State Law in Federal Courts: The Implications of de Novo Review—In re McLinn, 739 F.2d 1395 (9th Cir. 1984)

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STATE LAW IN FEDERAL COURTS: THE IMPLICATIONS OF DE NOVO REVIEW—In re McLinn, 739 F.2d 1395 (9th Cir. 1984).

Federal courts are often called upon to apply state law. When they do so, the Erie doctrine\textsuperscript{1} requires them to undertake the difficult task of predicting how the highest court of the state whose law they are applying would rule upon the issue.\textsuperscript{2} This task is so difficult that federal appellate courts have traditionally relied on federal district courts, which are more familiar with local law, to perform it.\textsuperscript{3}

In In re McLinn,\textsuperscript{4} the Ninth Circuit Court of Appeals rejected this traditional reliance on the district court’s determination of state law and held that issues of state law in federal court will be reviewed under a new, de novo standard.\textsuperscript{5} The McLinn case reveals a dilemma in the treatment of state law in federal courts. The Erie doctrine requires federal courts to ascertain and apply state law, and gives them a broad responsibility for doing so. At the same time federal courts are unable to accurately predict and apply unresolved issues of state law.

The McLinn decision correctly recognizes the need for full appellate review of those state law issues that are decided in federal courts.\textsuperscript{6} However, it reveals the inconsistency of full review with the Erie goal of conformity to state law.\textsuperscript{7} Full review reduces the ability of federal courts to apply the same state law that would have been applied if the case had been decided in state court.

This Note discusses the doctrine governing the treatment of state law in federal courts and presents the McLinn case. It then analyzes the Erie doctrine and the problems inherent in its application, and assesses the McLinn court’s approach to these problems. Finally, it suggests a way to implement the McLinn decision while achieving the goal of accurate application of state law in federal court.

\textsuperscript{2} See infra notes 8–12 and accompanying text.
\textsuperscript{3} See infra note 11 and accompanying text.
\textsuperscript{4} 739 F.2d 1395 (9th Cir. 1984).
\textsuperscript{5} Id. at 1397.
\textsuperscript{6} Id. at 1398.
\textsuperscript{7} See infra text following note 67.
I. BACKGROUND

In 1938 the United States Supreme Court decided in *Erie Railroad Co. v. Tompkins*\(^8\) that federal courts must apply state common law in diversity actions in federal courts.\(^9\) The *Erie* Court held that federal courts are to apply state law as declared by the legislature or the state's highest court.\(^10\) The *Erie* doctrine, based on that decision, requires federal courts to apply the same state law that would be applied if the case arose in state court.\(^11\) If there is no authoritative state ruling on an issue, the federal court is to predict how the state's highest court would decide the issue at that time and rule accordingly.\(^12\)

The goal of this prediction process is to apply the same state law to a claim whether it is judged in federal or state court.\(^13\) The *Erie* Court was motivated by a desire to avoid the forum shopping that had arisen under prior treatment of state law in federal court.\(^14\) The decision discouraged

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8. 304 U.S. 64 (1938).
9. The *Erie* Court held that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Id.* at 78.
10. *Id.*
11. See generally 19 WRIGHT & MILLER, supra note 1, § 4507.
12. Federal courts have the responsibility of applying state law as it would currently be applied by state courts, not as it has been applied in the past. See 17 WRIGHT & MILLER, supra note 1, § 4507, at 89. This requires federal courts to undertake an elaborate process of predicting state law. See Note, *The Ascertainment of State Law in a Diversity Case*, 40 IND. L.J. 541 (1965); see also Nolan v. Transocean Air Lines, 365 U.S. 293 (1961). Federal courts are to look to relevant state court decisions as evidence of how the state court would decide the issue, but should consider whether the decision is outdated or there are other reasons for believing that the state's highest court would no longer adhere to that precedent. 19 WRIGHT & MILLER, supra note 1, § 4507, at 91-94. In the absence of authoritative state holdings on the issue, the federal courts may look to analogous decisions, to legislative intent, or to the law of other circuits. See 19 WRIGHT & MILLER, supra note 1, § 4507, at 97-103; Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 321-22 (1967); Note, *Federal Interpretation of State Law—An Argument for Extended Scope of Inquiry*, 53 MINN. L. REV. 806, 817-19 (1969) [hereinafter cited as Note, Federal Interpretation of State Law]; see also Bernhardt v. Polygraphic Co., 350 U.S. 198, 205 (1956) (federal courts should be sensitive to possible changes in state law occurring subsequent to prior state holdings).
14. See Erie R.R. v. Tompkins, 304 U.S. 64, 74-77 (1938). Under the earlier rule of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), federal courts attempted to apply a general federal common law. Justice Brandeis noted in *Erie* that this allowed litigants to determine the content of the law applicable to their case by manipulating the forum rules. 304 U.S. at 76-77; see also Hanna v. Plumer, 380 U.S. 460,
State Law in Federal Courts

litigants from choosing federal or state courts solely on the basis of which court would apply the law most favorable to their case.\(^\text{15}\)

Federal appellate courts traditionally have pursued the goal of \textit{Erie} by deferring to district court determinations of state law issues.\(^\text{16}\) The rationale for this deference is that district judges are more familiar with the law of the states in which they sit.\(^\text{17}\) Thus, they are better able to conform to how a state court would decide state law issues.\(^\text{18}\)

Prior to the Ninth Circuit's decision in \textit{McLinn}, all of the circuits deferred to the district judge's determination of state law.\(^\text{19}\) The Ninth Circuit deferred according to the "clearly wrong" standard which it rejected in \textit{McLinn}.\(^\text{20}\) Other circuits continue to defer.\(^\text{21}\) Although these circuits articulate the standard of review differently, the standard is uniformly held to be highly deferential to the district judge's determination of state law.\(^\text{22}\)

\footnotesize
\textcite{468 (1965) (Erie aim of discouraging forum shopping).}
\textcite{15. See \textit{Erie}, 304 U.S. at 74–75.}
\textcite{16. See 9 \textit{WRIGHT & MILLER}, supra note 1, § 2588, at 752–53; 32 \textit{FEDERAL PROCEDURE, LAWYER'S EDITION} § 77.261 (1981).}
\textcite{17. See, e.g., \textit{Schulz v. Lamb}, 591 F.2d 1268, 1271 (9th Cir. 1978) ("[b]ecause of the district judge's presumed expertise in local law, his finding should be accepted on review unless clearly wrong"); see also 9 \textit{WRIGHT & MILLER}, supra note 1, § 2588, at 752.}
\textcite{18. C. \textit{WRIGHT, LAW OF FEDERAL COURTS} § 59, at 271 (3d ed. 1976); Note, supra note 13, at 711. Most circuits, including the Ninth, have traditionally deferred only when district judges are ruling on the law of the state in which they sit. See, e.g., \textit{Aydin Corp. v. Loral Corp.}, 718 F.2d 897, 904 (9th Cir. 1983). Only the Eighth Circuit defers to decisions on state law by district court judges who are from another state and thus have no particular expertise in the law in question. See, e.g., \textit{St. Paul Hosp. & Casualty Co. v. Helshy}, 304 F.2d 758, 759 (8th Cir. 1962); see also Note, supra note 13, at 712 n.48.}
\textcite{20. See, e.g., \textit{Safeco Ins. Co. v. Schwab}, 739 F.2d 431 (9th Cir. 1984) ("clearly wrong" standard customary for review of district court determination of state law); \textit{Taylor v. Sentry Life Ins. Co.}, 729 F.2d 652, 654 (9th Cir. 1984) ("substantial deference" to the district judge under the "clearly wrong" standard); \textit{Pacific Mutual Life Ins. Co. v. American Guar. Life Ins. Co.}, 722 F.2d 1498, 1500 (9th Cir. 1984) (appellate court will accept district court determination of state law unless "clearly wrong"); \textit{Zieman Mfg. Co. v. St. Paul Fire & Marine Ins. Co.}, 724 F.2d 1343 (9th Cir. 1983) (same). Although the prior deferential standard was usually expressed as permitting reversal of the district court where it was "clearly wrong," this wording frequently varied. See, e.g., \textit{Shakey's, Inc. v. Covalt}, 704 F.2d 426, 436 (9th Cir. 1983) (equates "clearly wrong" with "clear error"). The \textit{McLinn} majority termed the prior standard as both "clearly wrong" and "clear error." \textit{McLinn}, 739 F.2d at 1397, 1402.}
\textcite{21. See supra note 19.}
\textcite{22. Id. The Eighth Circuit has held that it will defer to a "reasonable interpretation" of the state law issue by the district court judge. \textit{Tharrason v. Pfizer Genetics, Inc.}, 728 F.2d 1108, 1111 (8th Cir. 1984). The Tenth Circuit has held that in the absence of controlling state precedent, the decision of the district judge will carry "extraordinary force" on appeal. \textit{McGehee v. Farmers Ins. Co.}, 734 F.2d 1422, 1424 (10th Cir. 1984).}
The United States Supreme Court also adheres to a policy of limited review of state law issues. While this policy is expressed as one of deference, the Court generally does not consider state law issues at all. The traditional, pre-\textit{McLinn} treatment of state law in federal courts thus entails full consideration at the district court level, limited review at the appellate level, and nonreview by the Supreme Court. The appellate court gives the district court's decision substantial weight, which must be overcome for the appellate court to decide differently. By contrast, under the usual de novo standard of review for legal issues, the appellate court may freely substitute its own determination of an issue of federal law for that of the district court.

II. THE \textit{MCLINN} FACTS AND HOLDING

The \textit{McLinn} case arose out of the collision of two skiffs off of the coast of Kodiak, Alaska. The district court granted federal admiralty jurisdiction under 28 U.S.C. § 1333(1) and \textit{Foremost Insurance Co. v. Richardson}. The plaintiffs asserted personal injury and wrongful death claims based on Alaska law in addition to their federal claims as allowed under 46 U.S.C. § 1489.

The personal injury and wrongful death actions were based on an Alaska statute that has never been interpreted definitively by the Alaska Supreme

\footnotesize{23. See Bishop v. Wood, 426 U.S. 341, 346–47 & n.10 (1976); Huddleston v. Dwyer, 322 U.S. 232, 237 (1944) (Supreme Court ordinarily does not review appellate court determinations of state law); see also IA J. Moore, B. Ringle & J. Wicker, Moore's \textit{Federal Practice} ¶309[2], at 3127 n.28 (2d ed. 1985) (Supreme Court will ordinarily accept the determination of local law by the federal court of appeals) [hereinafter cited as J. Moore].

24. See, e.g., Butner v. United States, 440 U.S. 48, 57–58 (1979) (Supreme Court "declines to review" state law question); Huddleston v. Dwyer, 322 U.S. 232, 237 (1944) (Supreme Court ordinarily accepts and therefore does not review state law issues).

25. Deferential review presumes that the district court's determination is correct and should not be overturned unless, for example, it is "clearly wrong" or "clearly erroneous." See Airlift Int'l, Inc. v. McDonnell Douglas Corp., 685 F.2d 267, 269 (9th Cir. 1982); Chavez v. Kennecott Copper Corp., 547 F.2d 541, 543 (10th Cir. 1977).

26. De novo review is simply a full and independent reconsideration and decision upon appeal. See \textit{McLinn}, 739 F.2d at 1399–1400.

27. \textit{Id.} at 1397. The accident involved three skiffs, two of which collided.


29. 457 U.S. 668, 669 (1982). \textit{Foremost} held that the collision of vessels on navigable waters is within federal admiralty jurisdiction. The collision in \textit{McLinn}, which occurred in the channel between Near Island and Kodiak Island in southeastern Alaska, was thus included. See \textit{In re McLinn}, No. A80-038, slip op. at 2 (D.C. Alaska Nov. 4, 1982); see also Brief for Appellants at 9, \textit{In re McLinn}, 739 F.2d 1395 (9th Cir. 1984).

30. 46 U.S.C. § 1489 (1982). Parties may assert claims based on state as well as on federal law under this section. This "savings provision" provides that parties shall not lose claims based on state law through the granting of federal jurisdiction.
Court. Resolution of the claims turned upon the meaning and applicability of this statute. The United States District Court for the District of Alaska held that the statute did not apply. On appeal, the three-judge panel of the Ninth Circuit came to the opposite conclusion but requested en banc review because the standard of review precluded it from reversing. Under the Ninth Circuit's traditional deferential standard, the panel could have reversed the district court's holding only if it was "clearly wrong." The panel indicated that if it were to review the matter de novo, it would reverse. In an en banc review the court of appeals held that it would apply a new standard of review to district court determinations of state law. The court abandoned the deferential "clearly wrong" standard and held that the court of appeals should review all legal issues, both state and federal, under an independent de novo standard. Five of the eleven judges dissented, urging that appellate courts continue to review questions of state law under a deferential standard.

III. ANALYSIS

A. The Erie Dilemma

The *Erie* doctrine rests upon the premise that law consists of a set of articulable principles and doctrine that can be accurately applied in any forum. It assumes that federal courts can accurately apply state law and

31. ALASKA STAT. § 05.25.040 (1981); see also *McLinn*, 739 F.2d at 1397.
32. The plaintiffs asserted that the defendants were civilly liable for the negligent operation of one of the skiffs involved in the accident under ALASKA STAT. § 05.25.040 (1981). This statute makes owners of watercraft civilly liable for injury or damage caused by the negligent operation of their watercraft. *Id.* The plaintiff's claim turned on whether the defendant's skiff was a watercraft within the meaning of the statute as defined by ALASKA STAT. § 05.25.100(4) (1981). That section defines watercraft as vessels which are, among other criteria, devoted to recreational pursuits. The claim involved in *McLinn* turned on the issue of whether a chiefly commercial vessel which is being used recreationally at the time of an accident is a watercraft under § 05.25.100(4). *See In re McLinn, No. A80-038, slip op. at 6 (D.C. Alaska, Nov. 4, 1982).*
33. The district court held that the skiff in question was not a watercraft within the meaning of ALASKA STAT. § 05.25.100(4) (1981). *In re McLinn, No. A80-038, slip op. at 6–7 (D.C. Alaska, Nov. 4, 1982).*
34. *McLinn*, 739 F.2d at 1397.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 1397–98.
39. *Id.* at 1403.
40. See Kurland, Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases, 67 YALE L.J. 187, 215–18 (1957) (under *Erie*, the bases of state law are assumed to be communicable to federal judges no less than state judges). *Id.* at 217.
that different federal courts will be equally capable of doing so. Under \textit{Erie}, federal courts are presumed capable of selecting and applying state law in an almost mechanical way. Neither the local expertise of the state court nor of the federal district court is considered necessary to application of state law.

The \textit{Erie} doctrine does not acknowledge the role of local expertise in federal treatment of state law because it assumes that federal courts can accurately apply state law without it. Unfortunately, this assumption is false. \textit{Erie} requires federal courts to undertake a process of predicting state court action so difficult that it cannot realistically be performed. The \textit{Erie} requirement that federal courts decide state law issues as the state's highest court would decide them poses an impossible task. Federal courts cannot know how a state court would rule on a given issue. The attempt to predict how a state's highest court would rule necessarily depends largely on speculation.

The \textit{Erie} doctrine poses a particular problem for federal courts when they must decide unresolved issues of state law. When there is no existing state doctrine, federal courts must themselves create the state law that they apply. This process goes far beyond merely applying state law. Federal courts may be able to predict state law accurately if there is strong doctrinal support for the decision. However, it is not realistic to expect them to

41. The \textit{Erie} decision required a federal court sitting in New York to apply Pennsylvania law. \textit{Erie}, 304 U.S. at 69, 80. By holding that federal courts are to apply state law it implicitly assumes that federal judges sitting outside a state will be able to ascertain and apply the law of that state.

42. See R. Jackson, \textit{Full Faith and Credit: The Lawyer's Clause of the Constitution} 1 n.2 (1945).

43. The Supreme Court recognized the difficulty of applying \textit{Erie} in Bernhardt v. Polygraphic Co., 350 U.S. 198, 208 (1956) (Frankfurter, J., concurring) (“it is not always easy and sometimes difficult to ascertain what the governing state law is”); see also Wright, \textit{supra} note 12, at 321–22 (on the “laborious” and “onerous” task of deciding cases under \textit{Erie}: “it is easier to make good law than successfully to predict how it will be made”); Sheran & Isaacman, \textit{State Law Belongs in State Courts}, 12 Creighton L. Rev. 1, 57 (1978) (while application of \textit{Erie} may appear to be a simple task, “in practice it has done more to confuse the law than create evenhanded application”).

44. Commentators have interpreted \textit{Erie} as requiring federal courts to use their “judicial brains” to resolve state law issues. By this reasoning, federal judges are to use their personal judgment, rather than rely purely on state sources, in order to predict how the state court would currently rule on the issues involved. See Clark, \textit{State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins}, 55 Yale L.J. 267, 290–91 (1946); Corbin, \textit{The Laws of the Several States}, 50 Yale L.J. 762, 775 (1941).

45. The greater the ambiguity of the state law issue, the greater the difference between the capacities of the state and federal courts to reach the “correct” result. Field, \textit{Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine}, 122 U. Pa. L. Rev. 1071, 1093 (1974); see also 19 Wright & Miller, \textit{supra} note 1, ¶4507, at 97–103; Note, \textit{Federal Interpretation of State Law}, \textit{supra} note 12, at 817–19 (1969); Wright, \textit{supra} note 12, at 321–22.

46. See \textit{supra} note 12 and accompanying text.

47. See Field, \textit{supra} note 45, at 1090.
resolve the complexities of novel issues in the same manner as the state's highest court.48

In an effort to follow Erie's command to apply the same law that state courts would, federal appellate courts customarily limit their review of state law by deferring to district court judges.49 District court judges are considered better able to ascertain state law and thus better able to achieve the Erie goal of conformity to state court decisions. The cases indicate that appellate court judges readily defer to the greater expertise of district judges ruling on the law of the state in which they sit.50

This practice is based on a sound assessment of the relative abilities of the district and appellate courts. District court judges are more familiar with local traditions and law than are circuit judges who often sit far from the locus of the law in question.51 In the Ninth Circuit, the states of Alaska and Hawaii and the territory of Guam are examples of regions with distinct local traditions that affect their law. District court judges sitting in these regions are far more likely than circuit judges to be familiar with both the substance and the background of local law.52 The Ninth Circuit Court of Appeals has long recognized this and deferred accordingly.

Deference to the district court decision thus furthers the Erie goal of conformity. However, it also has significant costs. The district court's determination of state law does not receive full appellate review.53 Thus, state law does not receive the full judicial attention in federal court that it would in state court. Appellate review should not be denied simply because a case arises in the federal forum.54 This compromises the right to de novo

48. State supreme courts are the best authority on state law. See Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967) ("the State's highest court is the best authority on its own law"). Federal ability to resolve state law issues is necessarily inferior to that of the state supreme court.
49. See supra notes 16-18 and accompanying text.
50. See, e.g., Ball v. Tokyu Land Corp., 724 F.2d 1403, 1404 (9th Cir. 1984) (appellate court must defer to district court decision of state law based on "tenable theory").
51. See Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 285 (2d Cir. 1981) (Mansfield, J., dissenting) ("[u]nlike a state court or a federal district court within a single state, the court of appeals of a circuit in which several states are located, which disposes of diversity appeals as only a small percentage of its business, is not likely to gain any special familiarity with the law of one of the states within its boundaries"), cert. denied, 456 U.S. 927 (1982).
52. See, e.g., Laguna v. Guam Visitors Bureau, 725 F.2d 519, 520–21 (1984) (determinations of district court afforded deference due to familiarity with local Guam needs and customs).
53. See, e.g., Smith v. Strum, Roger & Co., 524 F.2d 776, 778 (9th Cir. 1975) (appellate review "narrowly circumscribed" under deferential "clearly wrong" standard).
54. Since state law issues would be granted full review upon appeal in state courts, it is placing undue prejudice upon the parties involved—particularly those who may not have chosen the forum—to deny that full review in the federal appellate process. Issues of foreign law are reviewed de novo by the appellate court under Fed. R. Civ. P. 44.1. Full review of issues of state law should also be provided. See Kurland, supra note 40, at 215–18.
review of legal issues that is established by statute in both state and federal courts.

B. McLinn: Rejecting Conformity in Favor of Full Review

The McLinn court correctly concluded that the cost of limited review under the deferential standard is too high.\textsuperscript{55} However, the court failed to acknowledge the full impact of its decision. It did not recognize that its rejection of the local expertise of district judges was a departure from the Erie goal of conformity.\textsuperscript{56} The McLinn decision has the effect of replacing the emphasis on conformity to state law with an emphasis on providing appellate review. This change in emphasis increases the risk of federal courts creating doctrine that diverges from a state's interpretation of its own law.

Emphasis on the appellate rather than district court determination of state law issues encourages the development of divergent doctrine because the appellate court is less familiar with state law and is less able to accurately predict how the state's highest court would rule. If the Erie goal is difficult to attain at the district court level, it is still more so at the appellate level. The appellate court's lack of familiarity with state law increases the speculativeness of its prediction of state supreme court action. This is especially true when previously unresolved issues of state law are presented. Yet decisions of previously unresolved issues are also most likely to have precedential effect. These federal appellate determinations of state law will thus be perpetuated throughout the federal system.

The McLinn court heightened the impact of its decision by implicitly assuming that it is appropriate to give increased precedential effect to federal determinations of state law.\textsuperscript{57} It maintained that full review is required because federal courts look to prior federal decisions in their determination of state law issues.\textsuperscript{58} Erie does not command federal courts to rely only on established state doctrine, but it does not, however, license federal courts to rely on federal rather than state sources to ascertain state

\textsuperscript{55}. \textit{McLinn}, 739 F.2d at 1398, 1403.

\textsuperscript{56}. \textit{De novo} review rejects the local expertise of the district judge because it gives priority to the appellate court's determination of state law issues. Although the district judge's opinion may be considered by the appellate court under \textit{de novo} review, it no longer carries the weight that it received under deferential review. The district judge's judgment has no compelling force when it is merely considered by the appellate court along with other factors in making its decision. Under deferential review, by contrast, the district judge's decision is controlling unless it is, to use the Ninth Circuit's language, "clearly wrong." It cannot be overturned simply because the appellate court reaches a different conclusion. Under \textit{de novo} review, while the district court's judgment may be of influence, it is still the appellate court's judgment which is decisive.

\textsuperscript{57}. \textit{McLinn}, 739 F.2d at 1401-02.

\textsuperscript{58}. \textit{Id.}
law. To the contrary, *Erie* requires federal courts to look to state sources to determine how state courts would determine unclear issues of state law.59

This reliance on federal sources results in an independent body of federally created state law which will have precedential value in federal, but not state, courts.60 Federal holdings on state law may be overruled by later state supreme court decisions,61 but before a state court conclusively resolves an issue, federally created state law will control in federal courts.62 This creates the potential for forum shopping between state and federal courts. Parties may choose the federal forum to gain the advantage of federal precedent on the issue or may choose the state forum to avoid the effect of those holdings.63 This presents exactly the kind of problem that *Erie* was meant to prevent.64

Although federal courts currently rely on federal decisions of state law in the absence of authoritative state holdings, *McLinn* will encourage the practice. The *McLinn* court's acceptance of the practice gives it new validity by mandating the appellate courts' creation of a body of separate doctrine.

The *McLinn* court did not appreciate the impact of its decision because it assumed that all federal courts are capable of accurately predicting and

59. *Erie* held that federal courts must apply state law as "declared by [the state's] Legislature in a statute or by its highest court . . . ." 304 U.S. at 78. Subsequent application of *Erie* has extended the scope of sources considered by federal courts in applying state law. See supra note 6 and accompanying text. Despite the increasing federal reliance on prior federal holdings, see infra note 60, these sources should be limited to state sources to be consistent with *Erie*. See *Erie*, 304 U.S. at 79 ("[t]he authority and only authority is the State") (quoting Justice Holmes' dissent in *Black & White Taxicab Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 535 (1928)); see also Note, supra note 13, at 718–21 (federal reliance on prior federal decisions forsakes *Erie* requirement of applying state law as it would be applied by the state's highest court for the goal of uniformity of federal application of state law).

60. Federal decisions on state law issues have limited precedential effect, but they do influence future federal and state decisions. Federal decisions are not binding on state courts, see infra note 61 and accompanying text, but they may carry precedential weight in federal courts insofar as they are consistent with state court decisions. In the absence of authoritative state decisions, federal decisions on state law are considered and relied upon by lower federal courts. See J. Moore, supra note 23, ¶.309[2], at 3122–25 & n.19; United States v. County of Humboldt, 628 F.2d 549, 551 (9th Cir. 1980) (where state court has not yet decided issues, federal court looks to relevant federal appellate decisions).

As the *McLinn* majority noted, the Ninth Circuit has relied heavily on prior federal holdings on state law. *McLinn*, 739 F.2d at 1401–02. In Whittaker Corp. v. Execuair Corp., 736 F.2d 1341 (9th Cir. 1984), the court relied upon the prior Ninth Circuit ruling on California law in *Monolith Portland Midwest Co. v. Kaiser Aluminum & Chem. Corp.*, 407 F. 2d 288 (9th Cir. 1969). Recent holdings show an increasing reliance on federal holdings on state law. See, e.g., *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 283 (2d Cir. 1981) (federal appellate court's interpretation of the law of a state located within its circuit is binding on federal courts in other circuits in the absence of an authoritative state declaration to the contrary), cert. denied, 456 U.S. 927 (1982).

61. See J. Moore, supra note 23, ¶.309[2], at 3123 n.19; *Wright*, supra note 12, at 322.

62. See supra note 61.

63. See Sheran & Isaacman, supra note 43, at 58–59; supra note 8 and accompanying text.

64. See supra notes 14–15 and accompanying text.
applying state law. It rejected the traditional belief that district judges are better able to do so. The court concluded that de novo review is preferable both in terms of providing review and in creating law. In practice, however, de novo review is preferable only for providing review because the district judge is better able to ascertain state law.

Central to both the *Erie* and *McLinn* decisions is the assumption that federal courts are capable of accurately applying state law and that federal district and appellate courts are equally capable of doing so. Under this assumption, the objective of providing full review is consistent with the objective of applying the same state law in state and federal courts. In practice, however, the difficulty of applying *Erie* makes it impossible to fully achieve both of these objectives. If appellate courts rely on the local expertise of the district judge to attain greater conformity to state law they necessarily limit review.

This dilemma compels a compromise between the two objectives. Deferential review resolves the conflict in favor of conformity with state law; de novo review resolves it in favor of review. The *McLinn* court did not take this inherent tradeoff of objectives into account. Although the court was correct to adopt de novo review, its decision compromises important objectives of the judicial system. In implementing *McLinn*, the Ninth Circuit should seek ways to limit the impact of this compromise.

C. Implementing McLinn: Avoiding the Dilemma

Federal courts can most accurately apply state law if they avoid determining unclear state law issues themselves. This can be done by

65. *McLinn*, 739 F.2d at 1400. The court denied, specifically, that the expertise of the district judge with respect to state law issues is any greater than that of the appellate court. The court based its conclusion on the fact that one of the *McLinn* judges had experience in Alaskan law commensurate with that of the district judge. *Id.* It is true that in some cases the appellate panel may have significant experience in the state law to be applied. See, e.g., *Metropolitan Life Ins. Co. v. Kase*, 718 F.2d 306, 307 (9th Cir. 1983). However, deference to the district judge ruling on the law of the state in which the judge sits more consistently assures that priority is given to the judgment of the court with greatest experience in the relevant state law.


67. *Id.* at 1401–02.

68. State court decision of a state's own law is preferable to federal decision of that law because state courts are better able to predict state supreme court action than federal courts. See Field, *supra* note 45, at 1091 n.86; see also Wright, *supra* note 12, at 321–22 (easier to make good law than to predict it). Where unclear issues of state law are being decided, the gap between federal and state court ability to predict state action is particularly great. Field, *supra* note 45, at 1093; see also Bork, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231, 237 (1976) (federal courts have no expertise in state law and are particularly disadvantaged where a diversity suit requires the decision of a point not settled by state court).
State Law in Federal Courts

restricting federal jurisdiction over state law, by abstaining on state law issues, and by certifying questions of state law to state courts. These processes would allow state courts to determine their own law and thus avoid unwieldy, speculative federal decisionmaking. They would also result in state-created doctrine of clear precedential value.

Much federal decision of state law would be avoided if Congress abolished federal diversity jurisdiction. Commentators have strongly advocated the abolishment of diversity jurisdiction as a way to ease the overcrowding of federal courts. In addition to reducing the number of cases brought in federal courts, it would have the advantage of leaving state law decisions to state courts. State law would still arise in federal question cases because of pendant and ancillary jurisdiction.

Certification is commonly described as a variety of abstention, see 17 WRIGHT & MILLER, supra note 1, § 4241, at 441, because it is a means of avoiding—or abstaining from—federal decision of state law. However, it is a separate process involving procedures distinctively different than those of traditional abstention. See infra notes 81, 84 and accompanying text.

Decisions of the state supreme courts through certification procedures are authoritative pronouncements of state law. They bind both state and federal courts. Federal decisions of state law, by contrast, do not. See supra note 61. Federal decision of state law creates precedent of limited applicability and delays conclusive resolution of state law issues by the state courts. State court decision of state law, by contrast, furthers the development of state doctrine. See Wright, supra note 12, at 322–23 (deciding state law issues in federal rather than state court “retards” development of state law); see also Sheran & Isaacman, supra note 43, at 58 (diversity cases perform no creative function in the evolution of the law and thereby waste public resources).

Federal diversity jurisdiction is provided under 28 U.S.C. § 1332(a)(2)-(3) (1982). It is responsible for a large proportion of cases brought in federal court. In 1975, for example, there were 30,631 diversity cases pending in federal courts, or 21.5 percent of the total docket. Bork, supra note 68, at 236–37. Abolishing diversity jurisdiction would remove this entire body of cases, which are based on state law, to state courts. While state law issues would still arise in federal courts, see 19 WRIGHT & MILLER, supra note 1, § 4507, at 80–81, this would reduce the volume of those issues dramatically.

Arguments against diversity jurisdiction have emphasized the lack of positive reasons for it and the need for a reduction in federal caseloads and jury trials as well as its effect on the treatment of state law. Rowe, supra, at 966. Rowe notes that abolition of diversity jurisdiction would result in “vastly fewer Erie problems of applicability, choice, determination and application of state law in the federal courts.” Id. at 969.

McLinn offers a typical example of the type of case that would continue to arise in federal court after the abolition of diversity jurisdiction. The plaintiffs in McLinn were able to raise state claims in federal

69. See infra notes 73–76 and accompanying text.
70. See infra notes 77–82 and accompanying text.
71. See infra notes 83–88 and accompanying text.
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75. See generally Sheran & Isaacman, supra note 43.

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749
far less, however, and state law issues would be less likely to be central to the dispute.

The federal courts could reduce the amount of state law they decide by abstaining on unresolved state law questions. Federal courts may currently abstain in some circumstances to avoid deciding unclear issues of state law, but this practice has proved controversial. The United States Supreme Court held in *Meredith v. City of Winter Haven* that the difficulty of ascertaining state law does not, in itself, provide a sufficient basis for a federal court to abstain from deciding a state law issue. Furthermore, because abstention involves instigating a new proceeding in state court to decide the state law issue, the process is costly and time-consuming. Federal courts thus tend not to decline from deciding unclear state law issues unless certification is available.

Certification of state law issues to state courts provides the most direct and feasible means of avoiding federal decision of state law issues. The certification process allows federal courts to submit state law issues to state court under admiralty jurisdiction because the “savings clause” of 46 U.S.C. § 1489 (1982) provides that federal jurisdiction shall not eliminate any otherwise existing causes of action.

The problem of applying state law outside of its original forum also arises in state courts. This Note does not address the issues associated with that process. The principles of the *Erie* doctrine, particularly the underlying concern for federalism, see *Erie*, 304 U.S. at 79, impose a different set of considerations than are involved when a state court applies the law of another forum. See Sheran & Isaacman, *supra* note 43, at 59 (litigation of state law issues in state courts comports better with principles of federalism).

77. See 17 WRIGHT & MILLER, *supra* note 1, § 4246.

78. Federal courts may also abstain to avoid premature decision of constitutional issues (Pullman abstention) or to avoid interference with state policies (Burford abstention). See generally 17 WRIGHT & MILLER, §§ 4242-43 (Pullman-type), 4244-45 (Burford-type). Abstention on these grounds has been widely accepted, while the practice of abstaining to avoid unclear issues of state law has not. *See id.* § 4246, at 492, 498-99.

79. *See id.*

80. 320 U.S. 228, 234 (1943).

81. Under abstention, state law claims are removed for decision in state court. After those claims are decided, parties may return to litigate federal issues in federal court. See *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 417 (1964); *Field, supra* note 45, at 1079. Thus, the party must undertake litigation in two separate courts. Judge Skelly Wright suggests that this deprives the litigants of their right to trial in a federal court. *Wright, supra* note 12, at 325; *see also* Kurland, *Toward A Cooperative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 489 (1960) (where Congress has created the right to utilize federal court, the Supreme Court has no right to limit that access).

82. *See, e.g.*, Zbaraz v. Quern, 572 F.2d 582, 587 (7th Cir. 1978) (abstention order of district court reversed where certification not available).

Professor Martha Field, author of a leading 1974 article on Pullman-type abstention, *see Field, supra* note 45, concluded in a later article that abstention is not worth its costs and should only be applied where it can be accomplished through certification rather than traditional abstention procedures. *See Field, The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 605, 609 (1977). The Supreme Court similarly implied in *Bellotti v. Baird*, 428 U.S. 132, 150-51 (1976), that where delay and expense would otherwise weigh against traditional abstention, it would be appropriate to use certification if available.
supreme courts for decision. Because the state law issues, rather than the entire case, are removed to state court, the process is more efficient and less time-consuming than abstention. Numerous states, including Alaska, have adopted certification procedures. The practice has grown rapidly in acceptance since the United States Supreme Court sanctioned the process in 1974 in *Lehman Brothers v. Schein*. Justice Douglas, speaking for the Court, emphasized the role of certification in the growth of a cooperative judicial federalism. He noted the appropriateness of the use of certification where state law is unclear and when “outsiders” lacking familiarity with local law are called upon to decide these issues.

The Ninth Circuit has demonstrated its acceptance of certification by its use of the process. The court explicitly approved certification in 1969 in *Turnbull v. Bonkowski*. This case, like *McLinn*, turned on the application

83. See generally 17 WRIGHT & MILLER, supra note 1, § 4248; J. MOORE, supra note 23, ¶203[5].
85. Twenty-six states and Puerto Rico have adopted certification procedures. 17 WRIGHT & MILLER, supra note 1, § 4248, at 525 nn.29 & 174 (Supp. 1985); ALASKA APP. R. 407.
87. Id. at 391. Justice Douglas' majority opinion noted that certification "save[s] time, energy, and resources and helps build a cooperative judicial federalism." Id. However, Justice Rehnquist's concurring opinion noted the delay involved in certification and cautioned against indiscriminate use of the procedure. Id. at 394–95 (Rehnquist, J., concurring). Justice Rehnquist noted that although certification may be more efficient than traditional abstention, it entails more time and expense than federal decision of the state law question. Id. at 394 (Rehnquist, J., concurring).
88. Id. at 390–91.
89. 419 F.2d 104 (9th Cir. 1969).
of an Alaska statute. The court could not avoid deciding the issue because the Alaska Supreme Court had not yet adopted certification procedures. The court stated that the Alaska Supreme Court should have been the first to resolve the issue. It noted the desirability of certification in such situations and regretted being forced to decide the issue itself. In 1984 the Ninth Circuit affirmed its support of certification in *Meckert v. Transocean Insurance Co.*, noting the Supreme Court's observation that certification saves "time, energy and resources and helps build a cooperative judicial federalism."  

Although several states in the Ninth Circuit have adopted certification procedures, the Ninth Circuit still has no established criteria for when to certify an issue. In *Mutschler v. Peoples National Bank*, the Ninth Circuit allowed certification simply because the issue was one of state statutory interpretation. No further criteria were suggested. In *Estate of Madsen*, the court held that it is appropriate to certify questions of statutory interpretation when the state court's position on the issue is unclear. In *Quets Band of Indians*, however, the court again failed to suggest any criteria for certification.

The Ninth Circuit dealt with the issue of certification in *McLinn* upon its remand from the en banc decision. In *McLinn II*, the appellees requested certification of the state law issue to the Alaska Supreme Court, which
adopted certification procedures in 1980. The Ninth Circuit held, however, that circumstances were not compelling enough to require certification. The court noted the lack of guidance in prior Ninth Circuit decisions and looked instead to the Fifth Circuit for applicable standards. The court determined that the question certified must be close and must be important to the state in terms of comity. The issue should be one that can realistically be resolved by the state court. The court should also consider the possible expenses and delay involved in certification.

The criteria adopted by the Ninth Circuit in *McLinn II* are consistent with the goals of certification and with the standards suggested by the Supreme Court in *Lehman Brothers v. Schein*. They also show appropriate concern for both the *Erie* objective of having federal courts apply accurately ascertained state law and for the state interest in consistent doctrine. The criteria of *McLinn II* do not indicate, however, when an issue should be considered unclear for purposes of certification.

The *McLinn* litigation suggests a useful rule for determining when an issue should be considered unclear and should thus be certified. If district and appellate courts differ in their resolution of a state law issue, that difference demonstrates that the issue is unclear. This recognizes that at the district court level the relative clarity of an issue may be difficult to determine by objective criteria. At the appellate level, the concurrence or disagreement with the district court indicates the clarity or ambiguity of an issue. Disagreement certainly shows a lack of federal ability to resolve the issue.

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108. *McLinn II*, 744 F.2d at 681-82.
109. *Id.* at 681.
110. *Id.* The court also considered the requirements of ALASKA APP. R. 407, which governs certification. *Id.* at 681-82. That rule allows certification only of issues which may be determinative of the cause of action. Because there was an unresolved factual question in *McLinn*, it was unclear if the issue would be determinative. This also weighed in the court's decision not to certify. See 17 WRIGHT & MILLER, supra note 1, § 4248, at 172 (Supp. 1985) (certification inappropriate where disputed factual issues make it unclear whether state law issue is dispositive).
111. 416 U.S. 386, 390-91, 394 (1974); see also supra notes 86-88 and accompanying text.
112. *See* McLinn II, 744 F.2d at 681-82.
113. This rule suggests that certification should be used less by the district court, but should be made more available upon appeal. This would have the additional advantage of requiring district courts to undertake the process of ascertaining state law. This accords with the Supreme Court's ruling in *Meredith v. City of Winter Haven*, 320 U.S. 228, 237 (1943) that federal courts have a duty to apply state law. The *Meredith* holding can be better reconciled with the use of certification if certification occurs at the appellate level. At that stage, the federal court has undertaken the duty to ascertain state law. The application of the rule suggested above insures that that duty is relinquished only where there is a definite indication that the issue is indeed ambiguous. In addition, certification at the appellate level gives the plaintiff the benefit of choice of forum up to that point, and, therefore, certification is a minimal incursion on federal jurisdiction. See J. MOORE, supra note 23, ¶.203[5], at 2162. Moore
The federal judge would, however, still have discretion to decide whether to certify. The judge would be able to decide the issue in federal court if it would be in the best interests of the parties; for example, when certification would involve extensive delay and the issue is only incidental to the litigation. The judge should have similar flexibility in deciding whether to certify when compelling state interests are involved. If the decision would affect state policies or other fundamental state concerns, then federal courts should decline to decide the state law issue on this basis, regardless of the concurrence of district and appellate judgment. The standards for determining compelling state interest with respect to abstention would be appropriately applied in these situations.

Although federal courts cannot avoid deciding state law altogether, they can reduce the risk of developing a separate body of federally created state law. Liberal use of certification will result in fewer issues of state law being decided in federal court, and those that remain will be based on state precedent. De novo review of these issues will not result in the creation of new doctrine. It will simply provide review for the parties involved.

suggests that Meredith is still sound doctrine with respect to certification and that it provides a basis for restricting the use of certification by the district courts.


115. The Fifth Circuit, which has used certification most extensively, suggests several factors which should be considered in deciding whether to certify. These include considerations of comity with respect to the state interest involved and the practical limitations of the certification process, namely the possible delay involved and the ability of the state court to produce a helpful response. See Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 274–75 (5th Cir. 1976); see also Marston v. Red River Levee & Drainage Dist., 632 F.2d 466, 468 n.3 (5th Cir. 1980).

116. Issues of interpretation of state statutes, for example, might warrant greater use of certification due to the state interest in construing its own statute. The Ninth Circuit suggests in Madsen v. Commissioner, 659 F.2d 897, 899 (9th Cir. 1981), and Mutschler v. People’s Nat’l Bank, 607 F.2d 274, 278–79 (9th Cir. 1979), that certification is particularly appropriate for questions of interpretation of state statutes.

Where a compelling state interest is involved, Burford-type abstention might be appropriate. This would remove the case from federal court entirely rather than having the federal court apply the state court’s answer to a question of state law. See 17 WRIGHT & MILLER, supra note 1, § 4248, at 520 (relation of certification to Burford-type abstention), §§ 4244–45 (Burford-type abstention generally).

117. See supra note 114.

118. See supra note 76 and accompanying text.

119. Where clear state precedent exists, the district and appellate courts will be able to base their judgment on that precedent. If it is indeed clear, they should concur. If they do, then under the rule suggested above, see supra text accompanying notes 109–11, that federal decision will stand. On the other hand, if there is little or no state precedent, the district and appellate courts will have little guidance in deciding state law issues and their determinations are likely to differ. These are the issues that would be certified to state courts under the suggested rule.
IV. CONCLUSION

The *McLinn* decision abandons the *Erie* goal of conformity. By rejecting the expertise of the district judge, it reduces the ability of federal courts to accurately ascertain and apply state law. After *McLinn*, federal decisions of state law are less likely to accurately reflect probable state action. They are also more likely to be relied on as precedent by federal courts. This encourages the development of a body of separate, federally created state law.

*McLinn* does, however, represent an appropriate resolution of the conflict between pursuing the *Erie* goal of conformity and the goal of providing full review. When state law issues must be decided in federal courts, the *McLinn* de novo standard provides parties the full review to which they are entitled. The benefit of full review offsets the cost in loss of local expertise.

Although de novo review increases the probability of federal development of divergent state law, this consequence can be avoided by the adoption of supplemental reforms. Of these possible reforms, increased use of certification offers the greatest potential for insuring that federal courts apply the same state law that is applied in state courts. Certification allows unclear state law issues to be decided by the state courts themselves. Certification of state law issues on which the federal district and appellate courts disagree would resolve these issues in the appropriate forum and reduce the danger of federal courts creating their own body of state law.

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