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A Nondeferential Standard for Appellate Review of State Law Decisions by Federal District Courts

A NONDEFERENTIAL STANDARD FOR APPELLATE REVIEW OF STATE LAW DECISIONS BY FEDERAL DISTRICT COURTS

The Rules of Decision Act[1] requires federal courts to apply state law in cases that do not arise under the Constitution, treaties, or statutes of the United States.[2] When a party appeals a federal district court's interpretation of state law to a federal circuit court of appeals, most federal appellate courts traditionally have deferred to the district court's interpretation.[3] In *In re McLinn,*[4] the United States Court of Appeals for the Ninth Circuit, in a rehearing en banc, recently considered whether deference to the federal district court's interpretation of state law is proper.[5]

In re McLinn was a wrongful death and personal injury suit arising from the collision of two skiffs near Kodiak Island, Alaska.[6] One man died and another received injuries as a result of the collision.[7] The decendent's father and the injured man brought suit in admiralty in the United States District Court for the District of Alaska against the owners and operators of the two skiffs and the owners and operator of a third skiff.[8] At the time of the

1. 28 U.S.C. § 1652 (1982) (Rules of Decision Act). The Rules of Decision Act states that "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." *Id.*

2. *Id.; see* Comm'r of Internal Revenue v. Stern, 357 U.S. 39, 45 (1958) (federal courts must apply law of state when adjudication concerns state-created rights, obligations and liabilities).

3. 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4507 at 106-07 (1982).

4. 739 F.2d 1395 (9th Cir. 1984) (en banc).

5. *Id.* at 1397. The panel of three judges that originally heard *In re McLinn* requested an en banc determination of the appropriate standard of review because the judges found that the standard of review was the controlling issue in the case. *Id.; see infra* note 14 (explaining dispositive role of standard of review in *McLinn).*

6. 739 F.2d at 1397. The three skiffs in *McLinn* were all operating without lights at speeds in excess of a local speed limit when two of the skiffs collided in the early hours of June 30, 1979. *In re* McLinn, 744 F.2d 677, 679-80 (9th Cir. 1984). Although only two skiffs collided, at the time of the accident a third skiff was escorting one of the skiffs that collided. *Id.*

7. 744 F.2d at 679. Patrick Churchill died as a result of the collision that formed the basis for the suit in *McLinn. Id.* Dale Carlough received injuries in the accident. *Id.* Both men were passengers in the McLinn skiff. *Id.*

8. *Id.* at 680. In *McLinn,* the McLinn skiff belonged to the fishing vessel Fjord. *Id.* William McLinn owned both the skiff and the Fjord. *Id.* At the time of the accident, McLinn's son Russell was operating the skiff. *Id.* The McLinn skiff collided with a skiff that the defendant Panamaroff was operating. *Id.* at 679. Michael Chichenoff, a friend of Panamaroff, was operating a third skiff which served as an escort to the Panamaroff skiff, because the Panamaroff skiff was experiencing engine trouble. *Id.* at 679-80. The Chichenoff skiff did not collide with either of the other skiffs. *Id.* at 680. Gilbert and Jack Johnson owned the Chichenoff skiff, which belonged to the Johnsons' fishing vessel Supersonic. *Id.* The plaintiffs Churchill and Carlough brought suit against the McLinns, the Johnsons, Panamaroff and Chichenoff. *Id.*

accident, the third skiff had been escorting one of the two craft that collided.[9] The plaintiffs also brought suit against the fishing vessels to which the skiffs belonged.[10]

The owners of the escort skiff moved for summary judgment on both their own liability and the liability of their fishing vessel.[11] The district court granted the motion for summary judgment and the plaintiffs appealed the decision to the Ninth Circuit.[12] A three judge panel heard the appeal.[13] The panel determined that the outcome of the *McLinn* case depended on whether the appellate court applied a deferential standard of review to the district court's determination of state law or decided the state law issue de novo without any deference to the district court's decision.[14] The Ninth Circuit panel then requested a rehearing en banc to determine the appropriate standard of review.[15] In the en banc opinion in *McLinn* the Ninth Circuit

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9. *Id.* at 679-80.

10. *Id.* The plaintiffs in *McLinn* brought suit in rem against the fishing vessels Fjord and Supersonic. *Id.; see supra* note 8 (explaining relationship between parties, skiffs, and fishing vessels in *McLinn).* Through an action in rem, a plaintiff can receive execution of the plaintiff's maritime lien which arises at the moment of injury and attaches to the *res* causing the harm. 7A J. MOORE & A. PELAEZ, MOORE'S FEDERAL PRACTICE ¶ C.03 at 612 (1983).

11. 744 F.2d at 680. In *McLinn,* the owners of the escort skiff moved for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. *See id.;* FED. R. CIV. P. 56(b). Rule 56(b) entitles a defendant to a judgment in defendant's favor without proceeding through a trial on the merits when no genuine issue exists concerning any material fact and applicable law authorizes judgment for defendant. FED. R. CIV. P. 56(b).

12. 744 F.2d at 680.

13. 739 F.2d at 1397.

14. *Id.* The issue whether the district court in *McLinn* should have granted summary judgment depended upon the proper interpretation of the Alaska Owner Responsibility Statute. 744 F.2d at 681; FED. R. CIV. P. 56(b); *see* ALASKA STAT. § 05.25.040 (1981). The Alaska statute assigns liability to the owner of a watercraft for injuries caused by the craft's negligent operation. ALASKA STAT. § 05.25.040 (1981). A vessel must be "devoted to recreational pursuits," in order to constitute a "watercraft" within the meaning of the statute. ALASKA STAT. § 05.25.100(4) (1981).

The district court in *McLinn* determined that the Alaska Owner Responsibility Statute did not apply to commercial fishing vessels because commercial vessels were not devoted to recreational pursuits. *See* 744 F.2d at 781. Thus, the owners of the escort skiff could not be found liable under the statute because the skiff was a commercial vessel. *Id.* The plaintiffs, however, argued that the Owner Responsibility statute created liability in the owner of any vessel being used for recreation at the time of an accident. *See id.* at 682. The plaintiffs contended that the owners of the escort skiff were liable under the statute because the operator of the escort skiff was using the skiff for recreational purposes at the time of the collision. *Id.* The Ninth Circuit panel determined that the plaintiffs' proposed interpretation of the statute was only slightly more plausible than the meaning that the district court had attributed to the statute. *See id.* at 683. Consequently, under a deferential standard of review, the Ninth Circuit would affirm the district court's grant of summary judgment, but if the circuit court construed the statute independently, as the circuit court would do under a de novo standard of review, the Ninth Circuit would reverse the grant of summary judgment and remand the case for trial to the district court. *See id.;* 739 F.2d at 1397.

15. 739 F.2d at 1397.

recognized that in the past appellate courts ordinarily had deferred to a district court's interpretation of state law unless that interpretation was clearly wrong.[16] As a general rule, however, federal appellate courts exercise independent plenary review of a federal district court's legal findings.[17] The *McLinn* court reasoned, therefore, that an appeal on an issue of state law should entitle parties to the same de novo review that federal appeals courts accord to issues of federal law.[18]

The Ninth Circuit noted in *McLinn* that the structural differences between federal appellate courts and district courts demonstrate that de novo review is the appropriate standard of review for district court determinations of both federal law and state law.[19] The Ninth Circuit emphasized that appellate courts do not hear evidence and therefore appellate courts are free to concentrate on the legal issues.[20] Another structural difference between circuit courts of appeal and district courts is that three judges hear each case at the appellate level, whereas a single judge presides in district court.[21] The Ninth Circuit explained that the increased number of judges reduces the risk

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16. *Id.* at 1398; *see* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2588 at 750 (1971) (federal trial court's determinations on questions of law are reviewable without limitation).

17. 739 F.2d at 1397; *see* Jablonski By Pahls v. United States, 712 F.2d 391, 397 (9th Cir. 1983) (Ninth Circuit will uphold construction of state law by federal district court unless district court's construction is clearly wrong). The deference that federal circuit courts have traditionally accorded to federal district court determinations of state law which are not "clearly wrong" has resulted in confusion because of the similarity between the phrases "clearly wrong" and "clearly erroneous." *See* 1A J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, MOORE'S FEDERAL PRACTICE § 309[2] at 3128 n.28 (1983). Appellate courts apply the "clearly wrong" standard in reviewing district courts' state law interpretations while appellate review of a trial court's factual findings requires use of the "clearly erroneous" standard. WRIGHT, MILLER & COOPER, *supra* note 3, at 106-10; *see* FED. R. CIV. P. 52(a) (trial court's findings of fact must not be set aside on review unless findings are clearly erroneous). Scholars in the law of procedure agree that since state law matters are questions of law, courts should not review district courts' state law decisions under the clearly erroneous standard which applies to questions of fact. WRIGHT, MILLER & COOPER, *supra* note 3, at 106-10; MOORE, *supra,* at ¶ 0.309[2] at 3127-28 n.28 (1983). Although the *McLinn* majority and dissent agreed that the Ninth Circuit should cease using the "clearly wrong" standard of review, the majority and dissent disagreed on whether any deference to the district court's determinations of state law was appropriate. *See* 739 F.2d at 1402.

18. *See* 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 52.03[2] n.1; Bose Corp. v. Consumers Union of the U.S., Inc., ____U.S.____, 104 S. Ct. 1949, 1959-60 (1984) (de novo appellate review of federal district court's legal conclusions was proper though clearly erroneous standard of review governed factual determinations); Stevenot v. Norberg, 210 F.2d 615, 619 (9th Cir. 1954) (appellate court is free to draw own conclusions regarding legal effect of district court's factual findings).

19. 739 F.2d at 1398.

20. *Id.; see* 9 WRIGHT & MILLER, *supra* note 16, § 2585 at 732 (appeals court does not consider evidence de novo).

21. 739 F.2d at 1398; *see* Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 345 U.S. 247, 254 (1953) (circuit courts of appeals traditionally have three-judge panels).

of error at the appellate level.[22] In addition to noting that an appellate court enjoys a larger bench and the freedom from hearing evidence, the Ninth Circuit also reasoned that because a federal appellate court's decisions have precedential impact on state law issues, a nondeferential standard of review is appropriate.[23] The *McLinn* court concluded that the precedential importance of federal appeals courts' opinions regarding state law confers a weighty responsibility on the courts of appeals to give de novo review to all legal decisions of the federal district courts.[24]

Despite all of the factors favoring a de novo standard for appellate review of district courts' state law determinations, the Ninth Circuit noted in *McLinn* that appellate courts customarily have given only one reason for applying a deferential standard of review.[25] The traditional justification for the deferential standard of review of state law determinations is that a federal district judge is more likely than a federal appellate judge to have practiced law in the state, and thus, the district judge generally is more familiar with state law.[26] The Ninth Circuit in *McLinn,* however, criticized this traditional justification, noting that a district court judge should be able to articulate the basis for the judge's interpretation of state law by reference to legislative materials, commentaries on the law, and judicial opinions.[27] The *McLinn* majority[28] further stated that reliance on the district judge's experience transfers attention from the basis of the decision to the judge's biography.[29]

The Ninth Circuit in *McLinn* supported its position that the federal court

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22. 739 F.2d at 1398; *see* F. COFFIN, THE WAYS OF A JUDGE 1, 58 (1980) (three judges are likely to provide decision superior to decision of a single judge).

23. 739 F.2d at 1401-02. When no state court has ruled on the meaning of a state statute, a federal district court will follow the construction of a federal circuit court of appeals in attempting to determine the proper interpretation of the state statute. MOORE, *supra* note 17, ¶ 0.309(2) at 3122, 3123 n.19.

24. 739 F.2d at 1401-02.

25. *Id.* at 1399; *see* 9 WRIGHT & MILLER, *supra* note 16, at 752 (federal appellate courts often accord deference to district court determinations of state law because of district judge's expertise in state law).

26. *Id.;* C. WRIGHT, FEDERAL COURTS § 58 at 271 (3d ed. 1976) (federal district judges generally are more familiar than federal appellate judges with state law); *see* Note, *Deference to Federal Circuit Court Interpretations of Unsettled State Law:* Factors Etc., Inc. v. Pro Arts, Inc., 1982(4) DUKE L.J. 704, 711 (rationale for federal appellate court's deference to district court's interpretation of state law is district judge's experience with state law, which appellate judge may lack).

27. 739 F.2d at 1400.

28. *Id.* The *McLinn* majority included six of the eleven Ninth Circuit judges who made up the en banc panel. Id. at 1397 & 1403. The remaining five judges joined in a dissent. *Id.* at 1403; *see infra* notes 34-53 and accompanying text (discussion of dissenting opinion in *McLinn).*

29. 739 F.2d at 1400. The majority in *McLinn* criticized the policy of deference to district courts' determinations of unsettled state law based on a district court judge's experience with state law because, according to the majority, such a rationale relies on personal characteristics which the record does not reveal. *Id.* The majority also decried as both inefficient and improper the resulting tendency to place the judge's experience in issue in determining whether an appellate court should defer to a district court. *Id.*

system requires full de novo review at the circuit court level by citing United States Supreme Court cases in which the Court declined to review state law issues.[30] In the Supreme Court cases cited by the Ninth Circuit, however, the Court deferred to the appellate court's decision, rather than the district court's determination of the state law issues.[31] Although the Supreme Court has the option of declining review of a federal district court's state law determinations because review has already taken place at the appellate level, federal courts of appeals must review state law issues de novo because the appellate courts are charged with providing initial review of all legal questions.[32] The *McLinn* majority viewed a de novo standard of appellate review as essential to the federal court system as a whole, since plenary review of state legal questions in the circuit court permits the Supreme Court to conserve the Court's resources for questions of national scope.[33]

The *McLinn* dissent disagreed with the majority view that a nondeferential standard of review of state law determinations was necessary to preserve the parties' rights of review.[34] Although the dissent agreed that federal appeals courts must exercise de novo review of all legal issues, the dissent stated that appellate courts could exercise de novo review of all legal issues and still defer to the determination of the district court on state law issues.[35] The dissent cited the decision of the United States Court of Appeals for the Eighth Circuit in *Luke v. American Family Mutual Insurance Co.*[36] as an example of a case in which a federal appeals court saw no conflict between the responsibility of an appellate court to review all questions of law and the adoption of a deferential standard of review for district court determinations of state law.[37]

In *Luke,* the Eighth Circuit considered whether to give deference to an interpretation of South Dakota law by the United States District Court for the District of South Dakota.[38] Specifically, the district court had held that

30. *Id.* at 1399; *see* Butner v. United States, 440 U.S. 48, 58 (1979) (Court declined to review decision of Fourth Circuit reversing United States District Court for Western District of North Carolina on unsettled issue of North Carolina law); Runyon v. McCrary, 427 U.S. 160, 181 (1976) (Court upheld Fourth Circuit's affirmation of decision by United States District Court for Eastern District of Virginia regarding Virginia law issue).

31. *See* Butner v. United States, 440 U.S. 48, 58 (1979) (Court deferred to Fourth Circuit's decision reversing district court's determination of North Carolina law); Runyon v. McCrary, 427 U.S. 160, 181 (1976) (Court deferred to Fourth Circuit rather than district court in declining to review Fourth Circuit's affirmation of district court's Virginia law interpretation).

32. 739 F.2d at 1399-1401; *see* 28 U.S.C. § 1291 (1982) (granting jurisdiction to courts of appeals over final decisions of district courts); *infra* notes 82-84 and accompanying text (rationale that conservation of judicial resources requires deference to district court determinations of state law applies to Supreme Court but not to federal appellate courts).

33. 739 F.2d at 1399-1400.

34. *Id.* at 1404.

35. *Id.*

36. 476 F.2d 1015 (8th Cir. 1973).

37. 739 F.2d at 1406; *see* Luke v. American Family Mut. Ins. Co., 476 F.2d 1015, 1019 n.6.

38. 476 F.2d at 1019, n.6.

under South Dakota law an insurance company's good faith refusal to defend a claim against an insured was a valid defense to the insured's subsequent action against the insurance company.[39] The *Luke* court noted that in prior cases the Eighth Circuit had stated that the district court's interpretation of a matter of state law bound the court of appeals.[40] The Eighth Circuit noted, however, that commentators on the law of procedure had criticized the rule that a federal trial court's state law decision bound the federal appellate court.[41] The Eighth Circuit in *Luke* acknowledged that although a federal court of appeals has a duty to review a district court's determinations of state law, the appellate court may give great weight to the trial court's opinion on state law issues.[42] Based on *Luke* and other supporting decisions, the *McLinn* dissent found no conflict between a federal appellate court's duty to review issues of law and the need to give deference to the trial court's construction of state law.[43]

The *McLinn* dissent also viewed as legitimate the traditional acknowledgment accorded to a district court judge's experience with matters of state law.[44] As an indication of district court judges' greater familiarity with state

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39. *Id.* at 1018-22. In *Luke v. American Family Mut. Ins. Co.*, the insured held an American Family Mutual policy that provided for coverage of a newly-acquired car without an additional premium only if American Family Mutual provided coverage for all other cars that the insured owned. *Id.* at 1017. At the time of the accident involving the insured's newly-acquired car, the insured held title to a car which was not operable and for which the insured had not purchased insurance. *Id.* at 1017-18. Therefore, American Family Mutual refused to defend a claim against the insured arising from an accident involving the insured's new car. *Id.* The insured brought suit against American Family Mutual for failing to settle within the limits of the policy. *Id.* The trial court found that although American Family Mutual had an obligation to defend the claim, the Company acted in good faith in failing to defend and to settle the claim. *Id.* at 1018.

40. *Id.* at 1019, n.6.

41. *Id.* Legal scholars have criticized the rule that some federal circuit courts of appeals have applied, which gives the state law decisions of a federal district court binding effect on the federal appellate court. *See* MOORE, *supra* note 17, ¶ 0.309[2] at 3128 n.28; C. WRIGHT, LAW OF FEDERAL COURTS, *supra* note 26, § 58 at 271.

42. 476 F.2d at 1019 n.6. The United States Court of Appeals for the Eighth Circuit in *Luke* chose to follow the rule of the Fifth Circuit, which calls for review of the trial court's state law decisions in the same manner as any other legal determination, yet gives great weight to the trial court's opinion. *Id.; see* Freeman v. Continental Gin Co., 381 F.2d 459, 466 (5th Cir. 1967) (expressing Fifth Circuit's policy toward review of district court determinations of state law).

43. 739 F.2d at 1404. Many federal courts of appeals have stated that a federal district court's determination of state law is entitled to "great weight." *E.g.*, O'Brien v. Heggen, 705 F.2d 1001, 1005 (8th Cir. 1983); Lamb v. Briggs Mfg., A Div. of Celotex Corp., 700 F.2d 1092, 1094 (7th Cir. 1983), Avery v. Maremont Corp., 628 F.2d 441, 446 (5th Cir. 1980). Other federal circuit courts have used the phrase "substantial deference" to define the appropriate standard of review for a district court's determinations of state law. *E.g., In re* Big River Grain, Inc., 718 F.2d 968, 970 (9th Cir. 1983); Caspary v. Louisiana Land and Exploration Co., 707 F.2d 785, 788 n.5 (4th Cir. 1983); Renfroe v. Eli Lilly & Co., 686 F.2d 642, 648 (8th Cir. 1982).

44. *Id.* at 1405; *see* 19 WRIGHT, MILLER & COOPER, *supra* note 3, § 4507 at 106-07 (district

law, the dissent observed that while a federal district judge sits within a single state, the Ninth Circuit embraces nine states.[45] The dissent also noted that the Supreme Court traditionally has relied on the greater state law experience of lower court judges in declining to review matters of state law.[46]

Following the rationale that a federal appellate court should defer to a district court judge's greater state law experience, a number of federal circuit courts of appeal have stated that an appellate court should accept the decision of a federal district court concerning state law unless the decision is clearly wrong.[47] The *McLinn* dissent conceded that federal appellate courts' use of a "clearly wrong" standard of review of federal district courts' state law decisions had generated considerable confusion.[48] Since the phrase "clearly wrong" is so similar to the "clearly erroneous" standard which governs review of district courts' factual determinations, the "clearly wrong" phrase appears to preclude de novo review of state law issues by appellate courts.[49] The dissent in *McLinn* nevertheless asserted that courts of appeals for the most part had not abdicated their responsibility to review the validity of district courts' conclusions regarding state law.[50]

The *McLinn* dissent concluded that the majority's rejection of a deferential standard of review would reduce the incentive to district court judges to elucidate their state law decisions because the circuit court's independent

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judge's experience with state law is traditional justification for federal appellate court's deference to district judge's opinion on matters of state law).

45. 739 F.2d at 1405.

46. *Id.* at 1406 (citing United States v. Durham Lumber Co., 363 U.S. 522, 527 (1960)). In *United States v. Durham Lumber,* the appellant challenged the Fourth Circuit's affirmation of a decision by the United States District Court for the Middle District of North Carolina on an issue of North Carolina law. *Id.* at 526. The Supreme Court stated that the Court generally was unwilling to disturb the state law interpretations of federal courts skilled in the law of particular states. *Id.* at 526-27. Therefore, the Court would not reverse the Fourth Circuit, since the appellate court was "closer" than the Supreme Court to North Carolina law. *Id.* The *McLinn* dissent viewed the Supreme Court's decision in *Durham Lumber* as legitimizing deference to a federal district court's determination of state law because a district judge is "closer" to state law than a circuit judge is. *See* 739 F.2d at 1406.

47. *See, e.g.,* Chavez v. Kennecott Copper Corp., 547 F.2d 541, 543 (10th Cir. 1977) (district court's interpretation of state law stands unless interpretation is clearly erroneous); United States v. Pollard, 524 F.2d 808, 810 (9th Cir. 1975) (appellate court will not overturn district court on state law construction unless construction is clearly wrong); Lee Shops, Inc. v. Schatten-Cypress Co., 350 F.2d 12, 17 (6th Cir.) (only question on appeal of district court decision on state law matter is whether district court reached permissible decision), *cert. denied,* 382 U.S. 980 (1965).

48. 739 F.2d at 1405-06; *see supra* note 17 (explaining confusion of "clearly wrong" standard of review for federal district courts' state law determinations with "clearly erroneous" standard of review for trial courts' factual findings).

49. 739 F.2d at 1404; *see* 19 WRIGHT, MILLER & COOPER, *supra* note 3, § 4508 at 106-10 ("clearly erroneous" standard accords too much significance to trial court's determination of state law, since parties have right to meaningful review on appeal).

50. 739 F.2d at 1404.

review would make thorough explanation by the trial court superfluous.[51] The dissent characterized the majority's holding in *McLinn* as affording no consideration to the district court's decisions on state law.[52] Further, the dissent noted that appeals would increase because of the greater likelihood of a reversal under the new standard of review.[53]

Although the *McLinn* court was divided in its opinion regarding the effect of a nondeferential standard of review of district courts' determinations of state law in the federal court system, the majority and the dissent agreed that the right of appeal demands that federal courts of appeal review state legal issues de novo.[54] Similarly, the majority and dissent agreed that de novo review is inconsistent with the "clearly wrong" standard of review that the Ninth Circuit often has applied in the past.[55] The central issue on which the dissent and majority disagreed was whether an appellate court may defer to the district court's interpretation of state law.[56]

The traditional argument in favor of deference to the district court on matters of interpretation of state law is that district court judges are more familiar with the law of the state in which they sit.[57] Prior to appointment to the bench, a district court judge usually has practiced law within the state where the district is located.[58] Federal appellate judges are slightly less likely

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51. *Id.* The *McLinn* majority disagreed with the dissent's contention that district court judges would devote less effort to construing state law under a nondeferential standard of review. *Id.* at 1403. According to the majority, the nondeferential standard of review does not dissuade district judges from vigorously pursuing the proper construction of federal law, although appellate courts do not accord deference to district judges' constructions of federal law on review. *Id.* at 1397 & 1403. Therefore, the majority saw no reason to anticipate that district judges would reduce efforts to construe state law under the nondeferential standard of review. *Id.*

52. 739 F.2d at 1404. The *McLinn* majority disputed the *McLinn* dissent's statement that the majority's refusal to defer to the district court gave no consideration to the district court's construction of state law. *Id.* at 1403. The majority stated that the Ninth Circuit would thoroughly consider the reasoning of a district court on matters of state law just as any federal court of appeals considers a district court's reasoning on matters of federal law. *Id.*

53. *Id.* at 1406. The *McLinn* dissent asserted that the majority's nondeferential standard of review of district court determinations of state law would create more work for the Ninth Circuit because the new standard would encourage appeals due to the increased likelihood of reversal on state law issues. *Id.* The majority, however, considered the conservation of judicial resources an insufficient justification for retaining a deferential standard of review. *Id.* at 1398. The majority reasoned that the parties' right to complete review of legal questions dictated a nondeferential de novo standard of review for district court determinations of both state and federal law matters. *Id.*

54. *Id.* at 1401, 1402 & 1404.

55. *Id.* at 1400 & 1405.

56. *Id.* at 1401 & 1402.

57. *See* 19 WRIGHT, MILLER & COOPER, *supra* note 3, § 4507 at 106 (federal district judge's experience with law of state in which district is located is rationale for appellate deference to district court determination of state law).

58. 739 F.2d at 1405; *see* Note, *supra* note 26, at 711 (district judge usually has practiced law in state where district is located).

to have practiced law in the circuit prior to their appointment.[59] Once on the bench, however, a federal appellate judge spends a smaller percentage of time than does a district judge resolving state law matters from any one state, because each circuit encompasses several states.[60]

The Supreme Court occasionally has referred to the state law experience of the lower court judges as a reason for the Court's refusal to disturb the rulings of the lower courts.[61] The Court traditionally has not deferred to a federal district court ruling on a state law issue, however, if the appellate court has not concurred in the judgment.[62] In contrast, in *Bernhardt v. Polygraphic Co.*,[63] the Court deferred to the judgment of the federal district judge concerning the interpretation of a state law issue, and remanded the case to the district court rather than to the court of appeals.[64]

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59. *See* W. DORNETTE & R. CROSS, FEDERAL JUDICIARY ALMANAC (1984) (3 of 23 Ninth Circuit judges in 1984 had no bar or bench experience in any state within circuit prior to appointment to circuit court).

60. *See* Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 285 (2d Cir. 1981) (Mansfield, J., dissenting). Judge Mansfield, in his dissent in *Factors Etc. v. Pro Arts, Inc.*, asserted that a federal court of appeals usually will not develop expertise in the law of any state because diversity suits, which require the application of state law, are typically only a small percentage of the cases that come before a court of appeals. *Id.* Mansfield noted that in 1980, diversity suits accounted for only 12.5% of the cases before all the federal courts of appeals. *Id.* For the Sixth Circuit in 1980, only 11.6% of the appeals that the court heard were diversity suits, and that 11.6% required the court to apply the law of the seven different states within the circuit. *Id.*

61. *See, e.g.*, Bishop v. Wood, 426 U.S. 341, 345 (1976) (Supreme Court noted state law experience of North Carolina federal district judge in Court's decision to leave holding below undisturbed); United States v. Durham Lumber Co., 363 U.S. 522, 527 (1960) (Court hesitates to overrule state law decisions by lower federal courts skilled in law of particular states); Propper v. Clark, 337 U.S. 472, 486-87 (1949) (same); Estate of Spiegel v. Comm'r, 335 U.S. 701, 707 (1949) (Court noted Illinois law experience of Seventh Circuit judge as factor in Court upholding decision below); Helvering v. Stuart, 317 U.S. 154, 163 (1942) (Court declined to overturn Seventh Circuit on Illinois law determination when judge with considerable legal experience in Illinois participated in decision and circuit included Illinois); MacGregor v. State Mutual Life Assurance Co., 315 U.S. 280, 281 (1942) (when no Michigan court decision on issue existed, Court deferred to decision by federal district judge within Michigan and three Sixth Circuit judges whose circuit included Michigan).

62. *See* Bishop v. Wood, 426 U.S. 341, 345-46, 346 n.10 (1976). Although the Supreme Court in *Bishop v. Wood* referred to the North Carolina legal experience of the district judge, the Court also noted that the Fourth Circuit had concurred with the district court. *Id.* In *Durham Lumber Co.*, the Supreme Court referred generally to the state law experience of the lower federal courts, but throughout the Court's opinion are references to the federal appellate court opinion rather than the district court opinion. United States v. Durham Lumber Co., 363 U.S. 522, 526-27 (1960); *see supra* note 46 (discussing United States v. Durham Lumber Co.). Similarly, in *Propper v. Clark*, though the Court referred generally to the state law experience of the lower federal court judges, the *Propper* Court also stated that the Court relied on the circuit court's determination of the state law issue. Propper v. Clark, 337 U.S. 472, 486-87 & 490 (1949).

63. 350 U.S. 198 (1956).

64. *Id.* at 204-05.

In *Bernhardt,* a Vermont plaintiff brought suit against a New York defendant for breach of an employment contract.[65] The defendant caused the suit to be removed to federal court on diversity grounds.[66] The contract included a provision for arbitration of any dispute according to New York law.[67] The United States District Court for the District of Vermont ruled that Vermont law governed the suit, and that the arbitration agreement was revocable under Vermont law.[68] The United States Court of Appeals for the Second Circuit, however, held that the United States Arbitration Act[69] required a stay of any case in federal court pending the outcome of arbitration.[70]

The Supreme Court determined that since arbitration affected the substantive rights of the parties, *Erie Railroad Co. v. Tompkins*[71] required that the law of the forum state apply in a diversity suit such as *Bernhardt.*[72] The parties agreed at oral argument that no developments having an effect on Vermont arbitration law had occurred, and therefore the precedents on which the district court relied remained valid.[73] The Court ruled that because the Vermont law on arbitration appeared clear, no reason existed to remand the case to the Second Circuit for review of the district court's decision.[74] Thus, the Court remanded the suit to the district court to determine the remaining Vermont conflict of laws question.[75]

Justices Frankfurter and Harlan concurred in the *Bernhardt* result but stated that the Court should have remanded the case to the Second Circuit

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65. *Id.* at 199. In *Bernhardt v. Polygraphic Co.,* the parties entered into the employment contract in New York, and the plaintiff subsequently moved to Vermont. *Id.*

66. *Id.; see* 28 U.S.C. § 1332 (1982) (granting jurisdiction to federal courts where amount in controversy exceeds $10,000 and parties are citizens of different states); *id.* at § 1441 (defendant may remove action from state to federal court when federal court has original jurisdiction over action).

67. 350 U.S. at 199 (Bernhardt parties entered into contract in New York).

68. Bernhardt v. Polygraphic Co., 122 F. Supp. 733, 734-35 (D. Vt. 1954), *rev'd,* 218 F.2d 948 (2d Cir. 1955), *rev'd,* 350 U.S. 198 (1956).

69. 9 U.S.C. §§ 1-3 (1982) (United States Arbitration Act).

70. Bernhardt v. Polygraphic Co., 218 F.2d 948, 951 (2d Cir. 1955), *rev'd,* 350 U.S. 198 (1956).

71. 304 U.S. 64 (1938).

72. *Bernhardt,* 350 U.S. at 204. Under the doctrine set forth in *Erie R.R. Co. v. Tompkins,* federal courts must apply state law in preference to federal law in a diversity action whenever the application of federal law would alter a substantive right which the parties have under state law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); *see* 1A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.304 at 3039 (2d ed. 1978) (discussion of *Erie* doctrine).

73. 350 U.S. at 204.

74. *Id.* at 205. In *Bernhardt,* the Court indicated that deference to the district court determination would be inappropriate if subsequent state court decisions modified the authority that the district court had relied on. *Id.* at 204. Other factors that would make deference to the lower court inappropriate included doubts, ambiguities or dicta in the existing state court opinions, and legislative developments that boded a change in prior law. *Id.*

75. *Id.* The district court in *Bernhardt* had not ruled clearly on what the Vermont conflict of laws rule was and thus that issue remained to be decided upon remand. *Id.*

rather than the district court.[76] The Second Circuit had not determined the proper construction of Vermont arbitration law because of the circuit's view that federal law was controlling.[77] The Supreme Court's remand to the district court to decide the conflict of laws question therefore precluded any appellate review of the district court's Vermont arbitration law decision.[78] Justice Frankfurter observed that the parties in *Bernhardt* had a right to review of the district court's determination which the Court's remand to the district court foreclosed.[79]

Although the Supreme Court's remand of the *Bernhardt* case to the district court would seem to indicate that district court opinions on state law matters deserve considerable weight, the Court in *Bernhardt* stressed the settled quality of Vermont arbitration law.[80] In a case where no state court has decided the issue at hand, *Bernhardt* may not apply.[81] Moreover, the Court's deference to lower courts in state law matters reflects the Court's need to conserve its judicial resources for deciding constitutional and federal statutory questions.[82] While the Supreme Court properly exercises discretion in choosing matters for review, the federal appellate court's jurisdiction is almost exclusively obligatory.[83] Therefore, the Court's pronouncements about

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76. *Id.* at 212 (Frankfurter, J. & Harlan, J., concurring).

77. *See* 218 F.2d 948, 951 (2d Cir. 1955) (Second Circuit in *Bernhardt* held that federal law controlled arbitration issue).

78. 350 U.S. at 211.

79. *Id.* at 212. In *Bernhardt,* Justice Frankfurter considered that in view of the long period of time since Vermont courts had ruled on arbitration provisions included in a contract, and the change in attitude towards arbitration that had occurred among courts in other states, the Second Circuit might have found that a Vermont court would rule differently from the federal district court on the arbitration question. *Id.* at 211-12. Therefore, Justice Frankfurter thought that the Court should have remanded the case to the Second Circuit for review. *Id.* at 212.

80. *Id.* at 205.

81. *See* Huddleston v. Dwyer, 322 U.S. 232, 236-37 (1944). In *Huddleston,* an Oklahoma Supreme Court decision cast doubt upon a prior determination of Oklahoma law by the United States Court of Appeals for the Tenth Circuit. *Id.* at 235-36. In remanding the case to the Tenth Circuit, the U.S. Supreme Court stated that circuit courts as well as trial courts have a duty to ascertain the controlling state law. *Id.* at 236.

82. *See* Note, *Unclear State Law in the Federal Courts: Appellate Deference or Review?,* 48 MINN. L. REV. 747, 756 (1964) (reason for Supreme Court's deference to lower federal courts' determinations of state law is need to reserve court's effort for more important issues). In a discussion of the Judiciary Act of 1925 which transferred a large part of the Supreme Court's responsibilities for deciding particular types of cases to other federal courts, Justice Taft explained that litigants' rights were sufficiently protected by the opportunity for trial and review of the trial's outcome at the circuit court level. Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925,* 35 YALE L.J. 1, 2 (1925); *see* 28 U.S.C. §§ 1251-94 (1976) (Federal Judiciary Act of 1925). Justice Taft stated that the function of the Supreme Court is to decide cases of national importance, rather than to correct errors affecting only individual litigants. Taft, *supra* at 2.

83. *See* Hellman, *Error Correction, Lawmaking and the Supreme Court's Exercise of Discretionary Review,* 44 U. PITT. L. REV. 795, 806 (1983) (contrasting obligatory jurisdiction

reliance on the judgment of lower courts regarding state law issues may not have prescriptive value for the courts of appeals, because appellate courts perform a different function than the Supreme Court does.[84]

Although Supreme Court decisions provide no clear guidance about whether federal appellate courts should defer to federal district courts on matters of state law, commentators have argued that underlying the *Erie* doctrine is the assumption that federal judges are approximately as able to determine state law issues as state judges.[85] A judge's experience in applying state law need not be dispositive because federal judges have the benefit of the same written sources of interpretation that are available to state judges.[86] Likewise, federal appellate judges have the same resources at their disposal as federal district judges.[87] Particularly when the state law is unclear, a reliance on concrete sources of the law seems preferable to a reliance on assertions from one individual judge, no matter how experienced and well-respected. Because the legal basis for decision and the district court's interpretation of that basis are available to the appeals court, the appellate panel should be able to fully evaluate the lower court's determination without a need to defer to the district court's decision.[88]

Although judicial economy may provide a valid basis for the Supreme Court's deferential treatment of lower federal courts' determinations of state law questions, judicial economy cannot justify an appeals court's retreat from the court's duty to provide meaningful review of cases involving state law issues.[89] While the Supreme Court has discretion to refuse to review matters of purely state law, litigants have a statutory right to review by the courts of appeals.[90] Thus, deference by the Supreme Court to lower federal courts on state law matters provides no support for similar deference by federal appellate courts to federal district courts.[91] On the contrary, the right

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of circuit court with Supreme Court's discretion to select cases for plenary review); 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3901 at 398 (1976) (jurisdiction of circuit courts is almost entirely obligatory).

84. *See supra* notes 82-83 (although federal appellate courts have obligation to review district court decisions, Supreme Court's function is limited to review of matters of broad public interest).

85. *See* Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine and Diversity Cases,* 67 YALE L.J. 187, 217 (1957) (in requiring federal courts to apply state common law in diversity cases, *Erie* doctrine presumes ability of federal courts to discern state common law).

86. *See id.* (judge's knowledge of local law is relatively unimportant factor in achieving just resolution of lawsuits because lawyers can communicate legal reasoning to judges).

87. *Id.*

88. *See* Note, *supra* note 82, at 757 (state decisions and statutes which embody state's legal policies are equally available to federal district and circuit judges).

89. *See id.* at 756-57 (conservation of judicial resources for more important tasks is not valid rationale for circuit court deference to district court decisions on state law); *supra* notes 82-83 and accompanying text (in contrast to Supreme Court's discretion to review only matters of national importance, jurisdiction of circuit courts is largely obligatory).

90. *Id.; see* 28 U.S.C. § 1291 (1982) (circuit courts have jurisdiction over appeals).

91. *See* Note, *supra* note 82, at 756-57 (though conservation of judicial resources for

of appeal requires the federal circuit courts to give full independent review to all matters of law regardless of the state or federal basis of the legal question.[92]

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more important tasks is valid rationale for Supreme Court deference to district court's state law determinations, same rationale does not apply to deference by circuit court).

92. *See supra* notes 82-84 and accompanying text (federal appellate courts have obligation to provide full review of legal issues).