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Iv. Civil Procedure

because of the limited number of cases in which the time test and corresponding different characterizations of obstinacy will be needed. Few cases will require a determination of whether attorney's fees may be assessed by a district court after an appeal is taken. To make the *Wright* test more functional in these few cases, the Fourth Circuit should carefully explain the precise differences between general and merit-related obstinacy and supply more examples of the types of conduct included under each heading. Finally, *Thonen* indicates that state officials guilty of unreasonable bad faith conduct should expect no eleventh amendment immunity from fee awards in the Fourth Circuit. Under the *Thonen* doctrine, attorney's fees are likely to be characterized as properly taxable costs incident to the litigation and justified either as a means of obtaining prospective relief or as a means to insure the orderly administration of justice.

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IV. CIVIL PROCEDURE

The *Erie* Doctrine: Appellate Review of State Law Questions and the Status of Obsolescent State Decisions.

The rule of *Erie Railroad Co. v. Tompkins*[1] declares that federal courts must apply state decisional law in cases based on diversity jurisdiction.[2] Although simply stated, the rule has proved troublesome to apply.[3] The recent case of *Springer v. Joseph Schlitz Brewing Co.*[4] illustrates current difficulties the Fourth Circuit Court of Appeals has had in implementing the *Erie* doctrine.[5] In *Springer*, the Fourth Circuit avoided considering the effect of obsolescent state

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[1] 304 U.S. 64 (1938).

[2] *Id.* at 78. *See generally* U.S. CONST. art. 3, § 2; 28 U.S.C. § 1332 (1970).

[3] Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

[4] 510 F.2d 468 (4th Cir. 1975).

[5] The *Erie* doctrine is really a composite of several Supreme Court decisions. C. WRIGHT, LAW OF FEDERAL COURTS § 55 (2d ed. 1970) [hereinafter cited as WRIGHT]. They include: Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958); Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Erie R.R. v. Tompkins, 304 U.S. 64 (1938). *See also* Commissioner v. Estate of Bosch, 387 U.S. 456 (1967); Hanna v. Plumer, 380 U.S. 460 (1965).

decisions directly relevant to a legal issue in the diversity action.[6] Moreover, the court failed to formulate a distinct standard for appellate review of state law questions.[7] While most circuits give express deference to a district court's construction of state law,[8] the standards of the circuits are in conflict,[9] and no uniform criterion for review has been articulated by the Supreme Court.[10]

The Rules of Decision Act declares that when a federal court sits in a case based on diversity jurisdiction, the court must apply the "laws of the several states."[11] In construing this statute, *Erie* established that the forum state's case law as well as its statutes govern decisions by a federal court.[12] After *Erie*, a federal court in a diversity action effectively sits as a state court,[13] bound by authoritative deci-

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[6] *See* text accompanying notes 72-78 *infra*. *See also* Shealy v. Challenger Mfg. Co., 304 F.2d 102 (4th Cir. 1962). Although the Fourth Circuit departed from state precedent in *Shealy*, Comment, *Federal Jurisdiction—Diversity Action—Federal Court Determining State Law*, 43 B.U.L. REV. 409, 413 (1963), the statutory construction in *Shealy* was later implicitly approved by the forum state in Carolina Boat & Plastic Co. v. Glascoat Distribs., Inc., 249 S.C. 49, 152 S.E.2d 352 (1967). The court thus correctly anticipated the future development of state law.

[7] *See* text accompanying notes 43-46 *infra*. The Fourth Circuit has persistently reviewed state law questions without recognizing the need to establish a distinct appellate standard. *See, e.g.*, Brendle v. General Tire and Rubber Co., 505 F.2d 243 (4th Cir. 1974); Denny v. Seaboard Lacquer, Inc., 487 F.2d 485 (4th Cir. 1973); McClung v. Ford Motor Co., 472 F.2d 240 (4th Cir.) (per curiam), *cert. denied*, 412 U.S. 940 (1973). *But cf.* Williams v. Weyerhaeuser Co., 378 F.2d 7, 8 (4th Cir. 1967) (indicating when the Fourth Circuit may elect to defer to the district court).

[8] *See* cases cited in notes 38-40 *infra* and 1 W. BARRON & A. HOLZOFF, FEDERAL PRACTICE AND PROCEDURE § 8, n.6.14 (Wright ed. 1960, Cum. Supp. 1971) [hereinafter cited as BARRON & HOLZOFF].

[9] *E.g.*, *compare* United States v. Hunt, 513 F.2d 129, 136 (10th Cir. 1975), *with* Peterson v. Klos, 433 F.2d 911, 912 (5th Cir. 1970). *See* text accompanying notes 39-42 *supra*.

[10] *See* text accompanying notes 47-61 *supra*.

[11] 28 U.S.C. § 1652 (1970), *amending* Federal Judiciary Act § 34, 1 Stat. 92 (1789).

[12] The Supreme Court's decision, which ended the ability of a federal diversity forum to resolve issues of state law based on federal common law principles, rested on three bases: first, a revised statutory construction of the Rules of Decision Act, *presently* 28 U.S.C. § 1652 (1970); second, the difficulties created by the rule of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (authorizing federal courts to determine the law in diversity cases irrespective of state decisions), *see* WRIGHT, *supra* note 5, § 54; and third, the unconstitutionality of independently determined law for diversity cases. Erie R.R. v. Tompkins, 304 U.S. 64, 72-80 (1938). The constitutional rationale has received extensive criticism. *E.g.*, WRIGHT, *supra* note 5, § 56 and authorities cited therein; ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 442 (1969).

[13] *E.g.*, Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 203 (1956); Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

sions of the state's highest court.[14] As the *Erie* doctrine evolved, the Court developed the objective of uniformity with the state forum[15] to discourage forum-shopping[16] and to avoid the inequity of divergent results.[17] By requiring federal courts to follow state decisions, however, *Erie* and its progeny have compounded the factors courts must consider in formulating a rule of law in a diversity action.[18] These factors may be especially difficult for a circuit court to assess because it is often unfamiliar with the law of the state,[19] thus creating problems of appellate review peculiar to diversity cases. These difficulties in resolving issues of state law underlie the Fourth Circuit decision in *Springer v. Joseph Schlitz Brewing Co.*[20]

As a matter of substantive law, the *Springer* court determined the extent of private industry's liability under North Carolina law for water pollution damages.[21] Springer, a downstream landowner, brought a claim against Schlitz for alleged injury caused by inadequately treated effluent from an upstream brewery. The plaintiff

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[14] Presently only decisions of the state court of last resort are binding in federal court. Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967) (dictum). *See generally* text accompanying notes 86-97 *infra*.

[15] The danger of disparate results between state and federal courts prompted the formulation of the "outcome determinative" test for identifying which of the forum state's laws—whether putatively "substantive" or "procedural"—the federal court must apply. Guaranty Trust Co. v. York, 326 U.S. 99, 107-12 (1945).

[16] The evil of forum-shopping is created in part by the federal removal statute, 28 U.S.C. § 1441 (1970), which allows a non-resident defendant the option of removing the case to federal court—an option unavailable to a resident defendant. A non-resident plaintiff can therefore choose whichever forum is most advantageous, secure in the knowledge that his forum choice is final. If there is a significant disparity in the results achieved in federal and state courts, then the choice of forum option operates to the great disadvantage of a resident defendant. *Erie*, as embellished by Guaranty Trust Co. v. York, 326 U.S. 99 (1945), sought to restore neutrality to the federal forum. In *Guaranty Trust*, Justice Frankfurter explained:

> The nub of the policy that underlies [*Erie R.R. v. Tompkins*] is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.

Id. at 109.

[17] Hanna v. Plumer, 380 U.S. 460, 468 (1965).

[18] For example, the court must identify state decisions relevant to a legal issue and ascertain the scope and current validity of those decisions. Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956).

[19] WRIGHT, *supra* note 5, § 58 at 240.

[20] 510 F.2d 468 (4th Cir. 1975).

[21] For a fuller consideration of the environmental issues raised in this case, see Comment, *Environmental Law—Municipal Immunity—Springer v. Joseph Schlitz Brewing Company: Placing the Burden on Industry*, 53 N.C.L. REV. 1064 (1975).

complained that at the time the defendant constructed its plant it should have foreseen that its discharges would exceed the limited capacity of Winston-Salem's water treatment facilities.[22] Moreover, the plaintiff offered to prove that Schlitz failed to provide accurate data to the city concerning the projected strength and volume of its fluid waste.[23] Springer further claimed that the defendant's discharges into the sewage system violated standards established by a city ordinance[24] and thus constituted negligence.

On the strength of prior state authority,[25] the district court granted defendant's motion for a directed verdict.[26] On appeal, the Fourth Circuit reversed, holding that the facts alleged a claim because they fell within an exception to the immunity accorded users of municipal sewage facilities under North Carolina law.[27] The circuit court also concluded that Springer had presented sufficient evidence to support the allegations and remanded the case for a new trial.

The difference in holdings between the courts hinged on the interpretation of state precedent. Both courts recognized the relevance of the North Carolina cases of *Clinard v. Town of Kernersville*[28] and *Hampton v. Town of Spindale.*[29] These decisions held that a private industrial user of a municipal sewage system is immune from liability for injury caused after the user's waste enters the system. In narrowly construing the immunity, the Fourth Circuit focused on a dictum from *Hampton* which, in the court's opinion, "expressly restricts freedom from liability to those persons who use the sewers 'in the way

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[22] 510 F.2d at 475-76.

[23] *Id.* at 476.

[24] WINSTON-SALEM, N.C., CODE OF ORDINANCES § 23-2(2) (1970).

[25] Clinard v. Town of Kernersville, 215 N.C. 745, 3 S.E.2d 267 (1939); Hampton v. Town of Spindale, 210 N.C. 546, 187 S.E. 775 (1936).

[26] 510 F.2d at 470-71; *see* Record at 737, Springer v. Joseph Schlitz Brewing Co., Civil No. C-261-5-70 (M.D.N.C. Oct. 12, 1973).

[27] 510 F.2d at 471.

[28] 215 N.C. 745, 3 S.E.2d 267 (1939). In *Clinard*, Kernersville constructed a new treatment plant after the commencement of discharges by the corporate defendant. The town then began dumping municipal waste into the creek on which plaintiff possessed riparian rights. Plaintiff alleged that the waste from the corporation's upstream mill, inadequately treated by the town's plant, impaired the value of his property. Nevertheless, the Supreme Court of North Carolina, relying on its decision in Hampton v. Town of Spindale, 210 N.C. 546, 187 S.E. 775 (1936), dismissed the suit against the private industry. 215 N.C. at 748, 3 S.E.2d at 270.

[29] 210 N.C. 546, 187 S.E. 775 (1936). In *Hampton*, the Supreme Court of North Carolina affirmed the dismissal of claims against private industrial defendants, basing its decision upon the general immunity accorded persons using municipal treatment facilities. 210 N.C. at 548-49, 187 S.E. at 776-77.

prescribed by law.' "[30] Because the Schlitz discharges could have been found to exceed standards fixed by the Winston-Salem Code of Ordinances[31] and thus would have constituted a misdemeanor under state law,[32] the Fourth Circuit invoked the rule that proof of a statutory violation constitutes negligence per se. The circuit court also held that the immunity announced in *Hampton* and *Clinard* did not preclude plaintiff's alternative claim that the defendant was liable because it had actual or constructive knowledge of the inadequacy of the city treatment facilities.[33] In so holding, however, the Fourth Circuit's opinion did not consider sensitive questions related to the role of federal courts construing state law in diversity cases.

The Fourth Circuit's reversal on a matter of North Carolina law failed to accord the deference which generally attaches to a district court's determination of state law.[34] The reason for such deference is well established. A circuit court, whose jurisdiction covers a number of states, lacks the intimate familiarity which a district court possesses concerning the law of the forum state.[35] Therefore, courts of appeals have traditionally accorded great weight to the lower court's determination of state law.[36] Even the Fifth Circuit, which has shown less reluctance than most circuit courts to review conclusions of state law by a district court,[37] has hesitated "to substitute [its] view of

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[30] 510 F.2d at 472 (footnote omitted). In *Hampton*, the Court noted:

> "But the inhabitants of a city who invoke its power to construct and control a sewer, and who use the sewer after its completion for the purpose and *in the way prescribed by law*, are not liable jointly with the city for the damages which result to third persons from the negligence of the city in the construction, management, or operation of the sewer."

210 N.C. at 548, 187 S.E. at 776 (emphasis added), *quoting* 43 C.J. § 1916 at 1158-59 (1927).

[31] WINSTON-SALEM, N.C., CODE OF ORDINANCES § 23-2(2) (1970).

[32] N.C. GEN. STAT. § 14-4 (Repl. vol. 1969) provides that "[i]f any person shall violate an ordinance of a county, city, or town, he shall be guilty of a misdemeanor . . . ."

[33] 510 F.2d at 474-76.

[34] WRIGHT, *supra* note 5, § 58 at 240. *See* cases cited in notes 38-40 *infra* and BARRON & HOLZOFF, *supra* note 8, § 8 n.6.14. The deference to a district court's construction of state law is criticized in Note, *Unclear State Law in the Federal Courts: Appellate Deference or Review?*, 48 MINN. L. REV. 747 (1964).

[35] WRIGHT, *supra* note 5, § 58 at 240. *But see* Village of Brooten v. Cudahy Packing Co., 291 F.2d 284 (8th Cir. 1961), in which the court of appeals deferred to the expertise of the district court, although the judge was sitting by assignment from outside the state.

[36] This deference is supported—if not compelled—by indications from the Supreme Court. *See* cases cited in note 50 *infra*.

[37] *E.g.*, *compare* United States v. Hunt, 513 F.2d 129, 136 (10th Cir. 1975), *with*

state law for that of the district court sitting in that state and experienced in its jurisprudence."[38]

The Fifth Circuit's reluctance is nevertheless tempered—if not contradicted—by its willingness to review fully questions of state law on appeal.[39] In most other circuits, however, a district court declaration of state law will be sustained on appeal unless the court of appeals is convinced the holding is clearly erroneous.[40] The "clearly erroneous" position represents the most widely accepted rule among

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Peterson v. Klos, 433 F.2d 911, 912 (5th Cir. 1970). *See* WRIGHT, *supra* note 5, § 58 at 241; 1A J. MOORE, FEDERAL PRACTICE ¶ 0.309[2] n.15 (2d ed. 1959, Cum. Supp. 1974) [hereinafter cited as MOORE].

[38] Peterson v. Klos, 433 F.2d 911, 912 (5th Cir. 1970) (footnote omitted). *See, e.g.*, Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); Tardan v. Chevron Oil Co., 463 F.2d 651 (5th Cir. 1972).

[39] *E.g.*, Peterson v. Klos, 433 F.2d 911, 912 (5th Cir. 1970). *Accord*, Luke v. American Family Mut. Ins. Co., 476 F.2d 1015 (8th Cir. 1973), in which the Eighth Circuit apparently abandoned the clearly erroneous standard. The court concluded that its previous standard effectively eliminated review of a district court's finding of state law. While the court criticized its prior willingness to be bound by a district court's "permissible conclusion" of state law, it nevertheless commended the appellate review posture of the Tenth, Ninth and Second Circuits, *id.* at 1019 n.6, all of which follow the clearly erroneous standard. *See* note 40 *infra*. The Eighth Circuit failed to appreciate that the "permissible conclusion" and clearly erroneous standards are identical. *E.g.*, Harris v. Hercules, Inc., 455 F.2d 267, 269 (8th Cir. 1972); National Bellas Hess v. Kalis, 191 F.2d 739, 741 (8th Cir. 1951). By confusing two analytically identical standards, the *Luke* court may not have fully reasoned the decision to shift standards of review. Nevertheless, the Eighth Circuit continues to cite *Luke* as the circuit's definitive opinion on review of state issues. *E.g.*, Carson v. National Bank of Commerce Trust and Sav., 501 F.2d 1082, 1083 (8th Cir. 1974). *See also* MOORE, *supra* note 37, ¶ 0.309[2] n.15 (Cum. Supp. 1974).

[40] *E.g.*, United States v. Hunt, 513 F.2d 129, 136 (10th Cir. 1975); American Timber & Trading Co. v. First Nat'l Bank, 511 F.2d 980, 983 (9th Cir. 1973), *cert. denied*, 421 U.S. 921 (1975); Lomartira v. American Auto. Ins. Co., 371 F.2d 550, 554 (2d Cir. 1967); Lee Shops, Inc. v. Schatten-Cypress Co., 350 F.2d 12, 17 (6th Cir. 1965), *cert. denied*, 382 U.S. 980 (1966). For a less explicit proposition than the clearly erroneous standard, see Wisconsin Screw Co. v. Fireman's Fund Ins. Co., 297 F.2d 697, 701 (7th Cir. 1962) (where there is no *compelling* indication to the contrary, the court accepts the view of the district court on doubtful questions of state law). *But see* Buehler Corp. v. Home Ins. Co., 495 F.2d 1211, 1214 (7th Cir. 1974).

Professor Wright describes the clearly erroneous standard as "treating the question of state law much as if it were a question of fact." WRIGHT, *supra* note 5, § 58 at 241; MOORE, *supra* note 37, ¶ 0.3092 at 136 (Cum. Supp. 1974). *See generally* FED. R. CIV. P. 52(a). A more apt analogy is to the clearly erroneous standard for court review of administrative findings. The standard is predicated in part upon a recognition of the agency's greater expertise in the field. K. DAVIS, ADMINISTRATIVE LAW TEXT § 29.02 (3d ed. 1972). In the federal court system, the district court is acknowledged as an expert in matters of local law. *E.g.*, WRIGHT, *supra* note 5, § 58 at 240.

the circuits.[41] It also appears to yield results more acceptable to state supreme courts[42] and is therefore more in harmony with the *Erie* goal of uniformity with state decisions.

The *Springer* decision perpetuates uncertainty as to the standard of review of state law questions in the Fourth Circuit.[43] The disposition of the district court firmly rested on state authority setting forth a comprehensive immunity from pollution liability. The court of appeals, however, reversed, relying on an insignificant dictum from the *Hampton* decision[44] to hold that the immunity doctrine did not bar

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[41] *See* cases cited in note 40 *supra*.

[42] Judge J. Skelly Wright, formerly a member of the Fifth Circuit bench, has concluded that state supreme courts frequently repudiate the Fifth Circuit, which shows relatively little deference to the decisions of its lower courts on issues of state law. Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 326 (1967). At the same time, the Seventh Circuit—which has shown greater deference to district court decisions than the Fifth Circuit, *see* note 40 *supra*—has had its formulations generally well received by the states. Wright, *supra* at 326-27. These indications suggest a possible nexus between accuracy and willingness to confirm the district courts on matters of local law. Judge Wright, however, expressly declines to offer an explanation for this phenomenon. *Id.* at 327.

Greater empirical research is needed to demonstrate conclusively whether the clearly erroneous standard generally yields a more accurate reflection of state law. The answer to this question would be especially valuable to the Fourth Circuit, which has not yet articulated a fixed standard of review. Of course, a circuit court should adopt the more accurate standard to approach the *Erie* goal of uniformity, thereby reducing the potential advantages of forum-shopping and achieving more equitable administration of the law. *See generally* note 46 *infra*.

[43] *See, e.g.*, cases cited in note 7 *supra*. The Fourth Circuit has never specified when it must accept a lower court ruling regarding state law. In Williams v. Weyerhaeuser Co., 378 F.2d 7 (4th Cir. 1967), the Fourth Circuit stated that the court is entitled to accept the expertise of the district court on a matter of local law, "especially . . . when [the court's] conclusions are articulated with clarity and no contrary precedent . . . is at hand." *Id.* at 8. According to the *Weyerhaeuser* standards, the Fourth Circuit could have elected to defer to the district court's determination of state law in *Springer*. Disregarding the *Hampton* dictum as precedent, *see* note 44 *infra*, there is no guiding statement by the Supreme Court of North Carolina concerning the breadth of immunity to users of municipal sewage facilities except that which supports the district court interpretation. In addition, as a basis for decision, the district court indicated its conclusion that the Supreme Court of North Carolina would not overrule its earlier case law. Record at 737, Springer v. Joseph Schlitz Brewing Co., Civil No. C-261-5-70 (M.D.N.C., Oct. 12, 1973).

[44] The value of a dictum in the search for state law is a function of how carefully considered the statement is. BARRON & HOLZOFF, *supra* note 8, § 8 at 41 (1960); WRIGHT, *supra* note 5, § 58 at 239. In *Hampton*, the Supreme Court of North Carolina quoted from two encyclopedias and a treatise for the immunity concept. Of the three sources cited for the same proposition, only one encyclopedia contained the dictum mentioned. There is no reason to conclude that the Supreme Court of North Carolina intended to endorse and adopt the gratuitous dictum. Little deliberation, and therefore little

suit against Schlitz.[45] The Fourth Circuit, therefore, required less than clear error to reverse in *Springer*. The opinion's silence, however, does not necessarily imply that the court intended to reject the prevailing clearly erroneous standard of review. The standard in the Fourth Circuit, therefore, remains undefined.[46]

In formulating standards of review for district court determinations of state law, the circuit courts have not had the benefit of a definitive Supreme Court decision on the issue. When federal jurisdiction is based on diversity, the Supreme Court has ultimate authority to resolve a state law question.[47] Although the Court's rules expressly establish important state issues as a consideration governing review on certiorari,[48] in practice the Court rarely reviews questions of state law.[49] Whether the district courts or the circuit courts are to have primacy on state law issues—subject to the potential check of Supreme Court review—remains unsettled. The Court itself has deferred to district courts in some decisions[50] and to circuit courts of

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weight, can be attributed to the dictum. As the Fifth Circuit noted, a federal court "cannot, consistent with *Erie*, interpret state decisions as turning on elements that were clearly insignificant to the deciding tribunals." Guardian Life Ins. Co. of America v. Eagle, 484 F.2d 382, 386 (5th Cir. 1973).

[45] 510 F.2d at 472.

[46] One way the court could avoid the inflexibility of a rigid standard would be to adopt a measure analogous to the sliding standard used in judicial review of administrative agencies. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 30.04-30.06 (3d ed. 1972). The court could exercise full review of state issues or merely review for clear error, depending on such objective factors as the lower court judge's relation to the forum state, whether members of the circuit court belong to the state's bar, and the frequency with which the circuit considers questions of the forum state's law.

[47] *See* 28 U.S.C. § 1254(1) (1970).

[48] The Supreme Court's rules provide for review "[w]here a court of appeals . . . has decided an important state or territorial question in a way in conflict with applicable state or territorial law . . . ." SUP. CT. R. 19(1)(b).

[49] Pierson v. Ray, 386 U.S. 547, 558 n.12 (1967). Under the *Erie* doctrine all federal courts, including the Supreme Court, defer to the state's highest court on matters of state law. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Consequently, the United States Supreme Court's determination of state law is only persuasive authority in state courts and could therefore be ignored. *See* Hickey v. Kahl, 129 N.J. Eq. 233, 19 A.2d 33 (1941); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 708 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; WRIGHT, *supra* note 5, § 58 at 237. *See also, e.g.*, Truck Ins. Exch. v. Seelbach, 161 Tex. 250, 339 S.W.2d 521 (1960), *expressly rejecting* National Sur. Corp. v. Bellah, 245 F.2d 936 (5th Cir. 1957). One commentator has concluded that the Supreme Court refrains from devoting its resources to state law questions because of the Court's more pressing constitutional and federal statutory responsibilities. Note, *Unclear State Law in the Federal Courts: Appellate Deference or Review?*, 48 MINN. L. REV. 747, 755-56 (1964).

[50] *E.g.*, Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 204-05 (1956) ("Since the federal judge making those findings is from the Vermont bar, we give

appeals in others.[51] Occasionally it has indiscriminately deferred to both tiers of the lower federal system.[52] The Court's decisions offer little guidance, indicating only that while the district court decision is entitled to great weight, a right to review by the court of appeals, based on a heretofore unestablished standard, remains.

Although the Supreme Court has never explicitly determined a standard of review for state law questions,[53] it did provide guidance in *Waialua Agricultural Co. v. Christian*.[54] In *Waialua*, decided shortly after *Erie*, the Supreme Court reversed the court of appeals on a matter of territorial law in reliance on *Erie* policy.[55] The Court held that the court of appeals could not overturn a determination of local law made by the territorial Supreme Court of Hawaii, despite appellate jurisdiction exercised by the federal court,[56] unless the Hawaii court's decision was clearly erroneous.[57] A territorial court, the Court reasoned, is likely to have a fuller understanding of the local law of its jurisdiction than a circuit court.[58] Moreover, the use of *Erie* policy in *Waialua* apparently rested on the following reasoning: because territorial and state courts are analogous and under the *Erie* doctrine state decisions are controlling, a circuit court must therefore exercise restraint in reviewing a territorial court's determination of local law.[59] Since the Supreme Court often similarly analog-

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special weight to his statement of what the Vermont law is."); Steele v. General Mills, Inc., 329 U.S. 433, 439 (1947); Diez v. Gonzalez y Lugo, 261 U.S. 102, 105-06 (1923); *cf.* Reitz v. Mealey, 314 U.S. 33, 39 (1941); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499 (1941) (three-judge district courts).

[51] *E.g.*, Pierson v. Ray, 386 U.S. 547, 558 n.12 (1967); Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 529-30 (1958); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 534 (1949); Huddleston v. Dwyer, 322 U.S. 232, 236 (1944) ("It is the duty of federal appellate courts . . . to ascertain and apply the state law where . . . it controls decision.") *See* Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273, 281 (1959) (Frankfurter, J., dissenting) and cases cited therein.

[52] *E.g.*, Palmer v. Hoffman, 318 U.S. 109, 118 (1943); MacGregor v. State Mut. Life Assurance Co., 315 U.S. 280, 281 (1942).

[53] *But see* Lomartira v. American Auto. Ins. Co., 371 F.2d 550 (2d Cir. 1967). The Second Circuit is of the opinion that the Supreme Court decision of Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956), endorsed the clearly erroneous standard. *Id.* at 554. *See generally* text accompanying notes 62-71 *infra*.

[54] 305 U.S. 91 (1938).

[55] *See* 350 U.S. at 107-09. Importantly, the decision did not simply rest on general principles of federalism.

[56] Act of Feb. 13, 1925, ch. 229, § 128(a), 43 Stat. 936.

[57] 305 U.S. at 109. The Court used the term "manifest error" to describe the standard.

[58] *See* 305 U.S. at 106-09. *See generally* text accompanying notes 35 and 42 *supra*.

[59] By elimination, the usual reasons given for the *Erie* rule—the avoidance of

izes a district court sitting as a diversity forum to a state court,[60] the policy of *Erie* may also compel adoption of the clearly erroneous standard of review for a district court's determination of state law.[61] Despite the *Waialua* rationale, the division and confusion among the circuits as to the proper standard for state issues continues to make the question appropriate for final resolution by the Supreme Court.

In addition to the unresolved standard of review in the Fourth Circuit, *Springer* raised another significant issue in the application of the *Erie* doctrine: the authority accorded potentially obsolete state decisions in a diversity action. The Supreme Court faced this question in *Bernhardt v. Polygraphic Co. of America*.[62] The substantive issue in *Bernhardt* was whether, under Vermont law, a party would be permitted unilaterally to disavow an agreement to arbitrate.[63] Decisions of the Vermont Supreme Court permitted revocation, and the district court so held.[64] Nevertheless, Mr. Justice Frankfurter, in a concurring opinion, contended that a federal court need not mechanically apply the state precedent.[65] Because of the nationwide acceptance of arbitration since that state supreme court had last spoken, he urged more vigorous scrutiny of the arbitration issue, even to the extent of possibly disregarding the relevant Vermont cases.[66] The

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forum-shopping and prevention of inequitable, divergent results—could not have supported the use of *Erie* policy in *Waialua*. Because in 1938 the federal court exercised appellate review over the Supreme Court of Hawaii, *see* note 56 *supra*, the *Erie* principle of uniformity would not have been transgressed by maintaining full review in *Waialua*. Also, forum-shopping was not even a possibility when the case was decided. Federal diversity jurisdiction did not cover controversies involving territorial citizens until 1940—two years after the *Waialua* decision. Munoz v. Porto Rico Ry. Light & Power Co., 83 F.2d 262, 266 (1st Cir.), *cert. denied*, 298 U.S. 689 (1936); Act of April 20, 1940, Pub. L. No. 76-463, ch. 117, 54 Stat. 143, *amending* 28 U.S.C. § 41(1) (1934).

[60] *E.g.*, Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 203 (1956); Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

[61] *Cf.* Lomartira v. American Auto. Ins. Co., 371 F.2d 550, 554 (2d Cir. 1967).

[62] 350 U.S. 198 (1956).

[63] *Id.* at 199-200.

[64] The district court in Bernhardt v. Polygraphic Co. of America, 122 F. Supp. 733, 734-35 (D. Vt. 1954), *rev'd on other grounds*, 218 F.2d 948 (2d Cir. 1955), *rev'd*, 350 U.S. 198 (1956), held that two state decisions were dispositive: Mead v. Owen, 83 Vt. 132, 74 A. 1058 (1910), and Sartwell v. Sowles, 72 Vt. 270, 48 A. 11 (1900). Closer analysis of these cases reveals that the Supreme Court of Vermont merely restated without discussion the decision of Aspinwall v. Tousey, 2 Tyler 328 (Vt. 1803). The federal court quite possibly bound itself to a rule which Vermont had not effectively reviewed for over a century and a half. *See* 350 U.S. at 209, 211-12 (Frankfurter, J., concurring).

[65] 305 U.S. at 208-12. Mr. Justice Frankfurter's concurring opinion was favorably cited by the Fourth Circuit in *Springer*. 510 F.2d at 471.

[66] One commentator has concluded that Justice Frankfurter's concurring opinion

Bernhardt majority did not accept the broader federal prerogative to examine state law which Mr. Justice Frankfurter's concurring opinion advocated,[67] approving the district court's application of the old state decisions.[68] In explaining its disposition of the case, the Court formulated certain indicia to measure the validity of obsolescent state decisions: the clarity of the case law, the absence of developing contrary authority, express doubts, or dicta undermining the rule embodied in the precedent, and the lack of legislative development to threaten its viability.[69]

Bernhardt rejected the widespread acceptance of arbitration, both as a current policy for efficiently settling contract disputes and as a general development of the law, as a source of law justifying departure from established state precedent.[70] The district court could have found that the Supreme Court of Vermont customarily favored policy arguments and important new developments in the law and willingly examined its own potentially archaic holdings in that light.[71] To some extent, therefore, *Bernhardt* limits the federal courts in ascertaining the posture of the state's highest court. As Mr. Justice Frankfurter's opinion illustrates, the indicia of the *Bernhardt* decision may not fully satisfy the uniformity objective of the *Erie* doctrine.

Nevertheless, *Bernhardt* is authority for federal courts to depart from earlier state precedent when one of the enumerated conditions is met. Examined against the *Bernhardt* indicia, North Carolina case law does include a dictum contrary to the district court's holding in *Springer*.[72] Moreover, the state cases do not evince a clear intention to create an exception to the rule of negligence per se for statutory violations.[73] Thus, according to the principles announced in

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suggested for the first time that a federal court sitting as a diversity forum had a greater role in ascertaining state law than the automatic application of all decisions from the state's highest court. Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 210 (1957) [hereinafter cited as Kurland].

[67] *Compare* 350 U.S. at 204-05 *with* 350 U.S. at 209-12 (Frankfurter, J., concurring).

[68] 350 U.S. at 204-05.

[69] *Id.* at 205.

[70] *Compare* 350 U.S. at 204-05 *with* 350 U.S. at 211-12 (Frankfurter, J., concurring). Similarly, in *Springer* the Fourth Circuit would have been precluded from finding that the national evolution of environmental policy since the 1930's rendered the *Hampton-Clinard* immunity obsolescent, if not obsolete.

[71] *See* 350 U.S. at 209-12 (Frankfurter, J., concurring).

[72] *But see* text accompanying note 44 *supra*.

[73] *See* Clinard v. Town of Kernersville, 215 N.C. 745, 3 S.E.2d 267 (1939); Hampton v. Town of Spindale, 210 N.C. 546, 187 S.E. 775 (1936).

Bernhardt, the Fourth Circuit could look beyond the face of the immunity announced in *Clinard* and *Hampton*. The court, however, did not regard the enactment of the ordinance allegedly violated by Schlitz as a development which undermined the North Carolina rule. Because the court represented *Clinard* and *Hampton* as limited holdings rather than obsolete cases,[74] it could not take advantage of the *Bernhardt* indicia, which were designed to assist federal courts in modifying or refusing to apply state precedent whose authority had lapsed.[75] Conceptually, the Fourth Circuit purportedly followed standard principles of stare decisis.

Examined on the basis of strict stare decisis, the Fourth Circuit simply refused to apply the North Carolina cases to their apparent breadth. The *Springer* court placed great reliance on a statutory violation by Schlitz. It harmonized its holding with earlier state precedent by relying on a dictum of apparent insignificance[76] from *Hampton*. Even assuming the reliance on such dictum was justified to qualify the scope of the North Carolina pollution immunity, its use of dicta was not evenhanded. The Fourth Circuit failed to discuss an equally important dictum from the *Hampton* decision which established an alternative rationale for the immunity. The state decision observed that pollution discharges treated by a municipal facility cannot be the proximate cause of injury.[77] Had the Fourth Circuit

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[74] *See* 510 F.2d at 471.

[75] *See* 350 U.S. at 204-05.

[76] *See* note 44 *supra*.

[77] The North Carolina Supreme Court in *Hampton* noted that the construction of discharge facilities by a private party is not the proximate cause of a water pollution nuisance. Rather, the proximate cause is the use of those facilities, which is solely the municipality's responsibility. 210 N.C. at 548, 187 S.E. at 776, *quoting* 9 RULING CASE LAW § 65 (1915) *and citing* Carmichael v. City of Texarkana, 116 F. 845 (8th Cir. 1902). *Carmichael* noted that the defendants, private users of city sewage facilities, "were improperly joined in this suit, not only because they were not jointly liable in damages with the city, *but also because their acts were not the proximate cause of the nuisance* . . . ." *Id.* at 851 (emphasis added). As well as support for the "proximate cause" dictum, *Carmichael* is a significant case. In *Springer*, the Fourth Circuit described *Carmichael* as the leading decision regarding the immunity of a municipal sewage system's users. 510 F.2d at 474. The Fourth Circuit itself relied on the case to support its use of independent contractor status as a benchmark for liability. 510 F.2d at 474-75. Although the "proximate cause" language is a dictum, it must be evaluated with reference to the holding and authority of *Carmichael*, which entitled it to more weight than the admitted dictum which the Fourth Circuit used to harmonize its holding in *Springer* with the North Carolina immunity. *See* note 44 *supra*.

By ignoring the "proximate cause" concept, the Fourth Circuit avoided expressly contradicting a prior state opinion. The Fourth Circuit, however, could have justified its disregard for the "proximate cause" dictum based on the evolution of tort law in

applied this dictum, it would have reached the opposite result: even if Schlitz had breached its duty of care to riparian owners by violating the statute and negligently locating its plant, the cause of action would fail for want of proximate causation.[78] The *Springer* opinion did not confront the literal scope of the pollution immunity, which excludes the loopholes the court purported to find.

Although the Fourth Circuit's representation of *Hampton* and *Clinard* as limited holdings amounted to an avoidance of the decisions, the North Carolina Supreme Court might have agreed with the circuit court's ultimate disposition in *Springer* by overruling or modifying the obsolescent case law.[79] Guided by the indicia *Bernhardt* announced for diversity cases, the Fourth Circuit also could have refused application of the obsolescent decisions. The approach the court elected to follow, however, is misleading, even though the result it reached may have been correct.

The Fourth Circuit's finesse in *Springer* may derive from the traditional reluctance of federal courts to question state decisions.[80] Because *Erie* requires federal courts to defer to state authorities on matters of state law in diversity cases, a federal court occupies an awkward position when it is the first tribunal to question antiquated state decisions.[81] On the other hand, if the federal court mechanically and unquestioningly applies the law of an obsolete decision, it transgresses the principle of uniformity by risking an anomalous result.[82] Although the Fourth Circuit's holding in *Springer* is inconsistent with state precedent, the court did not suggest that time had eroded the cases' validity. Yet by purporting to apply faithfully the law embodied in North Carolina decisions, the court avoided the sensitive issue

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North Carolina since *Hampton*. *See* Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962).

[78] The Fourth Circuit indicated in *Springer* that absence of proximate cause is fatal to a claim, irrespective of the negligent nature of the activity. *See* 510 F.2d at 472-73.

[79] *See* Carr v. Murrows Transfer, Inc., 262 N.C. 550, 554, 138 S.E.2d 228, 231 (1964), holding that an ordinance enacted for the protection and safety of the public creates a presumptive right in the general public not to be harmed by a violation. The Fourth Circuit could have viewed the municipal enactment as a partial overruling of the *Hampton-Clinard* immunity. *See generally* note 78 *supra*.

[80] Comment, *Federal Jurisdiction: Determination of State Law in Diversity Actions*, 45 CAL. L. REV. 87 (1957).

[81] *See* Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809, 823 (2d Cir.) (L. Hand, J., dissenting), *vacated sub nom.* Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944).

[82] If the federal court relies upon a case which would no longer be good law in the forum state, uniformity is destroyed. *See* cases cited in note 94 *infra*.

of federal-state relations under circumstances in which abstention was unavailable[83] and no certification provision existed to permit the North Carolina Supreme Court to review its prior decisions.[84]

As a means to avoid expressly refusing to apply[85] state precedent, the practice of overlooking inconsistencies and finding facile exceptions to case law is not new. At one time federal courts were bound to follow the decisions of any state court, not merely those of the highest state court.[86] As a result, the federal courts invented artificial

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[83] In *Springer*, the court could not avoid passing on the authority of state precedent. Assuming no federal constitutional question, a federal court may not abstain in a diversity action simply because the forum state's law is difficult to ascertain. County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959); Meredith v. City of Winter Haven, 320 U.S. 228 (1943). *See* HART & WECHSLER, *supra* note 49, at 998-1005; MOORE, *supra* note 37, ¶ 0.309[3]. However, when a case presents questions of state law related to a significant state interest, the court may stay its proceedings pending the outcome of a declaratory judgment action to determine the issue. Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593 (1968) (construction and state constitutionality of a state statute); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) (eminent domain by a municipality). An alternative to a stay pending declaratory judgment is available when the federal court certifies the question of state law to the state court of last resort pursuant to rules adopted by the state court or enacted by the state legislature. *See* note 84 *infra*.

[84] Some states have provided a means by which their supreme courts can receive certified questions from federal courts. *See* Uniform Certification of Questions of Law [Act] [Rule] in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 150 (1967), patterned after FLA. APP. R. 4.61 and 5 FLA. STAT. § 25.031 (West 1974). In the Fourth Circuit, only Maryland has enacted this provision. 2B MD. ANN. CODE art. 26, §§ 161-72 (Repl. vol. 1973).

In addition to clarifying the forum state's law, these certification provisions can help a federal court when it must, under the *Erie* doctrine, apply the law of another state under the conflicts of law principles of the forum state. *See generally* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); WRIGHT, *supra* note 5, § 57. The Supreme Court has endorsed the practice of certification in such circumstances. Lehman Bros. v. Schein, 416 U.S. 386 (1974). *See* Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960).

Aside from the advantages in a diversity action, certification provisions would provide relief for three-judge district courts convened to consider the constitutionality of a state statute. Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 490 n.44 (1960); Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 361-62 (1963). *See generally* ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 282-98 (1969).

[85] The federal courts could not *overrule* state precedent because they lack the authority. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[86] WRIGHT, *supra* note 5, § 58 at 236-38. MOORE, *supra* note 37, ¶ 0.309[1]. In its 1940 term the Supreme Court handed down a series of cases espousing this principle. One particular case in the group, Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940), has received special notoriety. The Supreme Court held binding in the federal

distinctions to emasculate lower state court precedent and thereby exercise a measure of independent judgment.[87] Similarly, prior to *Bernhardt* federal courts presumed an inability to question precedent from state courts of last resort, regardless of how antiquated.[88]

As the *Erie* doctrine evolved, the Supreme Court made inroads into these mechanical rules.[89] The Court established that decisions of state trial and intermediate appellate courts are only persuasive—not decisive—authority in the search to ascertain state law.[90] In its *Bernhardt* decision the Supreme Court further declared that federal courts are not bound to adhere inflexibly to all decisions by a state's highest court.[91] While the practical effect of the *Bernhardt* holding may have been to vitalize an arguably obsolete doctrine, its language signals a more extensive role for the federal judiciary in construing state law. The decision mandates a fuller look at state precedent to determine its current validity.[92] Although once thought to demand the automatic application of all state cases, the *Erie* doctrine no longer embraces obsolete or otherwise unauthoritative decisional law.

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court what Professor Hart described as "an obviously unsound decision" of a state trial court. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 510 (1954). *See* WRIGHT, *supra* note 5, § 58 at 236-37; Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 290-95 (1946); Corbin, *The Laws of the Several States*, 50 YALE L.J. 762, 775 (1941); Note, *The Ascertainment of State Law in a Federal Diversity Case*, 40 IND. L.J. 541, 546-47 (1965). This line of cases provoked Judge Frank's remark that *Erie* compelled federal courts "to play the role of ventriloquist's dummy to the courts of some particular state . . . ." Richardson v. Commissioner, 126 F.2d 562, 567 (2d Cir. 1942). *See generally* Kurland, *supra* note 66, at 214.

[87] Keeffe, Gilhooley, Bailey & Day, *Weary Erie*, 34 CORNELL L.Q. 494, 517-18 (1949).

[88] Comment, *Federal Jurisdiction: Determination of State Law in Diversity Actions*, 45 CAL. L. REV. 87 (1957). *See* Kurland, *supra* note 66, at 210. In 1945 Judge Clark complained that the *Erie* doctrine restricted the truly judicial quality of federal courts by compelling adoption of "wooden precedent" which may no longer be current. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 290-95 (1946).

[89] By 1948 the Supreme Court had begun a retreat from its rigorous position. *See* King v. Order of United Commercial Travelers, 333 U.S. 153 (1948).

[90] Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967) (dictum). WRIGHT, *supra* note 5, § 58 at 239. *But see* Comer v. Texaco, Inc., 514 F.2d 1243 (5th Cir. 1975) (per curiam); *cf.* Gooding v. Wilson, 405 U.S. 518, 525-26 n.3 (1972) (a non-diversity case).

[91] 350 U.S. at 204-05.

[92] Professor Wright reads *Bernhardt* as allowing broad discretion to re-evaluate obsolescent precedent. WRIGHT, *supra* note 5, § 58 at 238. *See also* Kurland, *supra* note 66, at 211-12 n.120; Note, *Unclear State Law in the Federal Courts: Appellate Deference or Review?*, 48 MINN. L. REV. 747, 754-55 (1964).

To achieve the *Erie* goals of uniform justice and prevention of forum-shopping, a federal court should disregard precedent by the highest court of the forum state when it appears that the state court itself would modify or overrule that precedent.[93] Indeed, some federal courts have begun to recognize an obligation to scrutinize cases which are potentially obsolete and reject those of lapsed validity.[94] Today a federal court need no longer resort to judicial gymnastics to avoid applying state case law which it believes to be archaic or less comprehensive than when declared.[95]

The *Springer* decision epitomizes problems concerning the *Erie* doctrine which the Fourth Circuit has evaded or ignored. Purporting to follow stare decisis and refusing to address the literal breadth of state precedent, *Springer* fails to guide the district courts of the Fourth Circuit in evaluating potentially obsolete law. The opinion

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[93] Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 31 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); Warner v. Gregory, 415 F.2d 1345, 1346 (7th Cir. 1969), *cert. denied*, 397 U.S. 930 (1970); Walton v. Arabian Am. Oil Co., 233 F.2d 541, 543 (2d Cir. 1956); M.A.S., Inc. v. Van Curler Broadcasting Corp., 357 F. Supp. 686 (D.D.C. 1973); United Fed. Sav. and Loan Ass'n v. Nones, 283 F. Supp. 638, 640 (D.P.R. 1968). A federal court should not, however, depart from state precedent for the purpose of implementing its own notions of what the law ought to be. *E. g.*, James v. United States, 467 F.2d 832, 833 (4th Cir. 1972); Kline v. Wheels by Kinney, Inc., 464 F.2d 184, 187 (4th Cir. 1972). *Erie* commands a detached appraisal of state law epitomized by the doctrine of legal positivism: to ascertain what the law is rather than what the law ought to be. *Compare* Erie R.R. v. Tompkins, 304 U.S. 64 (1938), *with* E. BODENHEIMER, JURISPRUDENCE §§ 24-27 (rev. ed. 1974).

[94] Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956); Grey v. Hayes-Sammons Chem. Co., 310 F.2d 291 (5th Cir. 1962), *discussed in* Comment, 17 ARK. L. REV. 225 (1963); Mason v. American Emery Wheel Works, 241 F.2d 906 (1st Cir.), *cert. denied*, 355 U.S. 815 (1957), *discussed in* Comment, *Application of Erie Rule Permits Federal Court to Disregard State Holding in Favor of Subsequent Dictum*, 106 U. PA. L. REV. 924 (1958); Galella v. Onassis, 353 F. Supp. 196 (S.D.N.Y. 1972), *aff'd as to state law*, 487 F.2d 986 (2d Cir. 1973); Caporossi v. Atlantic City, 220 F. Supp. 508 (D.C.N.J. 1963), *aff'd*, 328 F.2d 620 (3d Cir.) (per curiam), *cert. denied*, 379 U.S. 825 (1964). *See* Winston Corp. v. Continental Cas. Co., 508 F.2d 1298 (6th Cir.), *cert. denied*, 44 U.S.L.W. 3238 (U.S. Oct. 21, 1975); Shealy v. Challenger Mfg. Co., 304 F.2d 102 (4th Cir. 1962), *discussed in* Comment, *Federal Jurisdiction—Diversity Action—Federal Court Determining State Law*, 43 B.U.L. REV. 409, 413 (1963). *But see* Waltham Precision Instrument Co. v. McDonnell Aircraft Corp., 310 F.2d 20 (1st Cir. 1962), *discussed in* Comment, *Federal Jurisdiction—Diversity Action—Federal Court Determining State Law*, 43 B.U.L. REV. 409 (1963).

[95] As Professor Corbin urged, the federal forum should "use its judicial brains, not a pair of scissors and a paste pot." Corbin, *The Laws of the Several States*, 50 YALE L.J. 762, 775 (1941). *See also* Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964). Judge Friendly suggests that Justice Frankfurter's *Bernhardt* concurrence conforms to Corbin's views of "finding" state law. *Id.* at 401.