughfare or merely a one-time detour into a cul-de-sac?²¹⁹ When a statutory provision is ambig-

218. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 8 (Amy Gutmann ed., 1997) (characterizing the technique of distinguishing cases as "an art or a game").

219. As Judge Frank Coffin points out, "[t]he disagreements arise when some judges like a specific opinion and wish to expand its application and when others dislike it and wish to confine it to its original bounds." COFFIN, *supra* note 8, at

uous, how does a judge determine what the Supreme Court would make of a series of oblique comments in House and Senate Committee reports? As noted at the outset, many wise people have written about the art of judging.²²⁰ Part III begins by discussing the day-to-day processes that the Supreme Court follows in deciding cases, and then offers some general suggestions to assist state court judges in predicting how the Supreme Court would decide a case. Finally, Part III discusses five situations that state judges routinely face in ascertaining federal law and makes specific suggestions as to how they should proceed in each situation.

A. *How the Supreme Court Decides Cases*

The Supreme Court has never written a comprehensive description of how it decides cases. No manual lays out the process in hornbook fashion. It is possible, however, to discern parts of the process from watching the Court in action. The Supreme Court regularly decides novel issues of federal law; indeed, that is its chief function.²²¹ In the course of their opinions, the Justices sometimes remark on the decision-making process. The Court often speaks about *stare decisis*; it has identified the policy reasons underlying the doctrine and explained how it applies in different contexts. The Court also speaks about the basic rules of statutory construction. These discussions provide a helpful starting point.

The Court views *stare decisis* as indispensable²²² because the rule of law requires continuity over time.²²³ As the Court stated

260.

220. See *supra* note 8 and accompanying text.

221. See *supra* note 204 and accompanying text.

222. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992); see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) ("[I]t is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch"); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) ("[T]he doctrine of *stare decisis* is of fundamental importance to the rule of law.").

223. Several recent scholarly works challenge this assumption, at least in part. See Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041, 1058 (1987) (arguing that rules requiring lower courts to follow higher courts are merely persuasive, not mandatory); David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66

in *Payne v. Tennessee*.²²⁴ "Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."²²⁵ In addition, stare decisis keeps law from changing erratically based on "the proclivities of individuals."²²⁶

Although important, stare decisis is not a "universal inexorable command."²²⁷ The Court gives the doctrine greater effect in some contexts than in others. For example, the Court gives more weight to prior decisions interpreting federal statutes than to decisions interpreting the Constitution.²²⁸ Congress can amend a statute if it dislikes the Supreme Court's interpretation, but only

IND. L.J. 457, 502 n.225 (1991) (questioning the role of stare decisis in constitutional law); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24 (1994) (arguing that the practice of following one's own prior precedent "is affirmatively inconsistent with the federal Constitution"). There is no indication that the courts have paid much attention to these arguments. See Caminker, *supra* note 6, at 820 (noting that "[t]he reactions thus far to occasional . . . academic challenges to the doctrine of hierarchical precedent range from bemusement to brusque dismissal").

224. 501 U.S. 808 (1991).

225. *Id.* at 827. Justice Harlan stressed similar values in an oft-cited passage from *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970):

Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Id. at 403; see also Caminker, *supra* note 6, at 839-56 (providing a detailed review of the policies underlying stare decisis); Thomas S. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 235-37 (1965) (reviewing the values served by stare decisis).

226. *Patterson*, 491 U.S. at 172.

227. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting); see also *Casey*, 505 U.S. at 854 (quoting *Burnet*); *Payne*, 501 U.S. at 828 (noting that stare decisis "is a principal of policy and not a mechanical formula of adherence to the latest decision" (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940))).

228. See *Payne*, 501 U.S. at 828 (pointing out that the Supreme Court overruled, in whole or in part, 33 of its constitutional decisions over a 20 term period).

the Court (or the People, through the amendment process) can change a constitutional ruling. Thus, the Court believes it should be more willing to reconsider its constitutional decisions.²²⁹ The Court also purports to give more weight to precedents that are politically controversial²³⁰ or that involve property or contract rights where parties have relied on prior decisions.²³¹ By contrast, the Court gives less weight to precedent in cases involving procedural or evidentiary rules.²³²

The Supreme Court also uses the same techniques that all courts use to weigh and evaluate precedent. As Judge Ruggero J. Aldisert notes, "[t]here are precedents, and there are precedents. . . . All . . . do not have the same bite."²³³ The Supreme Court gives prior cases greater weight if the issue involved was clearly presented, fully considered, and explicitly decided.²³⁴ The

229. See *id.*; *Casey*, 505 U.S. at 954-55 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("Erroneous decisions in . . . constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible"); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986) (noting a "strong presumption of continued validity that adheres in the judicial interpretation of a statute"); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("[A]dherence to precedent is not rigidly required in constitutional cases.").

230. See, e.g., *Bush v. Vera*, 517 U.S. 952, 985 (1996) (advocating "adhere[nce] to *stare decisis*, especially in . . . sensitive political contexts"); *Casey*, 505 U.S. at 867-69 (reaffirming *Roe v. Wade*, 410 U.S. 113 (1973)).

231. See, e.g., *Payne*, 501 U.S. at 828 ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved."); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486-87 (1924) (reaffirming a decision that affected many tracts of land in California). But see BENJAMIN CARDOZO, *THE GROWTH OF THE LAW* 122 (1924) ("The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision overruled, is for the most part a figment of excited brains.").

232. See *United States v. Gaudin*, 515 U.S. 506, 521 (1995) (finding the effect of *stare decisis* "somewhat reduced" in cases involving procedural rules); *Payne*, 501 U.S. at 828 (finding *stare decisis* to be of the lowest value in procedural cases).

233. Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't: When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 630-31 (1990); see also Schaefer, *supra* note 202, at 7 ("[W]hen the judicial process is viewed from the inside, nothing is clearer than that all decisions are not of equivalent value to the court which renders them.").

234. See, e.g., *Craig v. Boren*, 429 U.S. 190, 198 (1976) (considering and rejecting "administrative ease and convenience as sufficiently important objectives to justify gender-based classifications"); *Mullane v. Central Hanover Bank & Trust Co.*, 339

Court also gives prior precedent less weight when the issue was not clearly presented or substantively treated²³⁵ or was decided *sub silentio*.²³⁶ Similarly, the Court generally gives great weight to a principle that is consistently applied over time in many cases,²³⁷ but it may give considerably less weight to a principle appearing in only one opinion.²³⁸ Naturally, the Court gives hold-

U.S. 306 (1950) (addressing and specifically deciding the type of notice required by the Due Process Clause).

235. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 118-19 (1984) (declining to follow earlier cases that granted relief against state officials on the basis of state law claims pendent to federal constitutional claims because the Court did not directly confront or explicitly mention the Eleventh Amendment question); *Edelman v. Jordan*, 415 U.S. 651, 669-70 (1974) (disregarding several affirmances of lower court judgments ordering state officials to make retroactive payments of wrongly withheld public benefits because the Court did not refer to or substantively treat the Eleventh Amendment objection raised by state officials).

236. See, e.g., *Hagans v. Lavine*, 415 U.S. 528, 535 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.").

237. See Schaefer, *supra* note 202, at 11 (noting that "[a] settled course of decision is more compelling than an isolated precedent"). The notice principle set forth in *Mullane v. Central Hanover Bank and Trust Co.*, 389 U.S. 306 (1950), provides a good example. In *Mullane*, the Court stated: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. The Court has consistently applied this principle to preclude notice by publication and/or posting when the name of the interested party is readily ascertainable and notice by mail is possible. See, e.g., *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484, 490-91 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795-800 (1983); *Greene v. Lindsey*, 456 U.S. 444, 449-56 (1982); *Schroeder v. City of New York*, 371 U.S. 208, 211-14 (1962); *Walker v. City of Hutchinson*, 352 U.S. 112, 115-16 (1956). After all of these decisions, the *Mullane* principle clearly has great authority: Notice solely by publication and/or posting simply will not suffice when the name and address of an interested party are readily ascertainable.

The well-pleaded complaint rule, which is applied to determine whether a federal court has federal question jurisdiction, provides another good example. By the time it decided *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908), the Court was able to cite 18 cases that had applied the rule. See *id.* at 154. Although frequently criticized, the rule is now cast in stone. See generally Donald L. Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987) (analyzing the historical development of the "well-pleaded complaint" rule).

238. Consider, for example, the Court's recognition in *Parratt v. Taylor*, 451 U.S.

ings more weight than dicta.²³⁹ As Justice Scalia has observed, however, "what constitutes the 'holding' of an earlier case is not well defined and can be adjusted to suit the occasion."²⁴⁰

The Supreme Court also weighs different sources of authority differently; some are given great weight, some a little less, some less still, and so on. To identify this hierarchy of authorities, it is helpful to review lower federal court decisions that discuss the methods used to ascertain state law. As noted above, the lower federal courts must decide issues of state law the way they think the highest court of the state would decide them.²⁴¹ To imple-

527 (1981), that negligent loss of property by a state official may constitute a deprivation within the meaning of the Due Process Clause of the Fourteenth Amendment if a proper redress under state tort law is unavailable. *See id.* at 531-35, 544. Five years later, in *Daniels v. Williams*, 474 U.S. 327 (1986), the Court reversed ground on this point, stating: "No decision of this Court before *Parratt* supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause." *Id.* at 330-31. Similarly, in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court reversed the rule announced in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), that the Commerce Clause granted Congress the power to abrogate state sovereign immunity. *See Seminole Tribe*, 517 U.S. at 47, 64. The Court was highly critical of the *Union Gas* rule, saying that it was reached without an expressed rationale agreed upon by a majority of the Court, that it had created confusion among the lower courts, and that it "deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in *Hans [v. Louisiana]*, 134 U.S. 1 (1890)." *Id.* at 64.

239. The classic statement of this principle is in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821):

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Id. at 399-400.

240. Scalia, *supra* note 218, at 8. Justice Scalia continued:

At its broadest, the holding of a case can be said to be the analytical principle that produced the judgment In the narrowest sense, however, (and courts will squint narrowly when they wish to avoid an earlier decision), the holding of a case cannot go beyond the facts that were before the court.

Id.

241. *See supra* notes 212-17 and accompanying text.

ment this mandate, federal courts have identified the hierarchy of authority that state high courts follow. Judge Adams's thoughtful opinion in *McKenna v. Ortho Pharmaceutical Corp.*²⁴² suggests that a state supreme court looks first to its own prior decisions.²⁴³ If there are none directly on point, the court will turn to its decisions in analogous cases and may also consider its own prior dicta.²⁴⁴ Next, a state high court looks to decisions of lower state and federal courts, giving them "proper regard," but not conclusive effect.²⁴⁵ Finally, the court may consider scholarly treatises, Restatements of the law, and germane law review articles.²⁴⁶

The Supreme Court follows a very similar process in deciding cases. In any volume of the U.S. Reports, the Supreme Court is the court most often cited. Unless it has a good excuse,²⁴⁷ the Court follows its own precedent when it is directly on point or closely analogous to the case it is deciding.²⁴⁸ Next, the Court

242. 622 F.2d 657 (3d Cir. 1980).

243. *See id.* at 662.

244. *See id.* at 662-63.

245. *See id.*

246. *See id.* Other cases suggest a similar hierarchy of authority. *See, e.g.,* *Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114, 119 (2d Cir. 1994) (looking to "state decisional law, federal cases which construe the state statute, scholarly works and any other reliable data tending to indicate how the New York Court of Appeals would resolve the [issue]"); *Ryan v. Royal Ins. Co. of America*, 916 F.2d 731, 734-35 (1st Cir. 1990) (considering "such sources as analogous state court decisions, adjudications in cases elsewhere, and public policy imperatives"); *Bailey v. V & O Press Co.*, 770 F.2d 601, 604 (6th Cir. 1985) (looking to "the decisional law of the Ohio Supreme Court in analogous cases and relevant dicta in related cases," lower Ohio state court decisions, Restatements of the law, law reviews, and decisions from other jurisdictions). For the results of an interesting empirical study suggesting that federal courts often do not faithfully attempt to apply state law in diversity cases, see David A. Thomas, *The Erosion of Erie in the Federal Courts: Is State Law Losing Ground?* 1977 *BYU L. REV.* 1; see also Geri J. Yonover, *Ascertaining State Law: The Continuing Erie Dilemma*, 38 *DEPAUL L. REV.* 1 (1989) (discussing the erosion of the *Erie* doctrine in federal courts).

247. *See supra* notes 227-32 and accompanying text.

248. *See, e.g.,* *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 564-65 (1987) (noting that on numerous occasions the Court has allowed individual employees to sue under federal statutes despite the availability of arbitration under the theory that suits should be allowed when the federal statute is designed to provide minimum substantive guarantees to individual workers); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (noting that "classifications based upon sex, like classifications

looks to decisions of the lower federal courts²⁴⁹ or the state courts on the issue.²⁵⁰ Opinions by highly respected jurists seem

based on race, alienage, and national origin are inherently suspect"); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 402-04 (1971) (Harlan, J., concurring) (noting that the Court has often implied private rights of action under federal statutes and that it would "at least be anomalous to conclude" that the Court could not do the same under the Constitution).

249. *See, e.g.*, *Commissioner v. Asphalt Prods. Co.*, 482 U.S. 117, 119-21 (1987) (specifically following Second Circuit decisions and quoting them with approval); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 111-12 (1987) (plurality opinion) (citing several lower federal court decisions for the proposition that the Due Process Clause requires a nonresident manufacturer to take some affirmative steps to direct its product to the forum state in order to be subject to jurisdiction). The Court's reliance on lower federal court opinions is particularly apparent when it grants review to resolve a split in the circuits. Generally, the Court adopts one of the positions espoused in the circuit courts. *See, e.g.*, *Old Chief v. United States*, 519 U.S. 172, 177-78 (1997) (following the rule of several circuits that when a prior conviction is an element of a present charge, a prosecutor may not introduce the name and nature of the offense underlying the conviction when the defendant agrees to stipulate that the conviction occurred); *Huddleston v. United States*, 485 U.S. 681, 685 (1988) (adopting the position of several circuits that the party introducing evidence of other crimes, wrongs, or acts under Federal Rule of Evidence 404(b) must give sufficient evidence to support a jury finding that the other conduct occurred); *Butner v. United States*, 440 U.S. 48, 52-54 (1979) (agreeing with the view of a majority of the circuits that state law, rather than federal common law, governs the steps a mortgagee must take to acquire a security interest in the rents from mortgaged property following a bankruptcy adjudication).

250. *See, e.g.*, *Caspari v. Bohlen*, 510 U.S. 383, 394-95 (1994) (suggesting that the Eighth Circuit should have looked to state court decisions on whether the Double Jeopardy Clause applies to noncapital sentencing hearings, and stating that "[c]onstitutional law is not the exclusive province of the federal courts, and in the *Teague [v. Lane]*, 489 U.S. 288 (1989) analysis the reasonable views of state courts are entitled to consideration along with those of federal courts"); *Craig v. Boren*, 429 U.S. 190, 208 (1976) ("[B]oth federal and state courts uniformly have declared the unconstitutionality of gender lines that restrain the activities of customers at state-regulated liquor establishments irrespective of the operation of the Twenty-first Amendment." (citations omitted)). When the Supreme Court reviews a federal issue raised in a state court case, it sometimes accepts the state supreme court's interpretation of federal law over the interpretation given by the lower federal courts. *See Wimberly v. Labor & Indus. Relations Comm'n*, 479 U.S. 511, 514 (1987) (accepting the view of the Missouri Supreme Court, rather than that of the Fourth Circuit, that denial of unemployment compensation benefits was proper under applicable federal statute), *aff'g* 688 S.W.2d 344 (Mo. 1985); *Brown v. Palmer Clay Prods. Co.*, 297 U.S. 227 (1936) (accepting the view of the Supreme Judicial Court of Massachusetts and two federal circuits, instead of the view of another federal circuit, on the construction of a federal bankruptcy statute), *aff'g* 195 N.E. 122 (Mass. 1935).

to be given particular weight.²⁵¹ Finally, the Court often relies on legal periodicals²⁵² and other secondary sources.²⁵³

The Supreme Court also regularly discusses the basic rules of statutory interpretation, purporting to follow many of the traditional maxims of statutory construction.²⁵⁴ For example, the Court tries to construe statutes to avoid constitutional ques-

251. See, e.g., *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454-55 (1989) (quoting opinion by Judge Learned Hand discussing statutory interpretation); *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 820 (1986) (Brennan, J., dissenting) (referring to Judge Henry J. Friendly's "authoritative opinion" in *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964)); *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971) (citing and accepting Justice Roger Traynor's opinion for a unanimous court in *Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 122 P.2d 892 (Cal. 1942), rejecting the doctrine of mutuality of estoppel); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citing Judge Learned Hand for the proposition that the terms "present" or "presence" are used merely to symbolize those activities of corporate agents within a state that courts will deem sufficient to satisfy the demands of due process).

252. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 110-11, n.8 (1996) (Souter, J., dissenting) (citing the "great weight of scholarly commentary" for the proposition that the history and structure of the Eleventh Amendment show that it reaches only to suits brought under the diversity jurisdiction); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594 (1993) (citing several legal authorities that suggested factors for courts to consider in deciding whether scientific evidence is reliable); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 n.11 (1979) (noting that various commentators have expressed reservations about the use of offensive collateral estoppel); *Erie R.R. v. Tompkins*, 304 U.S. 64, 72 (1938) (relying in part on an article by Charles Warren for the conclusion that the construction given the Rules of Decision Act by *Swift v. Tyson* was incorrect).

253. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 494 & n.11 (1954) (citing sociological and psychological literature in support of the proposition that racial segregation adversely affects black school children).

254. One problem with maxims, however, as Karl Llewellyn pointed out many years ago, is that "there are two opposing canons on almost every point." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950). Justice Scalia criticizes Llewellyn, suggesting that many of his contradictory pairs of canons are simply a rule and an exception. See Scalia, *supra* note 218, at 27. Justice Scalia, however, does not favor the use of maxims:

To the honest textualist, all of these preferential rules and presumptions are a lot of trouble. It is hard enough to provide a uniform, objective answer to the question whether a statute, on balance, more reasonably means one thing or another. But it is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight.

Id. at 28.

tions.²⁵⁵ Remedial statutes are construed broadly,²⁵⁶ penal statutes narrowly.²⁵⁷ The Court does not construe statutory phrases in isolation, but rather in the context of the whole statute.²⁵⁸

The justices seem to agree on several fundamental principles of statutory interpretation. As Justice Rehnquist stated in *Griffin v. Oceanic Contractors, Inc.*:²⁵⁹ "Our task is to give effect to the will of Congress . . ."²⁶⁰ The justices start with the words of a statute when searching for its meaning.²⁶¹ When the language is clear and unambiguous, the Court follows the plain meaning²⁶² in the absence of "a clearly expressed legislative intent to

255. See *Public Citizen*, 491 U.S. at 466 ("It has long been an axiom of statutory interpretation that 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988))).

256. See *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) ("We have liberally construed FELA to further Congress' remedial goal."); *Monell v. Department of Social Servs.*, 436 U.S. 658, 684 (1978) ("This act is remedial, and in aid of preservation of human liberty and human rights. All . . . such statutes are liberally and beneficently construed." (quoting CONG. GLOBE, 42nd Cong., 1st Sess. app. 68 (1871) (statement of Rep. Shellabarger) (describing how the courts should interpret § 1 of the Civil Rights Act of 1871))).

257. See *Chapman v. United States*, 500 U.S. 453, 463 (1991); *Moskal v. United States*, 498 U.S. 103, 113 (1990).

258. See, e.g., *United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole."); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1850))).

259. 458 U.S. 564 (1982).

260. *Id.* at 570; see also *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542 (1940) ("[T]he function of the courts is . . . to construe the language so as to give effect to the intent of Congress.").

261. See, e.g., *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President."); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) ("The starting point for interpretation of a statute is the language of the statute itself."); *American Trucking Ass'ns*, 310 U.S. at 543 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").

262. See *West Virginia Univ. Hosps.*, 499 U.S. at 101 ("[The statute's] language is plain and unambiguous. What the government asks is not a construction of a stat-

the contrary."²⁶³ The Court does not apply the plain meaning rule "in rare cases [when] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."²⁶⁴ In such cases, the legislator's intentions control.²⁶⁵ Similarly, the Court does not read a statute literally if the result would be absurd and some other interpretation is available that is consistent with legislative intent.²⁶⁶

The problem, of course, is that the justices disagree about how these principles apply in individual cases. There is "no errorless test for identifying or recognizing 'plain' or 'unambiguous' language."²⁶⁷ Nor is there any clear test for deciding when a literal reading is sufficiently absurd to justify evading it.²⁶⁸ Further-

ute, but, in effect, an enlargement of it by the court To supply omissions transcends the judicial function." (quoting *Iselin v. United States*, 270 U.S. 245, 250-51 (1926)); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (stating that where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))); *Commissioner v. Asphalt Prods. Co.*, 482 U.S. 117, 121 (1987) ("Judicial perception that a particular result would be unreasonable . . . cannot justify disregard of what Congress has plainly and intentionally provided."); *American Trucking Ass'ns*, 310 U.S. at 543 ("Often [the] words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning.").

263. *Kaiser Aluminum*, 494 U.S. at 835 ("Absent a clearly expressed legislative intention to the contrary, [the] language [of the statute] must ordinarily be regarded as conclusive." (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

264. *Griffin*, 458 U.S. at 571; see also *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would 'compel an odd result,' . . . we must search for other evidence of congressional intent to lend the term its proper scope." (quoting *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509 (1989)); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.").

265. See *Ron Pair Enters.*, 489 U.S. at 242; *Griffin*, 458 U.S. at 571.

266. See, e.g., *Griffin*, 458 U.S. at 575; *American Trucking Ass'ns*, 310 U.S. at 543 ("When [plain] meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.").

267. *United States v. Turkette*, 452 U.S. 576, 580 (1981).

268. Consider, for example, *Griffin v. Oceanic Contractors, Inc.*, which concerned a statute that required the employer of a seaman to pay double wages for each day the seaman's pay was withheld without sufficient cause. The employer in *Griffin* improperly withheld \$412.50 in wages, but by the time the matter was litigated and judgment entered, the penalty had grown to over \$300,000. See *Griffin*, 458 U.S. at 574-75. The majority held that the plain meaning of the statute required the

more, there simply is "no invariable rule for the discovery of . . . the intent of Congress."²⁶⁹ The current justices disagree about what sources they may properly consult to determine that intent.²⁷⁰ As Justice Stevens noted: "In recent years the Court has vacillated between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation."²⁷¹

This fundamental disagreement surfaces in many cases. For example, in *Chapman v. United States*,²⁷² the majority applied the literal language of a statute that set minimum mandatory sentences based on the weight of a "mixture or substance containing a detectable amount" of LSD, even though different offenders received very different sentences depending on whether the same amount of LSD was contained on a blotter, in a gel, or in a sugar cube.²⁷³ The dissent examined House and Senate Committee reports that showed Congress wanted to rationalize sentencing practices and impose equal penalties for the same wrongdoing²⁷⁴ and concluded that "[t]he Court today shows little respect for Congress's handiwork when it construes a statute to undermine the very goals that Congress sought to achieve."²⁷⁵ By contrast, in *Public Citizen v. United States Department of Justice*,²⁷⁶ the majority engaged in a full-blown review of the legislative history to determine whether the Federal Advisory Committee Act (FACA) should apply to an American Bar Association Committee that advised the Justice Department on potential

employer to pay the full amount. See *id.* at 577. Justice Stevens, joined by Justice Blackmun, dissented, arguing that the result of a literal reading was absurd, and that qualifying language in the statute allowed a much narrower construction. See *id.* at 577-78 (Stevens, J., dissenting).

269. *American Trucking Ass'ns*, 310 U.S. at 542.

270. See *West Virginia Hosp., Inc. v. Casey*, 499 U.S. 83, 112-15 (1991) (Stevens, J., dissenting) (discussing examples of different approaches).

271. *Id.* at 112 (Stevens, J., dissenting).

272. 500 U.S. 453 (1991).

273. *Id.* at 461-62.

274. See *id.* at 477 (Stevens, J., dissenting).

275. *Id.*

276. 491 U.S. 440 (1989).

nominees for the federal judiciary.²⁷⁷ Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor, strongly criticized this approach:

I cannot accept the method by which the Court arrives at its interpretation of FACA, which does not accord proper respect to the finality and binding effect of legislative enactments.

... Where it is clear that the unambiguous language of a statute embraces certain conduct, and it would not be patently absurd to apply the statute to such conduct, it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable.²⁷⁸

Justice Scalia's use of yet another approach to statutory construction confuses the matter even more. He calls his approach "textualism,"²⁷⁹ which he assures us is neither "strict constructionism" nor literalism.²⁸⁰ A textualist is leery of appeals to legislative intent.²⁸¹ Justice Scalia agrees with Justice Holmes's remark that "[w]e do not inquire what the legislature meant;

277. *See id.* at 453-67.

278. *Id.* at 468-69, 473 (Kennedy, J., concurring in the judgment). Disagreement among the justices is intense, as is evident from contrasting Justice Kennedy's statement with Justice Stevens's statement in *West Virginia University Hospital, Inc. v. Casey*, 499 U.S. 83 (1991):

In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it "to take the time to revisit the matter" and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error.

Id. at 115 (Stevens, J., dissenting) (citation omitted).

279. Scalia, *supra* note 218, at 23.

280. *See id.* at 23-24. Scalia asserts that textualism

should not be confused with so-called strict constructionism. . . . A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.

Id.

281. *See id.* at 29-37 (rejecting "intent of the legislature as the proper criticism of the law").

we ask only what the statute means.”²⁸² When a statute is ambiguous, Justice Scalia is willing to look beyond its four corners to determine its meaning: “Where a statutory term . . . is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.”²⁸³ For the textualist, he says, “context is everything.”²⁸⁴ He does not believe, however, that legislative history is an authoritative source of a statute’s meaning: “It is [not] our task . . . to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code.”²⁸⁵

The justices follow several different approaches to discern legislative intent. Moreover, no approach commands a majority in all cases. Lower federal courts and state courts must muddle through without clear guidance. Unfortunately, a comment by Henry Hart and Albert Sacks still seems true today:

Do not expect anybody’s theory of statutory interpretation, whether it is your own or somebody else’s, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.²⁸⁶

Plainly, this is a difficult time to follow the “Court’s” approach to statutory interpretation.

B. Predicting How the Supreme Court Would Decide

It is relatively easy to state general rules about how the Supreme Court—or individual justices—decide cases. It is another

282. *Id.* at 23 (quoting OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 207 (1920)).

283. *West Virginia Univ. Hosps.*, 499 U.S. at 100.

284. Scalia, *supra* note 218, at 37.

285. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30 (Scalia, J., concurring and dissenting).

286. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

matter to apply those rules. It is yet another matter to predict how someone else would apply them, and it is even harder to predict how a group of nine other people would apply them. It is thus no wonder that some state courts prefer to consider themselves bound by lower federal court decisions when there are no Supreme Court opinions on point.²⁸⁷

The complexity of the task facing state courts should not be overstated, however. State judges are familiar with federal law because they must apply it frequently. They know who sits on the Supreme Court and routinely read Supreme Court opinions.²⁸⁸ Thus, a state court trying to predict a Supreme Court outcome approaches the task with a large body of information. Predicting what the Supreme Court would do is certainly no harder than some other predictions state courts must make. For example, horizontal choice of law rules often require state judges to apply the law of a sister state or a foreign country.²⁸⁹ When the high court of the other jurisdiction has not spoken on the issue, predicting what it would say can be extremely difficult.²⁹⁰ A state court judge may have to do considerable research to acquaint herself with the law of another state or a foreign country.²⁹¹

In deciding federal issues, state courts should begin by using the same legal sources that the Supreme Court uses—statutes and legislative materials, prior Supreme Court decisions, lower federal and state court cases, Restatements, treatises, and other scholarly works.²⁹² State courts should also apply the same hierarchy of authorities and interpretive methods that the Supreme Court follows.²⁹³ They should use the same basic techniques the

287. See *supra* notes 37, 42, 46, and accompanying text.

288. See *infra* notes 310-16 and accompanying text.

289. See *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960).

290. One is reminded of Judge Friendly's observation in *Nolan*: "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought." *Id.*

291. See, e.g., *id.* at 281, 283.

292. See Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 654 (1995) (noting that it is the convention for lower court judges to decide cases "by consulting the same impersonal sources of law as high court judges consult").

293. See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 9 (1994) (asserting that,

Supreme Court uses in weighing and evaluating precedent and construing statutes.²⁹⁴

It is difficult to decide whether state courts should go further and consider additional information about individual justices to try to predict their votes. Courts and commentators disagree about what one court may appropriately consider in predicting the decision of another court. Some think it is inappropriate to consider an individual Justice's public statements or scholarly articles, or her background or general political and social views.²⁹⁵ Others think it is perfectly legitimate to consider such matters.²⁹⁶

after identifying relevant legal sources, judges "must apply some combination of various methods of interpretation in order to discern the meaning of those sources"). Justice Scalia conveyed a similar idea:

[W]hen the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts within that system, and even by that supreme court itself.

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989).

294. This suggestion is difficult to follow because of the lack of consensus on a theory of statutory interpretation. The justices occasionally agree on a rule of statutory construction in a specific context; when they do, state courts should follow the new rule of interpretation. For example, in 1979, the Court made a sharp break with tradition and adopted a new test for deciding whether to imply a private right of action from a federal statute. In *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), the Court abandoned the traditional multi-factor standard set forth in *Cort v. Ash*, 422 U.S. 66 (1975), and adopted a single factor test. See *Touche Ross & Co.*, 442 U.S. at 568 ("[O]ur task is limited *solely* to determining whether Congress intended to create the private right of action asserted.") (emphasis added); *Transamerica*, 444 U.S. at 15-16 (citing *Touche Ross*, 442 U.S. at 568). See generally Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 708-26 (1987) (discussing the potential impact of *Touche Ross* and *Transamerica* on state courts deciding issues of federal rights). Given the Court's clear language, state judges should follow the new standard when they are asked to imply a private right of action under a federal statute.

295. See *NAACP v. Medical Ctr., Inc.*, 657 F.2d 1322, 1330 (3d Cir. 1981); *Ferina v. United States*, 340 F.2d 837, 839 (8th Cir. 1965); *United States v. Swift & Co.*, 189 F. Supp. 885, 901 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961); *United States v. Silverman*, 166 F. Supp. 838, 840 (D.D.C. 1958). See generally Dorf, *supra* note 292 (examining arguments for and against judges using a "prediction approach" in cases involving the resolution of an issue for which the court lacks final authority); *id.* at 686-89 (criticizing the use of prediction models "as a general approach to lower court adjudication").

296. See *United States v. White*, 405 F.2d 838, 847-48 (7th Cir. 1969), *rev'd*, 401

Lower federal courts profess reluctance to predict Supreme Court outcomes based on assessments of individual justices, but on occasion they do so. In *United States v. Silverman*,²⁹⁷ the court said it was inappropriate "to speculate on what at some future time the Supreme Court might decide in the light of changes of personnel, and in light of the various remarks of individual members of the Court."²⁹⁸ In *United States v. White*,²⁹⁹ however, the circuit court declined to follow a Supreme Court precedent because it was a five to four decision, its authority had been eroded by recent cases, and many of the current justices had explicitly criticized it.³⁰⁰

Some federal judges are quite free-wheeling in predicting what state high courts would decide, while others are more circumspect. Chief Justice Rehnquist once observed that in making this prediction, a federal judge "must use not only his legal reasoning skills, but also his experiences and perceptions of judicial behavior in that State."³⁰¹ Similarly, the Third Circuit said that in predicting Pennsylvania Supreme Court behavior it must "consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the . . . court . . . would decide the issue."³⁰² By contrast, in *City of Philadelphia v. Lead Industries*

U.S. 745 (1971); see also Dorf, *supra* note 292, at 656-57, 671-78 (examining arguments supporting use of the predictive model).

297. 166 F. Supp. 838 (D.D.C. 1958), *aff'd*, 275 F.2d 173 (D.C. Cir. 1960), *rev'd*, 365 U.S. 505 (1961).

298. *Id.* at 840; see also NAACP, 657 F.2d at 1330 (following Supreme Court precedent even though "there is ample ground for argument that the Supreme Court has doubts about [a decision's] continued viability"); *Ferina*, 340 F.2d at 839 (declining to consider changes in Supreme Court personnel to "forecast the law of the Supreme Court"); *Swift*, 189 F. Supp. at 901 ("We are not free . . . to speculate upon probabilities or personalities.").

299. 405 F.2d 838 (7th Cir. 1969), *rev'd*, 401 U.S. 745 (1971).

300. See *id.* at 847; see also *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 815 (2d Cir. 1943) (declining to follow Supreme Court precedent in part because of personnel change), *vacated sub nom.*, *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944).

301. *Salve Regina College v. Russell*, 499 U.S. 225, 241 (1991) (Rehnquist, C.J., dissenting).

302. *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1046 (3d Cir. 1993) (emphasis added). In *State Farm Mutual Automobile Insurance Co. v. Armstrong*, 949 F.2d 99 (3d Cir. 1991), the Third Circuit engaged in explicit head-counting by assembling

Ass'n,³⁰³ the same court said that "federal courts may not engage in judicial activism" in diversity cases.³⁰⁴ Instead, "[f]ederalism concerns require that we permit state courts to decide whether and to what extent they will expand state common law."³⁰⁵

Commentators also disagree as to what information lower courts may properly consider in predicting what a higher court would decide. Some argue that it is improper to consider information about the personal views of individual justices. For example, Michael Dorf states:

The prediction model requires lower court judges, as well as the lawyers and clients who appear before them, to conceive of law as a prediction of how the particular individuals sitting on the high court would resolve the issue presented. This conception is inconsistent with central specific practices of American law—including the norm of the impartial adjudicator, the doctrine of stare decisis, and the institutional integrity of courts. More broadly, the prediction model is inconsistent with the overarching theme of the rule of law, of which these specific practices are manifestations.³⁰⁶

Others disagree, and contend that it is appropriate to consider the views of individual justices in some circumstances. For

the views of Pennsylvania Supreme Court Justices from a variety of written sources. See *id.* at 103-04; see also *Pomerantz v. Clark*, 101 F. Supp. 341, 345-46 (D. Mass. 1951) (characterizing the task of divining the view of the Massachusetts Supreme Judicial Court as "less philosophical and more psychological" and reviewing the general decisionmaking approach of that court).

303. 994 F.2d 112 (3d Cir. 1993).

304. *Id.* at 123.

305. *Id.*; see also *Taylor v. Phelan*, 9 F.3d 882, 887 (10th Cir. 1993) (noting that "we are generally reticent to expand state law without clear guidance from its highest court"); *Polk County v. Lincoln Nat'l Life Ins. Co.*, 262 F.2d 486, 489 (5th Cir. 1959) (criticizing a process that "attempt[ed] to psychoanalyze state court judges rather than to rationalize state court decisions").

306. Dorf, *supra* note 292, at 685; see also Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 187 (stating that a judge's task "is to interpret the superior courts' opinions, and that means taking their text—not the subjective intentions of their authors—and fitting it into the whole body of controlling legal materials"); David C. Bratz, Comment, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 WASH. L. REV. 87, 96 (1984) ("Justices' personalities, extra-judicial utterances, and other subjective factors may be relevant . . . [b]ut lower courts should not apply these factors because reference to them violates the concept that law is separate from the judges who declare it.").

example, Professor Evan H. Caminker argues that using information that will improve lower court predictions of higher court decisions serves the values of judicial economy, uniformity, and proficiency.³⁰⁷ Nonetheless, he would impose sharp limits on the type of information that judges can use to make predictions.³⁰⁸ He fears that if judges "routinely based their predictions on hunches concerning how particular Justices would decide a legal issue given their basic political ideologies and perceived agenda," people would be likely to believe that judicial decisions are based on politics rather than principle.³⁰⁹

I believe that a state court may appropriately consider personal, extra-judicial information about individual Supreme Court justices in predicting how the Court would rule. Those who challenge the legitimacy of considering such information are being unrealistic. Although it might be improper to base a prediction *solely* on such information, this scenario is unlikely to occur. In almost all cases, a state court will also have a great deal of additional information to use in making a prediction, such as statutory language and legislative history, previous Supreme Court decisions, and judicial opinions of individual justices in similar cases. Information about an individual justice's background or political and social views normally will be used only as a supplement in a close case.³¹⁰ In addition, if a Supreme Court justice were to make his or her views on an issue known in a speech or law review article, it may be virtually impossible for a state court wholly to ignore that information. Finally, the goal is to make a correct prediction. Refusing to consider any relevant information clearly conflicts with that goal.³¹¹

307. See Caminker, *supra* note 293, at 36-43; see also Note, *The Attitude of Lower Courts to Changing Precedents*, 50 YALE L.J. 1448, 1455 (1941) (arguing that it is appropriate to consider justices' "personal philosophies" in determining whether to disregard a precedent).

308. See Caminker, *supra* note 293, at 19, 43-51 (noting the need for predictive information to have high probative value).

309. *Id.* at 66.

310. See generally COFFIN, *supra* note 9, at 195-205 (discussing the "thought ways" of judges and the reliability of such thoughts in divining decisions).

311. Many political scientists believe that political and ideological concerns play a predominant role in judicial decisionmaking. See RONALD KAHN, *THE SUPREME*

There is reason for caution, however, because prediction based on assessment of individual Supreme Court justices poses substantial practical problems. Inquiries into the justices' personal views may occasionally produce useful guidance, but it is extremely difficult to predict the precise influence of background or personal philosophy in individual cases. Statements in speeches or articles may not accurately reflect how a justice will vote after collegial deliberation and under the constraints of *stare decisis*.³¹² Judge Frank Coffin cautions against pigeonholing judges as "conservative" or "liberal," or as "strict" or "loose" constructionists, or as favoring "judicial restraint" or "judicial activism."³¹³ Coffin complains that "judges are filed under one or more of these pairings as if craft constraints played no part at all."³¹⁴ He suggests that

[c]raft related factors, such as a case on point or clearly analogous, analysis of the evidence or a ruling by the trial court, a procedural or jurisdictional requirement, a compelling public policy, a close reading of legislative history, and considerations of institutional appropriateness, will in the end decide most cases.³¹⁵

Judge Coffin continues:

All that I think can be justly said about the utility of applying overworked labels to judges is that they are appropriate

COURT AND CONSTITUTIONAL THEORY, 1953-1993, at 3 (1994) (asserting that "[p]olitical models of Supreme Court decisionmaking, which emphasize that justices act like policymakers and are influenced by changes in the wider political system, have dominated the intellectual landscape, especially among political scientists"); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 64-69 (1993) (setting forth the attitudinal model of judicial decision-making); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997) (examining and critiquing the attitudinal model of decisionmaking). If this is true, it suggests that state court judges should pay attention to the underlying social and political attitudes of individual justices if they wish to make accurate predictions.

312. See Caminker, *supra* note 293, at 48.

313. COFFIN, *supra* note 9, at 200; see also Caminker, *supra* note 293, at 48-49 (suggesting that a Justice's personal ideological beliefs "likely will be more sophisticated and nuanced than the general picture available to the public, which might be limited to an approximate position on a spectrum ranging from left to right").

314. COFFIN, *supra* note 9, at 200.

315. *Id.* at 197.

to some judges on some issues some of the time. But to use them as generic descriptions characterizing judges on supposedly major points of difference exaggerates the extent to which they may fairly apply. They also carry such emotional freight that they more often terminate than advance thought.³¹⁶

In sum, a state court may legitimately consider personal information about individual justices in predicting how they would vote, but it would be wise to limit the weight given to such information.

C. Applying the Predictive Approach to Routinely Recurring Situations

Several situations repeatedly arise in state court decisions ascertaining and applying federal law. These situations include cases in which state courts must decide what weight to give to older Supreme Court decisions that may have been superseded or are simply ignored; cases in which there is no Supreme Court precedent on point, but lower federal court decisions are numerous and all point in the same direction; cases in which the lower federal courts are split or splintered; cases in which state rulings might be reviewed by the lower federal courts in habeas corpus proceedings; and cases in which a lower state court has to choose between conflicting interpretations of federal law by a superior state court and the lower federal courts. The remainder of this Article makes suggestions as to how state courts should proceed in each of these situations.

1. Cases in Which the State Courts Must Decide What Weight to Give to Old or Outmoded Supreme Court Decisions

This situation is a variation of a problem that lower courts face all the time. There is a higher court opinion on point, but the lower court suspects that the higher court would no longer follow it. Should the lower court simply follow the existing precedent, or should it decide the case the way it thinks the higher

316. *Id.* at 201.

court would decide the case today? This is a very difficult judgment call, and not surprisingly, lower courts disagree about how to proceed.³¹⁷

The Supreme Court follows specified guidelines in deciding whether to overrule its prior cases. The considerations are "prudential and pragmatic" and "designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."³¹⁸ Age alone is not a reason to reject a precedent; indeed, age makes some precedents venerable.³¹⁹ Time, though, may also erode a precedent. Developments in related areas may "have left the old rule no more than a remnant of abandoned doctrine," or facts may change or be seen so differently "as to . . . [rob] the old rule of significant application or justification."³²⁰ Despite its great reluctance to overturn prior cases interpreting statutes,³²¹ the Court will do so when "either the growth of judicial doctrine or further action taken by Congress . . . have removed or weakened the conceptual underpinnings from the prior decision . . . or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies."³²² The Court will also overrule prior cases when the standard it announced proved unworkable.³²³

317. See Caminker, *supra* note 293, at 19-20 and nn.71-75. See generally C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 *FORDHAM L. REV.* 39 (1990) (discussing the course lower courts should follow); Maurice Kelman, *The Force of Precedent in the Lower Courts*, 14 *WAYNE L. REV.* 3 (1967) (same); Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 *FORDHAM L. REV.* 53 (1982) (same).

318. *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992).

319. See, e.g., *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (stating that stare decisis is "not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sound, and verified by experience").

320. *Casey*, 505 U.S. at 855.

321. See *supra* note 228 and accompanying text.

322. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); see also *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (noting that the Court will overrule a prior decision construing a statute in order to "achieve a uniform interpretation of similar statutory language . . . [or] to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy as expressed in other legislation").

323. See *Casey*, 505 U.S. at 854 (asking "whether the rule has proven to be intol-

State courts should follow these guidelines, but obviously they should proceed with great caution before "underruling" the Supreme Court.³²⁴ A state judge must not only be sure in her own mind that one or more of the above conditions is satisfied, but also be reasonably sure that the Supreme Court would agree. The Supreme Court can be unpleasant when it thinks its decisions are being flouted. For example, in *Hutto v. Davis*³²⁵ the Court berated the Fourth Circuit for declining to follow a controlling Supreme Court precedent, accusing the court of "having ignored, consciously or unconsciously, the hierarchy of the federal court system."³²⁶ The Court concluded: "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."³²⁷ There is no reason to think the Court would be more forgiving of state courts that declined to follow Supreme Court precedent on matters of federal law.

In addition, the Court recently instructed the federal circuit courts to follow a Supreme Court decision directly on point even though the lower court believes the Supreme Court would no longer follow it:

We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko* [*v. Swan*, 346 U.S. 427 (1953)]. If a precedent of this Court has direct application in a case, yet appears to rest on reasons

erable simply in defying practical workability"); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (noting that the Court has not followed "governing decisions [that] are unworkable or are badly reasoned"); *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) (inquiring whether the rule is "unworkable in practice").

324. See COFFIN, *supra* note 8, at 59-60. Judge Coffin writes:

In the federal courts of appeal one would seldom—very seldom—urge a departure from Supreme Court rulings, whether constitutional ones or not. Only in the rare case of a ruling remote in time, where the advent of obvious changes in conditions and a tide of critical comment have signaled a time for interment, would an inferior appellate court essay the task of burial.

Id.

325. 454 U.S. 370 (1982).

326. *Id.* at 374-75.

327. *Id.* at 375.

rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.³²⁸

Michael Dorf found this admonishment surprising because the circuit court did not actually predict what the Supreme Court would do, but rather relied on Supreme Court decisions that it believed had overruled *Wilko sub silentio*.³²⁹ He protested that the Supreme Court “appears to confuse the power to declare a precedent dead with the power to kill it.”³³⁰ Nevertheless, the Supreme Court appears to believe that lower federal courts—and presumably state courts as well—should not have the power to do either.

The Supreme Court may take this position because it has the power to resuscitate apparently dead precedent and will occasionally choose to do so. For example, in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*³³¹ the Court revived *Moore v. Chesapeake & Ohio Railway*,³³² a 1934 decision restricting federal subject matter jurisdiction that had “never been relied upon or even cited” by the Court.³³³ Similarly, in *Younger v. Harris*³³⁴ the Court revived *Fenner v. Boykin*,³³⁵ a Supreme Court decision applying strict standards for federal injunctions against threatened state criminal proceedings that had been ignored for thirty years.³³⁶ As a result, a state court should proceed with great caution before predicting the demise of a Supreme Court precedent.

328. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

329. See Dorf, *supra* note 292, at 676-77 n.87.

330. *Id.*

331. 478 U.S. 804 (1986).

332. 291 U.S. 205 (1934).

333. *Merrell Dow Pharms.*, 478 U.S. at 821-22 n.1 (Brennan, J., dissenting).

334. 401 U.S. 37 (1971).

335. 271 U.S. 240 (1926).

336. See Donald H. Zeigler, *An Accommodation of the Younger Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266, 273-80 (1976).

2. Cases in Which There is No Supreme Court Precedent on Point, but Lower Federal Court Decisions are Numerous and Consistent

State courts generally should consider themselves bound by lower federal court decisions when many federal courts have considered an issue and all have reached the same conclusion. The more federal courts that have agreed, the more strongly the state courts should consider themselves bound. When many circuits consider an issue and all rule the same way, the case for following their lead becomes very strong indeed.³³⁷

No court likes to be overruled;³³⁸ therefore, the federal courts also consider how the Supreme Court would rule when they decide a case.³³⁹ If many federal courts decide a question the same way, chances are good that they have decided it the way

337. *Shah v. Glendale Fed. Bank*, 52 Cal. Rptr. 2d 417 (Ct. App. 1996), provides a model of how a state court should proceed in this situation. Plaintiff debtors brought suit against the bank for breach of contract. *See id.* at 418. While the case was pending, they filed for bankruptcy. *See id.* Subsequently, the state action was dismissed and the debtors appealed. *See id.* The debtors then moved to delay the appeal based on the automatic stay provided in bankruptcy proceedings. *See id.* The court began by reviewing the rules of statutory construction applied by the Supreme Court. *See id.* at 418-19. Looking at the language of the bankruptcy statute, the court concluded that it imposed an automatic stay only of proceedings *against* a debtor, not proceedings initiated by a debtor. *See id.* at 420. The court noted that this reading of the statute was consistent with the policy underlying the provision. *See id.* Moreover, seven federal circuits, the bankruptcy courts, and courts of several other states all agreed with this interpretation. *See id.* Considering the plaintiffs' appeal a continuation of their original action, the court followed the unanimous opinion that the automatic stay provision was inapplicable and ordered the appeal to proceed. *See id.* at 422.

338. *See Caminker, supra* note 6, at 827 n.40 ("Much anecdotal evidence suggests that inferior court judges fear being reversed on appeal because their professional audience . . . may question their legal judgment or abilities."); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHL-KENT L. REV. 93, 111 (1989) ("[R]eversals by higher courts are embarrassing and serve to curtail attempts by renegade judges to ignore precedent.").

339. *See, e.g., Vukasovich, Inc. v. Commissioner*, 790 F.2d 1409, 1416 (9th Cir. 1986) ("[T]he courts of appeal should decide cases according to their reasoned view of the way [sic] Supreme Court would decide the pending case today."); *Spector Motor Serv. v. Walsh*, 139 F.2d 809, 814 (2d Cir. 1943) ("[O]ur function cannot be limited to a mere blind adherence to precedent. We must determine with the best exercise of our mental powers of which we are capable that law which in all probability will be applied to these litigants or to others similarly situated."), *vacated sub nom. Spector Motor Serv. v. McLaughlin*, 323 U.S. 101 (1944).

the Supreme Court would decide it. In addition, a state court should be reluctant to break with unanimous opinion on a federal question because a split in the case law may eventually require the Supreme Court to review the issue.³⁴⁰ Thus, if federal court decisions are numerous and consistent, a state court must have very strong reasons for reaching a different decision.

As with any rule of *stare decisis*, however, there are always exceptions. The Supreme Court occasionally disagrees with the unanimous opinion of the lower federal courts. For example, in *McNally v. United States*,³⁴¹ the Supreme Court held that a federal mail fraud statute applies only to schemes to deprive people of money or property, and not to schemes to deprive people of other rights, despite unanimous lower court decisions to the contrary.³⁴² Similarly, in *Rizzo v. Goode*,³⁴³ the Supreme Court held that state police officials are not liable under 42 U.S.C. § 1983 unless they affirmatively direct their subordinates to violate citizens' civil rights, though ten circuit courts had held that mere acquiescence in such behavior sufficed.³⁴⁴ Thus, if a state court sincerely believes that the Supreme Court would not follow unanimous lower federal court opinion, it should rule the way it believes the high court would rule.

3. Cases in Which the Lower Federal Courts Are Split or Splintered

State courts often must interpret and apply federal law when the Supreme Court has not ruled and the lower federal courts are in conflict. The proposed approach is particularly helpful in this situation because it gives state courts a perspective that may help them choose among competing interpretations. By definition, the situation is one in which reasonable minds have

340. See COFFIN, *supra* note 8, at 261 (noting that a federal court of appeals will "not lightly disagree with another circuit" or with several circuits, as "[i]t does not desire to create a split among the circuits and thus add to the potential caseload of the Supreme Court").

341. 483 U.S. 350 (1987).

342. See *id.* at 362-64 (Stevens, J., dissenting).

343. 423 U.S. 362 (1976).

344. See *id.* at 385 n.2 (Blackmun, J., dissenting).

differed. By deciding the federal issue the way they think the Supreme Court would decide it, the state courts have the best chance of resolving the conflict in a way that will lead to an eventual consensus.³⁴⁵

Categorical approaches ("bound" and "not bound") are not very helpful. When federal decisions conflict, state courts cannot be bound by all of them. As noted above, some state courts resolve this dilemma by saying they are bound by the better reasoned decisions.³⁴⁶ This is a clever resolution, but not the optimal solution. A decision by a state court to follow its own circuit may seriously interfere with the goal of achieving national unifor-

345. *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294 (Tex. 1993), provides a model of how a state court should proceed when there is a split in lower federal court precedent. The plaintiff, a seaman, was injured while working on an offshore oil rig. *See id.* at 295. He brought suit in Texas state court and asserted two federal causes of action—one for violation of the Jones Act, 46 U.S.C. § 688 (1989), and the other for breach of warranty of seaworthiness under general maritime law. *Penrod Drilling*, 868 S.W.2d at 295. He sought punitive damages on both claims. *See id.* The trial court refused to allow punitive damages, but the Texas Court of Appeals reversed in part, holding that while punitive damages could not be obtained under the Jones Act, they could be granted under general maritime law. *See id.* at 296. The Court of Appeals noted that the Supreme Court recently had held that "non-pecuniary" damages, such as loss of society, could not be recovered under either the Jones Act or general maritime law. *See id.* (citing *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990)). Moreover, several lower federal courts had extended the rationale of *Miles* and held that punitive damages could not be obtained under general maritime law. Nonetheless, the intermediate appellate court felt bound to follow a Fifth Circuit case decided before *Miles* that allowed punitive damages in such actions. *See id.*

The Texas Supreme Court reversed, following the weight of authority in the lower federal courts that punitive damages should not be allowed for claims under general maritime law. *See id.* at 297. In reaching this conclusion, the court carefully reviewed the Supreme Court decision in *Miles* and concluded that *Miles's* rationale "compels its extension to the present case." *Id.* at 296. Punitive damages had been deemed "non-pecuniary" in several cases, and the Supreme Court had expressed a desire for uniformity and consistency between general maritime law and the Jones Act. *See id.* at 296-97.

Although the Texas Supreme Court did not say so explicitly, it decided this case the way it thought the Supreme Court would, using lower federal court precedent for guidance. The court clearly opted to further national uniformity over uniformity between federal and state courts in Texas. The intrastate disagreement was short-lived, as two years later, the Fifth Circuit held that its earlier precedent was no longer good law and adopted the holding of the Texas Supreme Court. *See Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1507 (5th Cir. 1995).

346. *See supra* note 43 and accompanying text.

mity.³⁴⁷ It also does not make sense to ignore federal court decisions. Federal cases often provide thoughtful discussions and may lay out the arguments and counterarguments for different positions with great care. Federal decisions should be given the opportunity to be persuasive. Thus, state courts should resolve the conflict by deciding the way they think the Supreme Court would decide.

4. Cases in Which State Rulings Might Be Reviewed by the Lower Federal Courts by Way of Habeas Corpus

Many state courts give federal court precedent particular weight in cases in which a defendant can seek federal habeas corpus relief at the conclusion of his state criminal proceedings.³⁴⁸ Although a habeas corpus action is technically a collateral proceeding,³⁴⁹ as a practical matter the lower federal courts exercise appellate jurisdiction over the state courts in such cases.³⁵⁰ A court generally must follow the decisions of courts that can reverse it; therefore state courts are wise to pay particular attention to lower federal court rulings when habeas review is possible.³⁵¹

Again, however, deference should not be automatic. Lower federal court precedent often should be considered persuasive rather than mandatory. It matters greatly, for example, whether the federal precedent that would entitle the defendant to habeas relief is from the local circuit court or from some other circuit. Given that only the local federal circuit can review the defendant's constitutional claims, the state court can safely regard precedent from another circuit as persuasive only. It also matters whether a district or circuit court rendered the federal deci-

347. See *supra* notes 207-09 and accompanying text.

348. See *supra* notes 56-66 and accompanying text.

349. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 780 (2d ed. 1994) ("Technically, federal court consideration of the habeas corpus petition is not considered a direct review of the state court decision; rather, the petition constitutes a separate civil suit filed in federal court and is termed *collateral relief*.").

350. See *supra* note 168 and accompanying text.

351. See Ragazzo, *supra* note 6, at 742 n.255 (asserting that "it makes eminent good sense" for state courts to follow the decisions of the local federal court of appeals when habeas review is possible).

sion, even if the decision is local. A district court ruling does not bind other federal district judges.³⁵² Thus, a state criminal defendant will not necessarily benefit from a federal district court ruling if his habeas petition goes to a different federal district judge. A circuit court ruling, however, binds all of the district judges in the circuit³⁵³ and thus must be enforced by any federal district judge to whom the defendant might apply.

In addition, Congress and the Supreme Court have restricted federal habeas corpus dramatically in recent years, thus reducing the situations in which state prisoners can obtain relief.³⁵⁴ In particular, recent reforms prohibit the federal courts from announcing new constitutional principles in habeas corpus cases except in very rare circumstances and from granting relief except on the basis of clearly established Supreme Court precedent. Thus, when a state court refuses to recognize a novel federal constitutional claim, it need not worry that a federal court will do so in a subsequent federal habeas corpus proceeding. Finally, state judges no longer need consider themselves bound by a local federal circuit court decision announcing a new constitu-

352. See, e.g., *Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1570 (Fed. Cir. 1993); *TMF Tool Co., Inc. v. Muller*, 913 F.2d 1185, 1191 (7th Cir. 1990).

353. See *United States v. Mitlo*, 714 F.2d 294, 298 (3d Cir. 1983) (stating that circuit rulings bind all inferior courts within the circuit).

354. The Warren Court greatly liberalized the availability of habeas corpus, extending it to all federal constitutional claims, see *Brown v. Allen*, 344 U.S. 443, 464-65 (1953), and allowing consideration of claims not raised in state court unless the petitioner deliberately bypassed available state remedies. See *Fay v. Noia*, 372 U.S. 391, 398-99 (1963). What the Warren Court gave, however, the Burger and Rehnquist Courts have taken away. The Burger Court forbade federal reconsideration of Fourth Amendment exclusionary rule claims, see *Stone v. Powell*, 428 U.S. 465, 481-82 (1976), and refused to allow consideration of claims not raised in state court unless the petitioner could demonstrate "good cause" for not raising the claim and "prejudice" so severe that he would not have been convicted but for the constitutional error. See *United States v. Frady*, 456 U.S. 152, 170 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). The Rehnquist Court has erected many additional procedural hurdles that often block review. Habeas petitions may not mix exhausted and unexhausted claims. See *Rose v. Lundy*, 455 U.S. 509, 522 (1982). In addition, the cause and prejudice standard applies to failure to raise all claims in one petition, thus effectively barring successive applications. See *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). The cause and prejudice standard also applies to failure to develop material facts in the course of the state criminal proceeding, thus further limiting evidentiary hearings in federal court. See *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 12 (1992).

tional rule because the federal courts will not apply that rule in a habeas proceeding.³⁵⁵

In *Teague v. Lane*,³⁵⁶ the Supreme Court forbade federal courts, itself included, from announcing new criminal constitutional rights in habeas corpus proceedings except in very limited circumstances.³⁵⁷ The Court imposed this restriction indirectly by instructing federal courts to decide whether a new right should be applied retroactively before announcing it.³⁵⁸ If it should not be, the court should not use the right to grant relief in the case before it.³⁵⁹ The Court then held that a new right should be applied retroactively only in two narrow circumstances: (1) "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'"; or (2) "if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'"³⁶⁰ If a new right does not fall within one of these exceptions, it cannot be applied to a state habeas petitioner. Thus, as a practical matter, the Court's holding in *Teague* means that federal courts almost never can announce new criminal constitutional rules in habeas corpus cases.³⁶¹

Teague does not preclude a federal court from granting habeas relief based on a new constitutional rule if the court announced the new rule in another context before the habeas petitioner's

355. See, e.g., *Commonwealth v. Clark*, 710 A.2d 31, 39 (Pa. 1998) (noting that state court was not bound by the decisions of federal courts).

356. 489 U.S. 288 (1989).

357. See *id.* at 304-10.

358. See *id.*

359. See *id.* at 310.

360. *Id.* at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692-93 (1971) (Harlan, J., concurring in the judgments and dissenting in part) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))).

361. *Teague* provoked extensive critical commentary. See, e.g., Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. REV. 371 (1991); Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665 (1990); David R. Dow, *Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23 (1991); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797 (1992).

state criminal proceedings became final.³⁶² Thus, if the Supreme Court announces a new rule in reviewing a state court or lower federal court decision, or if a lower federal court announces a new rule in a federal criminal case, *Teague* would allow habeas relief. Congress partially closed this loophole and imposed further restrictions on federal habeas corpus in the Antiterrorism and Effective Death Penalty Act of 1996.³⁶³ The Act relieves state courts of any obligation to consider new constitutional rulings by the lower federal courts in federal criminal cases and makes it even harder for federal habeas petitioners to win.³⁶⁴ Congress amended 28 U.S.C. § 2254(d) to read as follows:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.³⁶⁵

Under the statute, a federal court can grant a habeas petition only if the state court failed to apply “clearly established Federal law, as determined by the Supreme Court.”³⁶⁶ This seems to prohibit habeas relief based on new constitutional rights announced in prior lower federal court rulings. Thus, even if the local federal circuit court announced a new constitutional rule before a

362. A case is final for these purposes if the conviction has been entered and direct appeals are complete, or if the time to pursue appeals has passed. See *Teague*, 489 U.S. at 295.

363. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C. §§ 2244, 2253-55, 2261-66 (Supp. II 1996)). For excellent discussions of the many twists and turns of this law, see Lee, *supra* note 168; Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996); Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868 (1997).

364. See 28 U.S.C. § 2254(d).

365. *Id.*

366. *Id.* (emphasis added)

state criminal defendant's conviction became final, the federal courts could not apply that rule in the defendant's subsequent habeas corpus proceeding. In addition, habeas relief can be granted only if the state court decision involved an "unreasonable application" of Supreme Court precedent.³⁶⁷ This suggests that a state court must do something more than simply apply Supreme Court cases incorrectly for habeas relief to be warranted.³⁶⁸

The Act imposes several other restrictions on habeas corpus. It applies a one-year statute of limitations to habeas applications.³⁶⁹ It imposes further limits on successive petitions.³⁷⁰ The Act also expressly limits a federal court's power to hold an evidentiary hearing.³⁷¹

Neither *Teague* nor the Act forbid habeas relief if a federal court concludes that it is applying old law rather than announc-

367. See *id.*

368. See RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 97 (4th ed. Supp. 1997) (suggesting that the "unreasonableness" standard means that federal courts may no longer make a de novo determination of federal constitutional claims in habeas petitions).

369. See 28 U.S.C. § 2244(d). The statute of limitations generally runs from the time the conviction becomes final "by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A).

370. See *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991) (suggesting that a petitioner might file a successive petition when he could show cause for failing to raise a claim in his first petition and actual prejudice from the error in his case, or when he could show that the constitutional violation caused the conviction of an innocent person even if he could not show good cause for having failed to raise the claim). Under the Act, the petitioner must show cause for having failed to raise the claim and show actual innocence. See 28 U.S.C. § 2244(b)(2)(B)(i-ii).

371. Under 28 U.S.C. § 2254(e)(1), factual findings in a state proceeding are presumed to be correct. Under subsection (e)(2), if a petitioner has failed to develop the facts in state court proceedings, a federal court cannot hold a hearing unless the petitioner makes several showings. See 28 U.S.C. § 2254(e)(2). He must show that:

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id.

ing a new constitutional principle. The Supreme Court admitted in *Teague* that it is often difficult to determine whether a case announces a new rule or merely involves a novel application of an old rule.³⁷² In general, the Court stated, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government" or "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."³⁷³ Presumably, then, a case does *not* announce a new rule if it does not break new ground or if the result is dictated by (Supreme Court) precedent that existed before the defendant's conviction became final.³⁷⁴ Thus, under *Teague* and the Act, a federal court may still grant habeas relief if it concludes that it is applying established Supreme Court precedent that should have been applied by state courts during the petitioner's state criminal proceedings.

The bottom line for state court judges is that they should consider themselves bound by established Supreme Court precedent, but they need not consider themselves bound by the criminal constitutional rulings of the local federal circuit and district courts. Persons convicted of crimes in state court may still apply for habeas corpus relief, but they must run a procedural gauntlet and will obtain relief only if they can show that the state court unreasonably applied Supreme Court precedent that was clearly established before their conviction became final. Of course, state courts may choose to follow lower federal court decisions setting new constitutional standards if they so desire. They should, however, determine whether to follow a circuit or district court decision based on what they think the Supreme Court would decide instead of making the determination based

372. See *Teague v. Lane*, 489 U.S. 288, 301 (1989).

373. *Id.*

374. Both the Supreme Court and the lower federal courts are struggling with these criteria. See DONALD L. DOERNBERG & C. KEITH WINGATE, *FEDERAL COURTS, FEDERALISM, AND SEPARATION OF POWERS: CASES AND MATERIALS* 856 (1994). Compare *Gilmore v. Taylor*, 508 U.S. 333 (1993), *Sawyer v. Smith*, 497 U.S. 227 (1990), *Saffie v. Parks*, 494 U.S. 484 (1990), and *Butler v. McKellar*, 494 U.S. 407 (1990) (refusing habeas relief because in each case prior precedent did not dictate the result the petitioners sought), with *Stringer v. Black*, 503 U.S. 222 (1992) (holding that the petition did not seek application of a new rule and thus was not *Teague*-barred).

on the fear that they will be reversed on federal habeas corpus review.

5. Cases in Which a Lower State Court Has to Choose Between the Interpretation of a Superior State Court and a Lower Federal Court

Lower state courts face this problem whenever higher state courts and the lower federal courts disagree as to the meaning of federal law. State courts are split on what to do in this situation.³⁷⁵ Once again, categorical rules are not appropriate. Generally, lower state courts should follow higher state courts; however, if they strongly believe that the Supreme Court would decide the issue the way the lower federal courts have decided it, they probably should follow the lower federal courts and attempt to convince the higher state courts to alter their position.

Lower state courts are in an extremely difficult position here. It is a fundamental rule of *stare decisis* that lower courts are bound by the decisions of superior courts in their judicial hierarchy.³⁷⁶ A lower court must pay particular attention to the decisions of a higher court that can reverse it.³⁷⁷ Thus, state trial courts ordinarily must follow the decisions of an intermediate appellate court in the direct line of review and of the state supreme court.

Every rule of *stare decisis* has exceptions. What if ten federal circuits have taken a position at odds with the state supreme court, and the lower state court is virtually certain that the

375. See *supra* notes 74-84 and accompanying text.

376. See, e.g., *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (stating that superior court decisions bind inferior courts); *Auto Equity Sales, Inc. v. Superior Court*, 369 P.2d 937, 939 (Cal. 1962) ("Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense.").

377. See, e.g., *United States v. Mitlo*, 714 F.2d 294, 298 (3d Cir. 1983) (stating that circuit court decisions bind the district courts in that circuit); RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* 113 (3d ed. 1998) (stating that an appellate decision is mandatory authority for a lower court if it is made by an appellate court to which the matter at hand could be appealed); Caminker, *supra* note 6, at 824 ("A court must follow the precedents established by the court(s) directly above it.").

Supreme Court would agree with the circuits? In this situation, the state supreme court is like an intermediate appellate court. The Supremacy Clause requires the lower state court to apply federal law.³⁷⁸ Should the lower court follow what it thinks federal law really is, or follow the ruling of a court that does not have the final word on the matter? The American system of hierarchical precedent would not break down if a lower state court occasionally chose the former option.

CONCLUSION

This Article has proposed that the state courts adopt a uniform approach for ascertaining federal law. The approach should be the same that the Supreme Court mandated for the federal courts in the analogous situation when federal courts must ascertain state law. The state courts should decide questions of federal law the way that they believe the Supreme Court would decide them. This approach would best further the goals of correct and uniform interpretation of federal law. As Justices O'Connor, Kennedy, and Souter stated in their joint opinion for the Court in *Planned Parenthood v. Casey*: "Liberty finds no refuge in a jurisprudence of doubt."³⁷⁹ No approach to finding federal law can eliminate all doubt, but the approach proposed here can help achieve greater certainty.

378. See *supra* notes 147-49 and accompanying text.

379. *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992).