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Unclear State Law in the Federal Courts: Appellate Deference or Review

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Federal courts, in complying with the Rules of Decision Act, are often called upon to ascertain and apply state law. In those cases where state law is unclear, both the United States Supreme Court and the courts of appeals on review give great weight to the district court judge's interpretation of state law. The author of this Note examines the propriety of this policy of deference in light of the function of the federal judiciary in ascertaining state law as well as other principles of federal-state relations. He concludes that although the Supreme Court's practice may be well-founded, the courts of appeals ought to review independently the determination of state law made by the district courts.

I. INTRODUCTION

The foundation of American juridical federalism, implementing article III, section 2 of the Constitution, is the Rules of Decision Act:

That the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.1

Belying its significance, the act has been explicitly interpreted by the Supreme Court but twice — in both cases the meaning of the clause “laws of the several states” was at issue. Erie R.R. v. Tompkins,2 overruling the near-century old Swift v. Tyson3 and dispelling the notion of a federal common law, declared that “laws” binds the federal courts to apply state decisional as well as statutory law in cases where it applies. And, given the interstitial nature

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1. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 (1789) (now 28 U.S.C. § 1652 (1962)). Section 34 had remained virtually unchanged from 1789 until 1948 when “civil actions” replaced “trials at common law.” The Revisor’s Note indicates that the purpose of the alteration was to insure the section’s applicability to equity cases, 28 U.S.C.A. § 1652 (1950), although the act had been so interpreted before the change, see Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 205 (1938).
2. 304 U.S. 64 (1938).
of federal law, the Rules of Decision Act applies not only in diversity cases but often in non-diversity cases too. Thus, the Rules of Decision Act — now the "Erie doctrine" — preserves the state sphere within a single body of law by directing the federal courts, where acting within that sphere, to administer state law.

The often-overlooked bases of the Supreme Court's decision in Erie provide a foundation for exploring the problems of federal courts in administering state law. The Court recognized that

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4. Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose.


5. Although the clause "in cases where they apply" could be read to mean "in diversity cases," it is clear that the act was intended to cover non-diversity cases also. The members of Congress must certainly have been aware of the concept of diversity jurisdiction, see U.S. Const. art. III, § 2; Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78 (1789); The Federalist No. 80, at 533, 534, 536, 537 (Ford ed. 1898) (Hamilton); Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 56 (1923), so that if they had meant to limit the act to diversity cases, they could easily have said so. The language of the act is even more decisive: If the act were limited to diversity cases, the carefully articulated exception to the general rule expressed in § 34 would itself become the general rule and federal law would be applicable to all cases unless state law were expressly required. Since such a general rule has never been expressed, the federal courts would have no legislative guidance as to the rule of decision to be applied in non-diversity cases. Further, the concept of a federal government with limited powers, see The Federalist No. 45, at 309 (Ford ed. 1898) (Hamilton), is consistent with providing for a broad range of applicable state law. The act has been applied in non-diversity cases both before and after Erie. E.g., Wichita Royalty Co. v. City Nat'l Bank, 306 U.S. 103 (1939); Mason v. United States, 260 U.S. 545 (1923).

6. Generally, the federal courts have accepted the obligation to administer state law in any case within a valid grant of federal jurisdiction. The Supreme Court has, however, impliedly excepted from the general grant of federal jurisdiction certain cases where the Court felt that a unitary administration of the law was indispensable. Thus the Court recognizes a sphere of jurisdiction reserved exclusively to the states, including administration of estates, probating of wills, and matters of domestic relations. See generally Hart & Wechsler, op. cit. supra note 4, at 1001–18. Even where the right has been susceptible of enforcement by federal courts, they have traditionally abstained in favor of the states. See note 58 infra.

7. The first reason the Supreme Court gave for its decision was that Swift v. Tyson had erroneously construed § 34. 304 U.S. at 72–73. The Court based its conclusion on the recent "research of a competent scholar" who,
Swift v. Tyson had failed to attain its goal of a general common law uniform throughout the country, because the state courts refused to adopt federal rules of decision; as a result, Swift promoted forum shopping between the state and federal courts within the state’s jurisdiction. Another, and perhaps the most significant, ground for Erie was that Swift v. Tyson was "an unconstitutional assumption of powers by courts of the United States." Inherent in the constitutional make-up of our federal system is the exclusive power of the states to create substantive rights in those areas where the federal government has not acted pursuant to its limited grant, and a federal common law dealing with those rights in the federal courts in effect cripples the state jurisdictional power.

In cases where the Rules of Decision Act requires a federal court to administer state law and that state law is unclear, the federal court is faced with a dilemma that necessarily raises difficult problems of federal-state relations. Adherence to the Erie upon discovering Ellsworth's original draft of § 34, concluded that the word "laws" was merely a concise expression intended to include both statutory law and the unwritten or common law of the states. See Warren, supra note 5, at 81-88. But see Keeffe, Gilhooley, Bailey & Day, Wearie Erie, 34 Conn. L.Q. 494, 495-96 (1949). This was not, however, the motivating factor behind Erie; the Court said that "if only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century." 304 U.S. at 77.

8. 304 U.S. at 74-77.

9. 304 U.S. at 79, quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). Although the Court's opinion in Erie twice alludes to a constitutional basis for the decision, 304 U.S. at 77-78, 79, the language has been referred to as improper, see 304 U.S. at 90-92 (Reed, J., concurring), or, at best, mere dictum, see e.g., Bowman, The Unconstitutionality of the Rule of Swift v. Tyson, 19 B.U.L. Rev. 653 (1935); Shulman, The Demise of Swift v. Tyson, 47 Yale L.J. 1336 (1938). The Court has recently implied that Erie was constitutionally based, see Bernhardt v. Polygraphic Co., 350 U.S. 198, 202 (1950), however, the trend appears to be toward considering the doctrine as based on policies reflected in the Constitution but not required by it. See, e.g., Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945); Hart & Wechsler, op. cit. supra note 4, at 616-17, 633-35. But see Hill, The Erie Doctrine and the Constitution, 53 Nw. U.L. Rev. 427, 541 (1958). The difference between the latter two positions would be whether Congress is limited by policy or the Constitution; or, phrased somewhat differently, whether the last word as to rules of decision shall be that of Congress or the Supreme Court.

10. U.S. Const. amend. X. See also Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945). One early case suggested that the power of the states to change the "general commercial law" was not only less than exclusive, but that any attempt to make such a change binding on the federal courts "must be nugatory and unavailing." Watson v. Tarpley, 59 U.S. (18 How.) 517, 521
doctrine seemingly compels the federal court to follow strictly any antiquated state court declaration without questioning its soundness. Such an approach, however, would likely lead to forum shopping between state and federal courts; it might also stimulate the federal courts to read broadly the exception to the Rules of Decision Act, thus narrowing the range of cases in which state law applies, perhaps ultimately to diversity cases. Yet, if the federal courts were given free reign to interpret state law without being bound by the declarations of the state judiciaries, a separate body of federal law might be created within the state sphere of applicable law, clearly contravening the principle of the Erie doctrine.

Where the substantive rule of state law is unclear, the federal courts are naturally faced with the problem of ascertaining and applying the proper rule of decision. How the federal courts should perform this duty has been the subject of many dissertations by courts as well as legal scholars. Once the trial court makes its determination, however, the degree to which the litigating parties are or should be bound by it is unsettled. This Note is concerned with the problems arising out of deference by federal appellate courts to determinations of state law by federal trial courts.

II. THE PRACTICE OF APPELLATE DEFERENCE

If a state appellate court is dissatisfied with a lower state court’s interpretation of state law, it does not hesitate to impose its own interpretation on the parties as the rule of decision. So too with a federal appellate court on a question of federal law. On questions of unclear state law, however, federal appellate courts are reputed to rely heavily on the opinion of the federal district court judge. The United States Supreme Court has unequivocally stated that where there are no relevant state court decisions it will “leave undisturbed the interpretation placed upon purely

(1855). But see Burns Mortgage Co. v. Fried, 292 U.S. 487, 496 (1934): “What was there said [in Watson] on the subject was unnecessary to the decision, and has not been followed in later cases.”

11. See Part III infra.

12. The federal courts have taken one small step in this direction with respect to the law of unfair competition. See HART & WECHSLER, op. cit. supra note 4, at 809; Comment, Pendent Jurisdiction — Applicability of the Erie Doctrine, 24 U. CHI. L. REV. 543 (1957).


local law by a . . . federal judge of long experience and by three circuit judges whose circuit includes [the state whose law is in question].

Shortly after the Supreme Court stated this position, the Court of Appeals for the Eighth Circuit announced a decision summarily accepting a district court’s interpretation of unclear state law that interpretation was accepted because the court, on authority of the Supreme Court’s language, gave great weight to the opinion of the district court. Since then the Eighth Circuit has repeatedly affirmed its decision not to change the district court’s interpretation of state law unless convinced of error. This has been true even where the court recognized that the unclear state law lent itself to more than one permissible interpretation and that in its opinion the interpretation chosen by the district court was not the most convincing. The position of the Eighth Circuit has subsequently been adopted by many of the other circuits.

Implicit in the Erie doctrine is the recognition that courts make “laws.” Each time a court, whether state or federal, speaks it not only affects the rights of the parties before it, but it also sets down a rule by which prospective litigants might expect to be governed. Accepting the general principle of appellate review of these “laws” as well-founded in policy, the proper degree of federal appellate deference to lower federal court determinations of state law must, at least in part, depend on whether federal courts applying state law “make law” like other courts or whether they perform

Id. at 713. (Citations omitted.)


17. The trial court, in the case at bar, believed that to be the law. In deciding what the highest court of a state would probably hold the state law to be, great weight may properly be accorded by this court to the view of the trial court. This court would be justified in adopting a contrary view only if convinced of error.

Id. at 713. (Citations omitted.)

18. See, e.g., Billings v. Investment Trust Co., 309 F.2d 681 (8th Cir. 1963); Homolla v. Gluck, 248 F.2d 731 (8th Cir. 1957); Traders & Gen. Ins. Co. v. Powell, 177 F.2d 669 (8th Cir. 1949); Russell v. Turner, 148 F.2d 562 (8th Cir. 1945).

19. See Dierks Lumber & Coal Co. v. Barnett, 221 F.2d 695 (8th Cir. 1955); Budor v. Becker, 135 F.2d 911 (8th Cir. 1943).

20. See, e.g., Wisconsin Screw Co. v. Fireman’s Fund Ins. Co., 297 F.2d 697 (7th Cir. 1962); Rudd-Melikian, Inc. v. Merritt, 282 F.2d 934 (6th Cir. 1960); Sudderth v. National Lead Co., 272 F.2d 259 (6th Cir. 1960); Crawford v. Farnsworth & Chambers Co., 261 F.2d 8 (10th Cir. 1958); California v. United States, 235 F.2d 847 (9th Cir. 1964).
some other function. Thus, this Note will next consider the nature of the federal judiciary’s freedoms and responsibilities with respect to ascertaining and applying state law; then the nature and scope of appellate review will be examined in light of these considerations and other principles of federal-state relations to evaluate the propriety of appellate deference.

III. STATE LAW: THE FUNCTION OF THE FEDERAL COURTS

One week after Erie was handed down the Supreme Court, in Ruhlin v. New York Life Ins. Co., stated as a guideline in administering state law that “the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts.” The case suggests that the federal courts should follow the same course in determining the rule of decision to be applied to cases governed by state law as in other cases — “the forum should use the very same juristic data in determining the rights of the litigants, whether the forum be a federal court or a state court.” But this approach was short-lived.

To avoid applying the “law of the state” as expressed by inferior state courts, the lower federal courts often read the Supreme Court’s language in Wichita Royalty Co. v. City Nat’l Bank, decided one year after Erie and Ruhlin, to say that lower federal courts were to act as the highest court of the state; since these state courts are not bound by lower state courts’ interpretations of state law, the federal courts reasoned that they should not be so bound either. Only two and one half years after Erie, Fidelity Union Trust Co. v. Field and its companion cases pro-

22. Id. at 209.
23. Corbin, supra note 18, at 774.
25. E.g., Illinois Cent. R.R. v. Moore, 112 F.2d 959, 964 (5th Cir. 1940); Six Companies v. Joint Highway Dist., 110 F.2d 620, 626 (9th Cir. 1940).
26. 311 U.S. 169 (1940). This case has a particularly interesting history and is an excellent example of the absurd result that sometimes obtains from “blindly adhering” to state law. The New Jersey legislature had recognized the validity of the Totten trust by statute. However, two vice-chancellors construed the statute out of existence. Travers v. Reid, 119 N.J. Eq. 416, 182 Atl. 908 (Ch. 1936); Thatcher v. Trenton Trust Co., 119 N.J. Eq. 408, 182 Atl. 912 (Ch. 1936). The federal court of appeals, reversing a district court that had relied on the opinions of the lower New Jersey courts to declare the Totten trust invalid, felt that since the highest court of the state had not spoken, the statute still stood. Field v. Fidelity Union Trust Co., 108 F.2d 521 (3rd Cir. 1940). The Supreme Court reversed on the ground that the court of appeals had failed to follow state law. Later, another vice-chancellor
scribed this practice. Federal courts were not to sit as would the highest court of the state, limited only by stare decisis, but were bound by decisions of lower state tribunals, notwithstanding that higher state courts were free to ignore them. Thus, the discretion of the lower federal courts was severely limited by Field: For purposes of ascertaining state law, the federal judiciary was rigidly bound by the opinion of any state judge "who cares to express himself."28

One of the bases of the Erie decision was to prevent forum shopping — where different rules of decision existed between state and federal courts, a foreign litigant could pick the most advantageous forum merely because of the fortuity of diverse citizenship. Yet in some instances the restrictive Field doctrine merely substituted one kind of forum shipping for another. If a foreign litigant found a favorable state court decision, he would prefer to bring his action in a federal court since that forum would be bound to apply the declared law of the state; the state court, however, would be free to reverse or overrule the prior decision. Conversely, if the state court decisions were adverse to the foreign litigant, he would prefer to bring his action in the state forum, for the state courts could reexamine earlier decisions and refuse to follow them.

Perhaps the primary problem, however, is the resulting second-rate justice in the federal courts. Fundamental to the Erie doctrine is the recognition that the judiciary is a source of law — courts, as well as legislatures, make "laws." Although legislatures have at their disposal techniques for determining the most desirable social policies, not all of which are available to the courts, the judiciaries serve a complementary function by providing an agency that is more readily accessible than the legislatures.29 A court, whether federal or state, should be free to use its "judicial brains," limited only by those doctrines, stare decisis for example, that have traditionally limited courts.30 Forceful objections have been voiced in New Jersey, deciding a case based on the statute, cited the federal court of appeals decision as authority for his departure from the decisions of his brethren. He noted that the case had been reversed, but "on another point." Hickey v. Kahl, 129 N.J. Eq. 233, 240, 19 A.2d 33, 38 (Ch. 1941).


29. Hart, supra note 4, at 493.

30. See Corbin, supra note 13, at 774–75. Even stare decisis allows the overruling of prior decisions, and presumably the federal courts are at least as well qualified as the state courts to determine the proper application of that doctrine.
against the imposition upon the federal judiciary of a standard of mechanical jurisprudence—a requirement that forces federal judges "to abdicate [their] judicial functions and even prostitute [their] intellectual capacities to discover not state law, but the particular views a state judge may have uttered many years ago under quite different circumstances"—in cases where state law must be applied. To the extent that the federal courts are denied the right to participate creatively in the development of the law, not only is the philosophy of *Erie* ignored, but the litigants and the law itself are doomed to suffer.

There are intimations that the Supreme Court has relaxed its requirement of strict adherence to state decisions, apparently indicative of a feeling that the once hostile attitude of lower federal courts towards the *Erie* doctrine has changed and that those courts are capable of making a contribution to the law within the limitations of the doctrine. In *King v. Order of United Commercial Travelers,* the Court held, albeit in a labored opinion, that federal courts were not bound by an unreported decision of a "local" state court of nisi prius jurisdiction. The Court has also used language indicating that state supreme court decisions may, in effect, be ignored under certain circumstances. For example, in *Meredith v. Winter Haven* the Court said that "the rulings of the Supreme Court of Florida . . . must be taken as controlling here unless it can be said with some assurance that the Florida Supreme Court will not follow them in the future . . . ." Similarly, in *Bernhardt v. Polygraphic Co.* the Court said:

> [T]here appears to be no confusion in the Vermont decision, no developing line of authorities that casts a shadow over the established ones, no dicta, no doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule.

But should the federal courts be limited to legislative developments, dicta, ambiguities, etc., where, as was the case in *Bernhardt,* the state judiciary has not considered the rule for 50 years? If the federal courts are to be truly free to use their "judicial brains," they should not, in such a case, be precluded from looking to and considering such factors as consensus of laws in other jurisdictions, writings of legal scholars, etc.

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34. 320 U.S. 228 (1943).
35. *Id.* at 234. (Emphasis added.)
37. 350 U.S. at 205.
In so far as Swift v. Tyson resulted in subjecting the citizenry of a state to “dual and often inconsistent systems of substantive law,” the doctrine was an “offense to the most basic concepts of justice according to law.” At the expense of national uniformity of rules of law, Erie and the Field line of cases attempted to attain uniformity within each particular jurisdiction. Yet Field resulted not only in a kind of forum shopping perhaps even more deleterious than under Swift v. Tyson (because the result in the federal court was more predictable), but also threatened the litigants in the federal court with a second-rate type of justice. If Field is rejected and Meredith and Bernhardt are read broadly, the problem of forum shopping would be eliminated.

The final question, then, must be whether it is an offense to the ideals of federalism for federal courts to administer a justice equal to that available in state courts, a result likely to obtain from a viable approach to state law in federal courts under Bernhardt and Meredith. Would such an approach be any less of “an unconstitutional assumption of powers” than Swift v. Tyson? Unlike the situation existent under Swift, a decision based on the viable approach to state law would utilize state-expressed premises. Further, the rule of law derived by the federal court would be subject to being “overruled” by a subsequent state court decision; but in the interim the state judiciary would have the benefit and stimulation of the enlightened approach of an independent, yet responsible, federal judiciary. The viable approach would not yield either a double system of rules of substantive law or the application of a sterile rule of law in the federal courts.

IV. THE CASE FOR APPELLATE REVIEW

Whether the function of the federal judiciary acting within the scope of the Erie doctrine is to adhere blindly to whatever declarations of state law that might be available or to use its “judicial brains” in determining the applicable rule of decision, the question of the degree of judicial review or deference which should be accorded that determination is presented. On such questions of unclear state law, federal appellate courts accord considerable weight to the opinion of the federal district court judge.

The Supreme Court’s policy of deference appears justifiable because each year the Court is asked to decide more cases than it

38. Hart, supra note 4, at 505-06.
39. See text accompanying notes 29-32 supra.
42. See text accompanying note 15 supra.
can possibly handle. Although the most important function of the Supreme Court has often been said to be the construction and application of the Constitution, the Court is also asked to hear a variety of other cases. As to the latter function, the Court should certainly be free to limit the extent of its participation through the use of certiorari; but in exercising both functions the Court must be able to spend the necessary time to determine the perplexing issues presented. It follows that the Court should be able to choose to rely on the juristic ability of the lower federal courts to interpret the law of a state without having to make a complete re-examination itself, unless convinced of error. By leaving the final responsibility for ascertaining state law to the lower federal courts, the Supreme Court is, pro tanto, in a better position to adjudicate those great issues of government which by their very nature require its consideration.

The policy underlying the review procedure used by the Supreme Court does not, however, justify deference to a trial court’s determination of state law by a court of appeals. The basic rationale for the Supreme Court’s willingness to rely heavily on a lower federal court’s determination of state law is that the nature of the task is neither so important nor so difficult as to warrant Supreme Court consideration. This rationale obviously does not apply to the courts of appeals. Indeed, the Supreme Court’s procedure implicitly requires appellate court review of a district court determination of unclear state law, a fact which the Court has expressly recognized.

The parties to an action in the federal courts “have the right to

43. Concern over the pressure exerted on the Court’s time and strength was expressed at a time when a mere 539 petitions for certiorari were submitted. Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 CORNELL L.Q. 499, 504 (1928). During the 1961 Term, the Court disposed of 1892 petitions for certiorari and 189 appeals, see The Supreme Court, 1961 Term, 76 HARV. L. REV. 54, 82 (1962), and during the 1962 Term, 1976 cases submitted for certiorari were disposed of while 185 cases arose on appeal, see The Supreme Court, 1962 Term, 77 HARV. L. REV. 62, 84 (1963).


45. See text accompanying note 42 supra.

46. See text accompanying notes 43 & 44 supra.

47. See, e.g., United States v. Durham Lumber Co., 363 U.S. 522 (1960); Appalachian Power Co. v. American Institute of Certified Pub. Accountants, 361 U.S. 887 (1959); Huddleston v. Dwyer, 322 U.S. 232 (1944). The implication that review by the court of appeals is required exists, in the Supreme Court’s language, even if questions of state law are treated as “facts.” The Court has frequently referred to the “two-court rule”—findings of fact concurred in by two lower courts will be accepted by the Supreme Court unless
have the judgment of the Court of Appeals” on the rule of decision, an independent interpretation of the state law by a court of appeals. The Erie concept — of judiciaries being coordinate organs of state power — itself prohibits the finality of the determinations of a single district court; since each decision of a court is “law,” sound judicial policy requires that it be reviewable especially where the federal courts are permitted to exercise their “judicial brains” in ascertaining state law. Limiting the scope of appellate review in certain areas of the law is accepted, but for reasons found in established policy. For example, the right to an appellate review of questions of fact has been qualified because the finder of fact is in the best position to evaluate the credibility of witnesses and is in at least as good a position as an appellate body to draw inferences. Similarly, most of the decisions limiting the scope of appellate review of questions of state law are couched in terms of the reviewing court deferring to the opinion of the trial judge because of his experience with local law. Certainly a federal district judge may be required to deal with the law of his state more frequently than federal circuit court judges whose circuit includes many states, yet this fact alone does not make him more expert in the field. Arguably, the district judge is more familiar than the circuit judges with the policies of the state in which he sits; but those policies are no more than expressions embodied in the statutes and decisions of the state, and they are as readily available to the court of appeals as they are to the district court. Even the Eighth Circuit has appeared to recognize the need for an appellate review in certain circumstances.

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51. The “general rule” so often stated by the Eighth Circuit as the reason for deferring to the opinion of the trial judge provides for reversal when the appellate court is “convinced of error.” See, e.g., Russell v. Turner, 148 F.2d 566 (8th Cir. 1945); Doering v. Buechler, 145 F.2d 784 (8th Cir. 1945). In Yoder v. Nu-Enamel Corp., 145 F.2d 420 (8th Cir. 1944), the Eighth Circuit reversed a district court ruling that special damages for fraud were not recoverable under Nebraska law. Although the question had never been decided in Nebraska, and the case might therefore have fallen within the class of cases in which the Eighth Circuit has deferred to the judgment of the district court, the court suggested that the district court erred in interpreting Nebraska cases that denied special damages to mean that only general dam-
It should be recognized that most of the determinations of state law by the federal courts are likely to be sound, and the results reached by applying them to the causes pending are not likely to be different from independent exercises of judgment by the state courts even though there are certain to be cases like *Field* where a different result would obtain. Yet, where parties are litigating in an action before a federal court, they have but that single opportunity to be heard. If their day in court is to be at all meaningful the litigation must be governed by the most proper rule of law available. *Erie* decided that that rule was to be state law. If an appellate court reviewing the case for errors dogmatically re-

ices were recoverable. The court of appeals said that “the situation seems simply to be that the [Nebraska] Court never has been called upon to give direct consideration to the question.” *Id.* at 424. In both *Anderson v. Sanderson & Porter*, 146 F.2d 58 (8th Cir. 1945), and *Petsel v. Chicago B. & Q.R.R.*, 202 F.2d 817 (8th Cir. 1953), the Eighth Circuit was confronted with information on appeal that had not been presented to the district court—the court was convinced that this new information warranted reversal. Arguably the facts of each of these cases would have warranted reversal within the language of the Eighth Circuit’s “general rule.” Yet, while in those cases affirmed by the Eighth Circuit, the general rule is cited liberally, it was never mentioned in these three cases reversed by the court. In none of the three cases could the court of appeals say with certainty that their view of the state law in question was the interpretation that the state would have adopted; nor, in the many cases affirmed by the appellate court, could the trial courts have so claimed.

*Petsel* represents the type of case where the need for appellate review is most obvious. The action was commenced in an Iowa federal district court under an Illinois statute. Even assuming that the district court judge’s familiarity with local law justifies the Eighth Circuit’s policy of deference in the usual case, it would certainly not suffice in a case like *Petsel*. An Iowa judge is no more familiar with Illinois law or the policies underlying that law than the judges of the court of appeals. Yet the court in *Petsel* indicated that it would not review the determination of questions of law by the trial court except to the extent that it was presented with legal material not called to the attention of the lower court. 202 F.2d at 823-824.

52. A recent example was the extended litigation arising out of *Nolan v. Transocean Air Lines*, 173 F. Supp. 114 (S.D.N.Y. 1959). Decedent’s executor brought suit under the California wrongful death act on behalf of decedent’s wife and minor child. Under New York law the California one-year statute of limitations was applicable. Prior California decisions had held that although the statute of limitations might be tolled during the infancy of the plaintiff, the wrongful death act created a joint cause of action for all heirs and the bar of the statute of limitations as to one heir was a bar to all other heirs. *Haro v. Southern Pac. R.R.*, 17 Cal. App. 2d 594, 62 P.2d 441 (1938); *Sears v. Majors*, 104 Cal. App. 60, 285 P. 321 (1936). On appeal from a dismissal the Second Circuit said that its principal task was “to determine what the New York courts would think the California courts would think on an issue about which neither has thought” and held that the district court had properly relied on California authorities, although there were other al-
fuses to reconsider the rule of law, the parties' day in court is not meaningful.\textsuperscript{53}

Whether or not the court of appeals reviews the question of state law, the determination of the federal court is not binding on subsequent cases arising in state courts\textsuperscript{54}—to some extent, it is not even binding on subsequent cases in federal courts\textsuperscript{55}—and the obligation of the federal courts under the \textit{Erie} doctrine often involves "guesswork."\textsuperscript{35} These facts, however, should not preclude the parties from having their controversy adjudicated under a rule of decision derived by the body most capable of making the best decision under the circumstances. The appellate court is composed of a greater number of men of at least presumably equal competence in precisely the same field as the district judge. Their collective opinion as a panel is more likely to reflect "state law" than the opinion of a single trial judge. The fact that Congress has created courts of appeals with jurisdiction to review all final decisions of the district courts reflects a strong policy, founded on the belief that the decision of the appellate court is more likely to be "correct," that the litigants should not be bound by the ruling of the lower court.\textsuperscript{57} The parties should not be deprived of being governed by the best rule of decision under the circumstances merely because the court hearing the case happens to be a federal


\textsuperscript{53} See Corbin, \textit{supra} note 18, at 775.


\textsuperscript{55} E.g., Royal Netherlands S.S. Co. v. Strachan Shipping Co., 301 F.2d 741 (5th Cir. 1962).


court required to apply state law. Furthermore, many state courts often do look to federal decisions, and they should be able to rely on the courts of appeals' decisions as embodying the best approach to the state's law notwithstanding the fact that the state court is free to reject it.

To refuse the litigants a right of review appears to be giving questions of unclear state law the same place in the scheme of appellate review as is commonly accorded questions of fact. Certainly, if the parties were in a state court, the law of the case would be subject to review by a superior tribunal. The same holds true where a federal question is presented in a federal court. Why then, should this right be denied the parties merely because a federal forum is deciding questions of state law?

CONCLUSION

The problems that attend the application of state law in federal courts are a natural consequence of the Rules of Decision Act. In seeking to preserve the sphere of state-created substantive rights and to avoid forum shopping between state and federal courts, while at the same time recognizing that federal courts are capable of making a substantial contribution to the growth of the law generally and that the litigants, too, have an interest in the action, appellate review of federal district court determinations of state law appears to be a desirable answer, although not the only one.58

The policy of deference to the opinion of the lower courts, although sound at the Supreme Court level, cannot be justifiably applied by the courts of appeals. Review, on the other hand, gives full recognition to the Erie mandate that state courts be treated as law-making organs of the states: The state decisional rule of

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58. Although a discussion of the relative merits of the alternatives to appellate review as a solution to the problems created as a result of states' laws being applied in federal courts is beyond the scope of this Note, it should be obvious that they do exist. For example, abolition of diversity jurisdiction would certainly solve the bulk of the immediate problem. Also, increased use of the abstention doctrine, see Wright, The Abstention Doctrine Reconsidered, 37 Texas L. Rev. 815 (1959); Note, Judicial Abstention From the Exercise of Federal Jurisdiction, 59 Colum. L. Rev. 749 (1959); Note, Abstention: An Exercise in Federalism, 108 U. Pa. L. Rev. 926 (1959), or the certification of questions of doubtful state law to the state courts, see Kaplan, Certification of Questions From Federal Appellate Courts to the Florida Supreme Court and Its Impact on the Abstention Doctrine, 16 U. Miami L. Rev. 418 (1962); cf. HART & WECHSLER, op. cit. supra note 4, at 444–47; Vestal, The Certified Question of Law, 56 Iowa L. Rev. 629 (1971); Wilfson & Kurland, Certificates by State Courts of the Existence of a Federal Question, 63 Harv. L. Rev. 111 (1949), might obviate the problem.
law would be applied in federal courts as would any other rule. Further, the party forced into federal court by the fortuity of diverse citizenship would be assured of the same "day in court" as he would have had if he were in a state court or in a federal court applying federal law.