RESUSCITATING DEFERENCE TO LOWER FEDERAL COURT JUDGES' INTERPRETATIONS OF STATE LAW

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This Article examines the propriety of having federal courts afford deference to state law interpretations reached by lower federal court judges. Two Supreme Court decisions from the 1990s seemed substantially to circumscribe such deference. But in fact subsequent Court cases continue to afford deference. Moreover, such deference can be normatively valuable. This Article argues in favor of the use of deference in appropriate circumstances, including situations where the district court and court of appeals agree on the proper interpretation of state law, and where answers to state law questions are obtained through an intrafederal certification regime.

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Federal courts are often called upon to resolve cases that turn upon the proper interpretation of state law. But no federal court has the capacity definitively to resolve questions of state law; only the high court in each state can make final, definitive pronouncements of the law of that state. In limited circumstances, federal courts employ mechanisms—certification and abstention—to allow state courts to decide the questions of state law that are raised in federal cases. These mechanisms are often not available options or in any event are often not employed by federal courts.

In the typical setting in which state law questions were to be resolved solely within the federal court system, the Supreme Court tended to defer to state law determinations of federal appellate courts and three-judge federal district courts. In turn, federal appellate courts traditionally employed a rule of deference in evaluating questions of state law: an appellate court deferred to the interpretation of state law proffered by a lower federal court whose jurisdiction included the state whose law was at issue, usually on the underlying assumption that the lower court's estimation of state law was likely to be a good one. But the Supreme Court in the 1990s disavowed the

propriety of deference to lower federal court interpretations of state law. Thus, the traditional deference mechanism seems now to be a dead letter.

But all is not as it seems. In this Article, I argue that reports of the death of deference to lower federal court interpretations of state law have been greatly exaggerated. Despite its facially clear holdings that deference is inappropriate, the Supreme Court itself has on occasion continued to defer substantively to lower federal court interpretations of state law. The Supreme Court's holdings against deference should be read only to disapprove of deferring to lower federal courts on issues of state law under particular, specific procedural settings. In other settings, deference may be acceptable. Indeed, deference to lower federal courts on matters of state law in appropriate circumstances is normatively valuable.

Consideration of the factors that led the Court to conclude that deference under the traditional rule was inappropriate does not rule out the possibility of deference in every circumstance. To the contrary, the Court's focus on lawfinding ability and state law expertise in fact lends some support to having the Supreme Court substantively defer to state law interpretations reached by federal courts of appeals, and even greater support to Supreme Court deference where the district court and court of appeals agree as to the proper interpretation of state law. One also might conceive of the introduction of a new intrafederal procedural structure under which deference might be appropriate. This Article outlines one such possible structure, which would involve the creation, for each state, of panels of federal district court and circuit judges to resolve questions arising under that state's law. Deference to answers rendered by panels would neither run afoul of core Supreme Court precedent on intrafederal deference, nor would it run counter to the logical criticisms upon which the Supreme Court relied in rejecting the traditional rule of deference. In addition, the intrafederal certification procedure would provide a useful way for federal courts to resolve questions of state law where resort to a state judicial system is either legally barred or practically unavailable.

This Article proceeds as follows. Part II presents the options available to a federal court faced with questions of state law, and explains why the treatment of those questions wholly within the federal system is the norm. Part III focuses on the traditional rule of deference to lower federal court determinations of state law by first summarizing the working of the rule, then discussing the Supreme Court's apparent rejection of the traditional doctrine, and finally turning to the Court's little noticed and sub silentioc resuscitation of deference in recent years.
Part IV argues that general expertise in the state judiciary and state jurisprudence is useful for federal courts fulfilling their obligation under *Erie Railroad Co. v. Tompkins*\(^2\) and its progeny. Part V summarizes current doctrine governing deference to lower federal courts on questions of state law, and concludes that the possibility of deference should not be read to have been eliminated. Part VI argues that deference can be normatively appropriate in certain settings. Part VII examines the benefits and shortcomings of possible avenues available to federal courts to resolve questions of state law, including the possible intrajurisdictional certification of questions of state law to panels of district and circuit court judges.

II. FEDERAL COURTS' OBLIGATIONS AND OPTIONS WITH RESPECT TO QUESTIONS OF STATE LAW

Questions of state law routinely arise in cases heard in federal courts.\(^3\) In addressing these questions, federal courts generally have two options open to them: they may, via certain procedural mechanisms, have the questions actually resolved in the state court system, or they may resolve the questions themselves. In this Part, I elucidate the available options, and explain why intrafederal resolution of state law questions is the norm.

The landmark decision of *Erie Railroad Co. v. Tompkins*\(^4\) mandated that a federal court faced with questions of state law should endeavor to resolve those questions as it believes that the high court of the state whose law is in question would resolve them.\(^5\) In fulfilling this obligation, the federal court may enlist the help of the relevant state judiciary to resolve the questions. If—as is usually the case—it does not avail itself of that option or if that option is unavailable, then the federal court must resolve the state law questions on its own.

A federal court's prognostication of how the state high court would resolve a question may prove to be—and, in practice, often has proven to

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3. For example, diversity cases, see 28 U.S.C. § 1332 (2000), cases against foreign sovereigns, see id. § 1330, and cases against federal officers, see id. § 1442(a) (providing for removal to federal court of civil actions and criminal prosecutions brought against federal officers), are cases that may feature only claims that sound in state law. Moreover, state law claims may be heard in federal court under federal supplemental jurisdiction. See id. § 1367. Also, federal law may incorporate elements of state law. See, e.g., *infra* note 97 (discussing Supreme Court precedent to the effect that the Takings Clause relies upon state law for the relevant definition of "property").
5. Some of the reasoning and policies underlying *Erie* are discussed below. See *infra* text accompanying notes 157–62.
be—incorrect.\textsuperscript{6} Enlisting the state judiciary is thus the only hope that the federal court has of ensuring a "correct" result. There are two ways in which a federal court may defer resolution of state law questions to the state judiciary: abstention and certification.

Abstention involves a federal court's decision not to proceed with the case before it to allow the courts of the state to hear another case that presents the same state law question pending before the federal court.\textsuperscript{7} There might be a state court case already pending, or the federal court might abstain in order to allow the parties to bring and argue a new suit in state court. The Supreme Court has recognized different forms of abstention that may be applicable in cases in which state law questions arise. Foremost among these doctrines is \textit{Pullman} abstention,\textsuperscript{8} under which a federal court may abstain in favor of a round of litigation in the state court system if resolution of the state law claims might obviate the need for the federal court to confront novel issues of federal law.\textsuperscript{9} \textit{Pullman} abstention is not available, however, in cases in which no issue of federal law lurks;\textsuperscript{10} in other words, the mere presence of a novel question of state law is insufficient to justify \textit{Pullman} abstention.

The Supreme Court has recognized other forms of abstention that may apply in federal cases in which there are only questions of state law and the questions at issue go to the heart of state sovereignty.\textsuperscript{11} But these forms of "\textit{Erie-based} abstention"\textsuperscript{12} are of quite limited applicability.

\begin{itemize}
\item \textsuperscript{6} See Jonathan Remy Nash, \textit{Examining the Power of Federal Courts to Certify Questions of State Law}, 88 CORNELL L. REV. 1672, 1674 n.3 (2003) (citing cases in which federal courts have incorrectly predicted how state high courts would rule).
\item \textsuperscript{7} There may be a state court case already pending, or the federal court may abstain to allow the parties to bring and argue a new suit in state court. See, e.g., Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594 (1968) (per curiam) (reversing the court of appeals' denial of a stay pending resolution of a state court declaratory judgment suit that would address the pertinent state constitutional question); R.R. Comm'n v. Pullman Co., 312 U.S. 496, 501-02 (1941) (holding that the trial court should have abstained from moving forward in the case given that a proceeding to determine the matters of state law had commenced and was being litigated in the state courts).
\item \textsuperscript{8} The doctrine draws its name from the Supreme Court case that introduced it, \textit{Railroad Commission v. Pullman Co.}, 312 U.S. at 496.
\item \textsuperscript{9} See id. at 501.
\item \textsuperscript{10} See Meredith v. Winter Haven, 320 U.S. 228, 234-35 (1943). It remains somewhat unclear whether the presence of a novel subconstitutional issue of federal law is sufficient to justify \textit{Pullman} abstention. See Propper v. Clark, 337 U.S. 472, 492 (1949) (refusing to abstain where resolution of a state law issue might obviate the need to resolve a federal nonconstitutional issue); Nash, supra note 6, at 1633 n.33 (discussing \textit{Propper}).
\item \textsuperscript{11} See \textit{Kaiser Steel}, 391 U.S. at 594 (reversing the court of appeals' denial of a stay in favor of pending state litigation, which sought to determine the constitutionality, under the state constitution, of a statute authorizing one party to trespass on another's property to enjoy water rights granted by the state); La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959) (upholding the federal
Another avenue open to federal courts that involves the state judiciary is the use of the "certification" procedure, under which the federal court certifies the unresolved state law question—along with a properly developed factual record—directly to the state high court for resolution. Upon receipt of the certified answer, the federal court resolves the federal case in accordance with the state court's definitive exposition of state law.

Both the abstention and certification options have their limitations and drawbacks. Abstention offers the promise of definitive resolution of the state law question, but the set of cases in which the procedure is available is highly circumscribed. Moreover, abstention tends to be a cumbersome, time-consuming, and expensive process, insofar as it entails a full round of litigation in the state courts (above and beyond any litigation that has already taken place, and may have to take place following the state court litigation, in the federal court system).

Certification, like abstention, offers definitive resolution of the state law question, but in a far more expeditious fashion. Still, certification merely minimizes the delay and cost of litigation as compared with abstention—it does not eliminate them. Further, certification procedure leaves the state court with the discretion to decline to answer the questions. Thus, the procedure does not guarantee definitive resolution of
the questions; indeed, a few states do not provide procedures for certification.\textsuperscript{20}

I have recently argued that the certification procedure raises grave jurisdictional concerns.\textsuperscript{21} If a state high court responding to certified questions partakes in the very case that is pending before the certifying federal court, then an argument can be made that the state court is improperly exercising the federal judicial power.\textsuperscript{22} If instead the federal court abstains while the state high court adjudicates, in an expedited fashion, the certified questions in an independent litigation, then the federal judicial power problem evaporates.\textsuperscript{23} But then the question becomes, in cases that raise no federal law issue, the justification for abstention (in light of Supreme Court precedent generally precluding abstention in such circumstances).\textsuperscript{24} Furthermore, even if the Supreme Court precedent is distinguishable, certification remains fundamentally inconsistent with the grant of diversity jurisdiction: if Congress has seen fit to have certain diversity cases heard in federal court and not in state court, then it is odd indeed that the state high court should adjudicate critical issues in the case.\textsuperscript{25}

Most commentators, both judicial and academic, strongly endorse certification as a useful contributor to interjurisdictional comity.\textsuperscript{26} Although certification imposes some delay and cost,\textsuperscript{27} these commentators are of the opinion that these costs are outweighed by the benefits of the procedure.

Indeed, some commentators have advocated expanded use of certification. Bradford Clark has suggested creating a "presumption in favor of certification whenever the procedure is available and [federal courts] are presented with unsettled questions of state law that call for the exercise of significant policymaking discretion."\textsuperscript{28} Calling upon federal courts to "certify, certify, certify,"\textsuperscript{29} Judge Guido Calabresi endorses the

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\item \textsuperscript{20} See id. at 1691 n.74.
\item \textsuperscript{21} See id. at 1721–48.
\item \textsuperscript{22} See id. at 1721–29.
\item \textsuperscript{23} See id. at 1726.
\item \textsuperscript{24} See id. at 1729–40.
\item \textsuperscript{25} See id. at 1740–48.
\item \textsuperscript{26} See id. at 1697–1700 & nn. 89–110.
\item \textsuperscript{27} See id. at 1698–1700 & nn. 96–110.
\item \textsuperscript{28} Clark, supra note 12, at 1544–45.
\item \textsuperscript{29} Guido Calabresi, \textit{Federal and State Courts: Restoring a Workable Balance}, 78 N.Y.U. L. \textsc{Rev.} 1293, 1301 (2003). Judge Alex Kozinski takes a markedly different approach: "[T]hat a case raises difficult legal questions is not enough. . . . Certification is justified only when the state supreme court has provided no authoritative guidance, other courts are in serious disarray and the question cries
use of certification—albeit in a somewhat modified form, since he would require federal courts first to opine on the proper answers, leaving the state high court to accept certification only if the federal court resolution is unacceptable\textsuperscript{30}—"whenever there is a question of state law that is even possibly in doubt."\textsuperscript{31}

Under these proposals, the number of certifications would surely increase. At some point, the concern might arise that greater demand for the service might make state high courts less inclined to accept requests for certification.\textsuperscript{32} To the extent that these proposals rely upon increased use of certification as offering the definitive resolution of state law issues, the possibility exists that the modifications might undermine that goal by rendering the procedure less available.\textsuperscript{33} Indeed, while Barry Friedman suggests that "most diversity cases do not require certification" since "their disposition rests on state law that is sufficiently settled,"\textsuperscript{34} there is some evidence that even under the current structure, some state courts are, for one reason or another, declining a substantial percentage of federal court certification requests.\textsuperscript{35}

The limitations and drawbacks of abstention and certification leave federal courts to resolve questions of state law on their own in the vast majority of cases in which state law questions arise. It is in this context that the traditional notion of deferring to lower federal courts' interpretations of

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\textsuperscript{30} Calabresi, supra note 29, at 1301-02.

\textsuperscript{31} Id. at 1301. Another member of the Second Circuit bench, Judge Jon Newman, has suggested a broader approach still: Judge Newman suggests funneling appeals of state law issues from federal district courts to state intermediate appellate courts (and, analogously, the channeling of appeals of federal issues from state trial courts to federal courts of appeals). Jon O. Newman, Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System, 56 U. Chi. L. Rev. 761, 774-75 (1989).

\textsuperscript{32} Judge Newman's proposal, see id., would be less likely to raise this concern because his proposal involves mandatory appeals to state intermediate appellate courts. Additionally, the increase in state intermediate appellate court workload would be offset by the reduction in workload from appeals of state trial court rulings on federal issues to federal courts of appeals.

\textsuperscript{33} Judge Calabresi explicitly understands his proposal would result in many denials of certification. He argues that, under his modified version of certification, a denial would give the federal court that sought certification "authority to impose [its] view of state law, provisionally, until the highest court of the state decides to resolve the question." Calabresi, supra note 29, at 1302.


\textsuperscript{35} See Kremen v. Cohen, 325 F.3d 1035, 1051 (9th Cir. 2003) ("California... has rejected one-third of the cases [that the Ninth Circuit has] certified to it since the [state certification] rule went into effect."); id. at 1054 app. (displaying a table summarizing dispositions of Ninth Circuit certification requests to the California Supreme Court).
state law arose. The next Part summarizes and critiques the rise, fall, and limited resurrection of that deference.

III. A BRIEF HISTORY OF DEFERENCE TO LOWER FEDERAL COURT DETERMINATIONS OF STATE LAW

A. THE RISE OF DEFERENCE

The Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*36 obligated federal courts to resolve questions of state law as would the high court of the state whose law is at issue.37 In the wake of *Erie*, the Supreme Court reasoned that as an appellate court of last resort it would not normally determine questions of state law in the first instance; rather the lower federal courts should endeavor to resolve the issues first.38 In addition, the Court indicated a general inclination not to reexamine the resolution of state law questions reached (1) by three-judge district court panels where the federal district lies within the state whose law is at issue,39 (2) by district judges whose district lies within the state whose law is at issue, where the district judges’ interpretation was subsequently affirmed by the federal court of appeals,40 and (3) more rarely, by a court of appeals panel whose geographic reach includes the state whose law is at issue.41 Though not delineated in great detail, the justification underlying these tendencies was clear: the comparative expertise of lower federal judges in dealing with and understanding the law of the state in which they sat, or in the case of circuit judges, of the states that lie within the geographic jurisdiction of the court of appeals.42

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37. As previously discussed, there are procedural devices that allow for state courts in fact to resolve questions of state law that arise in federal cases, but the circumstances under which these procedures are available are quite limited. *See supra* Part II. Thus, in ordinary federal cases in which questions of state law arise, federal courts must determine on their own how the high court of the relevant state would resolve the state law questions.
41. *See, e.g.*, Helvering v. Stuart, 317 U.S. 154, 163 (1942); *infra* note 46.
42. *See, e.g.*, *Huddleston*, 322 U.S. at 237 (describing circuit judges as “familiar with the intricacies and trends of local law and practice”).
The federal courts of appeals soon followed suit and adopted a rule under which they would defer to the determinations of state law rendered by federal district judges. The deference rule represented an exception to the more general rule that federal courts of appeals review district courts’ legal analyses and conclusions de novo. Like the justification for the Supreme Court’s invocations of deference, the primary justification for the courts of appeals’ deference rule was comparative expertise.

In 1943, the Eighth Circuit first enunciated the rule according deference to interpretations of state law rendered by federal district judges sitting in the state whose law is at issue. Despite the questionable strength of the Eighth Circuit’s rationale, the rule of deference spread among the

43. See, e.g., Dan T. Coenen, To Defer or Not to Defer? A Study of Federal Circuit Court Deference to District Court Rulings on State Law, 73 MINN. L. REV. 899, 910–12 (1989).

44. See id. at 905–06, 913–14. A few courts and commentators justified the traditional rule of deference by reference to Rule 52(a) of the Federal Rules of Civil Procedure. See id. at 916–20 (discussing and criticizing this reliance, and noting that the Tenth Circuit had on occasion advanced such reasoning). Rule 52(a) directs that “[f]indings of fact . . . shall not be set aside unless clearly erroneous.” FED. R. CIV. P. 52(a). The argument that Rule 52(a) requires—or even suggests—deference to district court interpretations of state law necessarily entails understanding Rule 52(a)’s reference to “findings of fact” to include district judges’ rulings on the law of the state in which they sit.

As Coenen aptly puts it, such an understanding of Rule 52(a) “startles the intuitions.” Coenen, supra note 43, at 916. Rule 52(a) speaks distinctly of “findings of fact” and “conclusions of law.” Nowhere in Rule 52(a)—or elsewhere in the federal rules—is there any suggestion that findings of fact are intended to subsume a subset of what otherwise would be considered conclusions of law. See id. at 916–20. Indeed, the Federal Rules of Civil Procedure make clear that even district courts’ determinations of foreign law—which district courts may ascertain using “relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence”—“shall be treated as a ruling on a question of law.” FED. R. CIV. P. 44.1. See also Arthur R. Miller, Federal Rule 44.1 and the “Fact” Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine, 65 MICH. L. REV. 613 (1967) (analyzing the effect of Rule 44.1, then recently effective, on the determination of foreign law in federal courts). For a comprehensive discussion of how domestic federal and state courts resolve questions of foreign law, see John G. Sprankling & George R. Lanyi, Pleading and Proof of Foreign Law in American Courts, 19 STAN. J. INT’L L. 3, 68–88 (1983).

45. See Magill v. Travelers Ins. Co., 133 F.2d 709, 713 (8th Cir. 1943).

46. The court in Magill explained its rationale thus: “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. (citation omitted).

For the proposition in the first sentence, the court cited Reitz v. Mealey, 314 U.S. 33 (1941), overruled on other grounds by Perez v. Campbell, 402 U.S. 637, 651–52 (1971). One statement by the Supreme Court in Reitz makes the Eighth Circuit’s reliance seem quite appropriate: “[W]e should accord great weight to the District Court’s view of New York law.” Id. at 39. However, the Eighth Circuit did not mention that, despite the Supreme Court’s comment about deference to the district court, the Supreme Court specifically noted that it had undertaken its own “examination of the [state] authorities” and concluded that “any contrary view is untenable.” Id. The Eighth Circuit opinion also took no notice of the fact that the district court opinion affirmed in Reitz was a three-judge panel: a circuit judge, Judge Learned Hand, authored the opinion, and one district judge dissented. See Reitz v.
circuits. Indeed, by 1991 when the Supreme Court ultimately disapproved of the rule in *Salve Regina College v. Russell*, federal courts of appeals generally followed the rule of according some degree of deference to interpretations of state law rendered by district judges. Only the Ninth Circuit expressly rejected the rule—and it did that only in 1984. The

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For the proposition in the second sentence, the Eighth Circuit relied upon two Supreme Court opinions: *Helvering*, 317 U.S. at 154, and *MacGregor v. State Mutual Life Assurance Co.*, 315 U.S. 280 (1942). The Court in *MacGregor* held that "[i]n the absence of [state court] guidance... [it would] leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan." *MacGregor*, 315 U.S. at 281. Thus, the *MacGregor* court did not defer to a state law interpretation solely because it was reached by a district judge, but also because the same interpretation was shared by judges on the court of appeals.

*Helvering* did not involve a case where deference was given to a district judge interpreting the law of the state in which he sat; indeed, trial was held before the Board of Tax Appeals. Rather, the Supreme Court accorded deference to the Seventh Circuit's interpretation of Illinois law, affirming "the reasoned judgment of the circuit which includes Illinois in which a judge of long experience in the jurisprudence of that state participated." *Helvering*, 317 U.S. at 163. Citing *MacGregor*, the *Helvering* Court explained that "[w]ithout a definite conviction of error in the conclusion... [it would] not reverse" the judgment of the court of appeals. *Id.*


48. See Coenen, supra note 43, at 901 ("[A]lmost every circuit has held that appeals panels should afford heightened deference, not applicable in federal law cases, to the state law rulings of district court judges."). See also 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 2.15, at 2-84 to 2-86 (3d ed. 1999) (reviewing different courts' language regarding deference). Cf. *id.* at 2-86 ("[I]n practice it has always been clear that the usual appellate court will not defer to incorrect law. These circuit (and panel) individualities [on the question of deference] often seem more like variations of language than really different deference.").

49. See *In re McLinn*, 739 F.2d 1395, 1403 (9th Cir. 1984) (en banc) (rejecting the rule of deference). Coenen describes the Third Circuit's pre-*Salve Regina* position on the rule of deference as "uncertain." Coenen, supra note 43, at 970. See also *id.* at 970-72 (collecting and analyzing cases in the Third Circuit that address the rule of deference). In *Craig v. Lake Asbestos*, 843 F.2d 145, 148 (3d Cir. 1988), the court of appeals asserted that "when a district court sitting in diversity applies state legal precepts to determine whether to pierce the corporate veil, the legal conclusion that it has drawn from the facts found is subject to plenary review." In support of this proposition, the court cited the Ninth Circuit's *In re McLinn* decision with the parenthetical explanation, "(‘appellate review of conclusions of state law should be under the same independent de novo standard as conclusions of federal law’)." *Id.* The *Craig* court did not further undertake an analysis of the rule of deference. The Supreme Court in *Salve Regina* cited *Craig* and *In re McLinn* as evidence of a circuit split between the Third and the Ninth Circuits on the one hand, and the majority of circuits that endorsed the rule of deference on the other. See *Salve Regina*, 499 U.S. at 231.

The Federal Circuit apparently never adopted the rule of deference. See Coenen, supra note 43, at 1017 ("[N]o cases in the Federal Circuit discuss[ the rule of deference."]). This is perhaps not surprising. First, because the Federal Circuit never hears pure diversity cases, it might be expected to come upon questions of state law with much less frequency than its sister circuits. Second, because the Federal Circuit hears comparatively few appeals from decisions of federal district courts—for example, from decisions rendered by judges residing in the state whose law is in question—the rule of deference would likely be inapplicable. But see *id.* (suggesting that "the rule of deference may [have been] especially appropriate" in the Federal Circuit because of its "unlimited geographic jurisdiction").
degree of deference varied circuit by circuit (and sometimes case by case), with most courts affording "great," "substantial," or "considerable" weight or deference, and two Circuits—the Sixth and Tenth—seeming to go even beyond that. The rule was applied broadly to "any and all questions of state law" in any and all circumstances. In short, until 1991, the rule of deference was by far the accepted majority rule.

B. THE FALL OF DEERENCE

The fall of the courts of appeals’ rule of deference was presaged and perhaps somewhat prompted by an influential article by Dan Coenen. Coenen’s 1989 article questioned the legal, practical, and normative validity of the rule. Two scant years later in *Salve Regina*, the Supreme Court rejected the notion of deferential review of district court state law holdings by courts of appeals, opting instead for a de novo standard.

In an opinion by Justice Blackmun, the *Salve Regina* Court enunciated two basic reasons for rejecting deferential review: comparative institutional advantage and doctrinal coherence. On the first point, the

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50. *Id.* at 902-03. Coenen’s article includes an appendix that surveys the then-current state of the law, circuit by circuit. See *id.* at 963-1017 app. I.

51. Coenen explains that [t]he Tenth Circuit has held that [federal district court] rulings [on state law] carry "extraordinary force" and should stand unless they are "clearly erroneous" or "clearly wrong." The Sixth Circuit has stated that it will not reverse "if a federal district court has reached a permissible conclusion upon a question of local law." *

52. See *Coenen*, supra note 43, at 904. Coenen’s article includes an appendix that sets out various exceptions to the rule that courts of appeals have recognized. See *id.* at 1017-21 app. II.

53. *See id.* It is interesting to note that prior to writing his article, Coenen clerked for Justice Blackmun, the author of the decision that invalidated the traditional rule of deference.

54. Some of Coenen’s arguments are detailed and critiqued below. See *infra* notes 164, 190-95 and accompanying text, 237-49 and accompanying text.


57. *Id.* at 231. The Court’s opinion identifies an additional factor, "economy of judicial administration." *Id.* The reasons discussed by the Court, however, relate to the greater ability on balance of courts of appeals, as opposed to district courts, to resolve questions of state law. See *infra* text accompanying notes 58-64. Such arguments fall under the rubric of comparative institutional advantage; they speak little, if at all, to the notion that judicial resources are somehow conserved when courts of appeals review district courts’ state law holdings de novo, as opposed to under a deferential standard. See *Salve Regina*, 499 U.S. at 239 (referring to the factors that justify its conclusion as "[t]he obligation of responsible appellate review and the principles of a cooperative judicial federalism"); *id.*
Court noted that district judges' busy schedules, as well as in general the "limit[ed] . . . extent to which trial counsel is able to supplement the district judge's legal research with memoranda and briefs," suggested that district judges were likely to decide "complicated legal questions without benefit of 'extended reflection [or] extensive information.'" The Court noted three ways in which the appellate court setting contrasts with the trial court setting. First, appellate courts address cases once the factual records have been established, so that they are free to focus on legal questions. Second, briefs on appeal "can be expected . . . to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge." And, third (and according to the Court, "[p]erhaps most important"), the fact that courts of appeals sit in multijudge panels allows for "reflective dialogue and collective judgment."

On the issue of doctrinal coherence, the Court explained that "appellate deference to the district court's determination of state law is inconsistent with the principles underlying . . . Erie." First, deference might lead to inequitable administration of the laws by allowing splits of authority to develop even within single district courts. Second, deference might encourage forum shopping by insulating from proper review federal district court decisions that are in actuality contrary to state law.

In addition to providing these two primary justifications for de novo appellate court review, the Court confronted and rejected the expertise argument—that a district judge has "superior capacity" to resolve questions of state law based on both "the regularity with which a district judge tries a diversity case governed by the law of the forum State, and . . . the extensive experience that the district judge generally has had as practitioner or judge."

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58. *Salve Regina*, 499 U.S. at 239.
59. *Id.*
60. *Id.* at 232 (quoting Coenen, *supra* note 43, at 923 (alteration in original)).
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 234.
66. See *id.* (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965)).
67. See *id.* *Cf.* Leavitt v. Jane L., 518 U.S. 137, 144-45 (1996) (per curiam) (granting certiorari "solely to review what purports to be an application of state law" because "the alternative is allowing blatant federal-court nullification of state law").
in the forum State." The Court first noted that the argument "seems . . . to be founded fatally on overbroad generalizations." "[M]ore important" to the Court was the fact that "the proposition that a district judge is better able to 'intuit' the answer to an unsettled question of state law is foreclosed by [the] holding in Erie." The Court attempted to justify this conclusion thus:

The very essence of the Erie doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge. . . . Similarly, the bases of state law are as equally communicable to the appellate judges as they are to the district judge. To the extent that the available state law on a controlling issue is so unsettled as to admit of no reasoned divination, we can see no sense in which a district judge's prior exposure or nonexposure to the state judiciary can be said to facilitate the rule of reason.

This reasoning is puzzling on several counts. First, while it is true that the bases of state law are "communicable" by parties to federal as well as state courts, Erie does not presume the broader point that the state and federal court systems are equally capable of resolving issues of state law. To the contrary, Erie makes clear that state high courts have the final word on the proper interpretation of state law.

Second, even if one accepts that Erie presumes federal and state courts are equally able to resolve issues of state law, the notion that federal appellate and district judges are equally competent to resolve state law issues does not, as the Court suggests, follow similarly. While Erie compares the ability of federal and state judiciaries, the comparative ability of different judges within the same (federal) judicial system to resolve such questions raises not similar concerns, but rather concerns that are quite distinct.

68. Salve Regina, 499 U.S. at 238. The Court also rejected the argument that, despite the courts of appeals' description of their standard of review as deferential, the circuit courts in practice actually undertook plenary review of district court determinations of state law. See id. at 235–38.

69. Id. at 238.

70. Id.

71. Id. at 238–39.

72. The notion that legal arguments are "communicable" to judges generally seems unobjectionable; one wonders why Justice Blackmun thought it necessary to specify that the notion was "presumed" by "[t]he very essence" of the Erie doctrine. Id. at 238.

73. Indeed, were it otherwise, federal courts would need never avail themselves of certification or abstention.

74. See infra text accompanying notes 185–86.
Third, the Court’s attempt utterly to discredit the usefulness of a federal district judge’s exposure to state law is conclusory and falls flat. Indeed, the attempt is belied by a footnote immediately following the above excerpted language; the Court quotes a major federal jurisdictional resource for the assertion that

"[a]s a general proposition, a federal court judge who sits in a particular state, especially one who has practiced before its courts, may be better able to resolve complex questions as to the law of that state than is a federal judge who has no such personal acquaintance with the law of the state." 75

Moreover, the opinion makes no attempt to harmonize its assertion with statements by the Court in earlier cases about the expertise of local judges on matters of local law; indeed, it does not even cite any such earlier statements. 76

It is not clear why the Salve Regina Court thought it necessary, or even appropriate, to reach out for and include these arguments in its opinion, given the arguments’ scant elucidation and questionable strength. 77 The Court could have rested its holding simply on the logic that (1) district judges’ expertise in state law is based upon “overbroad generalizations,” and (2) whatever district judges’ expertise in matters of state law might be, that expertise is outweighed by the institutional advantage enjoyed by courts of appeals. The inclusion of other arguments bespeaks an intent by the Salve Regina Court to reject clearly and on every front the deferential approach theretofore endorsed by the courts of appeals.

75. See Salve Regina, 499 U.S. at 239 n.5 (emphases added) (quoting 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4507, at 106–10 (1982)). The footnote proceeds to quote language from the treatise indicating that familiarity with state law is not enough to justify deferential review of district courts’ state law holdings by courts of appeals. See id. The quoted language also rejects the analogy between deferential review of trial court factual findings and review of district court state law determinations. See id.; supra note 44. Thus, the treatise on the whole accords with the Court’s ultimate holding. Nevertheless, the treatise does not support—and even belies—the Court’s claim to “see no sense in which a district judge’s prior exposure or nonexposure to the state judiciary can be said to facilitate the rule of reason.” Salve Regina, 499 U.S. at 239 (emphasis added).

76. Earlier in Salve Regina, the Court dismissed the notion that the Court “has not spoken with a uniformly clear voice on the issue of deference to a district judge’s determination of state law,” arguing instead that “a careful consideration of [its] cases makes apparent the duty of appellate courts to provide meaningful review of such a determination.” Id. at 234. Once again, the Court did not cite any cases in which it affirmatively credited the greater expertise of district judges.

77. These arguments are further critiqued below. See infra Part V.
The Court seemed to take *Salve Regina* a step farther in *Leavitt v. Jane L.*, holding that it would review a court of appeals’ determination of state law de novo, even where the state whose law was in question lay within the court of appeals’ geographic reach. In the end, the Court’s treatment of the question raises more questions than it answers. First, in a per curiam opinion the Court characterized the dissent’s assertion that the court of appeals’ state law decision was entitled to deference as “particularly weak (if not indeed counterindicative) where a Court of Appeals panel consisting of judges from Oklahoma, Colorado, and Kansas has reversed the District Court of Utah on a point of Utah law.” But this argument seems contrary to *Salve Regina*’s holding. If, as *Salve Regina* directs, courts of appeals owe no deference to federal district court determinations of state law, why should it matter that the court of appeals reversed the determination of a federal judge based in Utah on a question of Utah law?

The *Leavitt* Court then asserted the following: “If, as we have said, the courts of appeals owe no deference to district court adjudications of state law... surely there is no basis for regarding panels of circuit judges as ‘better qualified’ than we to pass on such questions...” *Salve Regina*’s predominant reasoning, which focused on doctrinal coherence and comparative institutional advantage, does not support the Court’s assertion. First, the *Salve Regina* Court’s concern that deference to district court state law determinations might lead to different holdings on state law questions (as well as the accompanying forum shopping concern) has no application

79. The per curiam opinion was endorsed by Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas. *Id.*
80. Justice Stevens authored the dissent, in which Justices Souter, Ginsburg, and Breyer joined. *Id.* at 146.
81. *Id.* at 145.
82. Justice Stevens noted that
83. *Id.* at 145 (citation omitted). Note that the dependent clause is worded conditionally, opening as it does with the word “if.” The word “insofar” would have seemed a more natural, and (in light of *Salve Regina*) appropriate, word with which to begin the sentence. One might argue that the wording almost seems to reopen the question that *Salve Regina* purported to put to rest. While such an argument seems rather grounded in semantics, one might note that the argument is consistent with the Supreme Court’s questionable adherence to its *Salve Regina* precedent elsewhere in *Leavitt*. See supra text accompanying notes 79–82, as well as with the deference the Court has continued occasionally to accord courts of appeals’ state law determinations after *Leavitt*. See infra Part III.C.
in the *Leavitt* context: a court of appeals' state law holding is binding on subsequent panels of that court unless and until the court rehears the matter en banc. Second, the *Salve Regina* Court juxtaposed the substantial obstacles faced by district judges in determining questions of law with courts of appeals' greater aptitude to determine questions of law. Similar institutional considerations do not indicate that the Supreme Court has a substantial institutional advantage over courts of appeals in terms of resolving questions of state law.\(^{84}\) Thus, the likelihood that circuit judges would have greater expertise than Supreme Court Justices in determining state law questions *would* make circuit judges "‘better qualified’ . . . to pass on such questions." In short, the mere fact that courts of appeals should not defer to district courts on matters of state law does not imply, as the *Leavitt* majority asserted, that the Supreme Court should not defer to courts of appeals.\(^ {85}\)

The Court in *Leavitt* concluded by recognizing that it applied a "general presumption that courts of appeals correctly decide questions of state law."\(^ {86}\) But the Court emphasized that the presumption arose out of "a judgment as to the utility of reviewing [questions of state law] in most cases, . . . not a belief that the courts of appeals have some natural advantage in this domain. . . ."\(^ {87}\)

**C. THE LIMITED RESURRECTION OF DEFERENCE?**

*Leavitt* may be read broadly or narrowly. Broadly, the case can be read to put to rest altogether the notion of affording substantive deference to the lower federal courts on questions of state law. Even if such a broad interpretation is inaccurate, however, it seems that, at minimum, the case stands to reject deference under the particular circumstances there presented. For example, it precludes deference by the Supreme Court to a court of appeals' state law determination where there is no additional basis for deference, but perhaps preserves deference in other circumstances—as when the court of appeals' determination is in line with that of the district

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84. *See infra* text accompanying note 226. Note, however, that the Supreme Court's larger panels (other than in en banc cases) and rarified atmosphere may provide some measure of institutional advantage over courts of appeals.

85. The one obstacle to that reasoning—and the one aspect of *Salve Regina* that somewhat supports the *Leavitt* majority's assertion—is the portion of *Salve Regina* in which the Court rejected the notion of district court expertise as a basis for deference, on the grounds both that *Erie* precludes the notion and that expertise would not help a district judge to reach a reasoned resolution of a state law question. *See supra* text accompanying note 71.


87. *Id.* (citations omitted).
court. But even the narrow interpretation of Leavitt is drawn into question by subsequent opinions of the Court in McMillian v. Monroe County and Phillips v. Washington Legal Foundation.

The Court in McMillian addressed the question of whether a sheriff acting in his law enforcement capacity was a policymaker for the county in which he worked (in which case the county would be liable for his unconstitutional actions) or for the state of Alabama (in which case the county would not be so liable). Classifying the question as one of Alabama state law, the Court deferred to the Eleventh Circuit’s conclusion that the sheriff was a policymaker for the state: “Since the jurisdiction of the Court of Appeals includes Alabama, we defer considerably to that court’s expertise in interpreting Alabama law." As if to clarify that the Court truly was affording substantive deference to the court of appeals’ interpretation of state law, and not simply conserving its own judicial resources, the Court noted that “two of the three judges on the Eleventh Circuit’s panel are based in Alabama.”

88. See supra note 40 and accompanying text.
90. Phillips v. Wash. Legal Found., 524 U.S. 156 (1998). Justice O’Connor has also suggested that a narrow interpretation of Leavitt is incorrect:

We have stated on several occasions that we ordinarily defer to the construction of a state statute given it by the lower federal courts unless such a construction amounts to plain error. . . . Such deference is not unique to the abortion context, but applies generally to state statutes addressing all areas of the law.

91. The parties agreed that the sheriff was a policymaker, disputing only the governmental entity for which he was a policymaker. See McMillian, 520 U.S. at 783.
92. Id. at 786.
93. Id. Notably, the opinion was authored by Chief Justice Rehnquist, who had endorsed the Court’s per curiam opinion in Leavitt, but who dissented in Salve Regina.
94. In this respect, compare McMillian and Phillips with the Court’s decision in UNUM Life Insurance Co. of America v. Ward, 526 U.S. 358 (1999), another post-Leavitt case. Among the issues there before the Court was the question of whether a provision of California state law was preempted under the preemption and savings clauses of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1144(a), 1144(b)(2)(A) (2000). The savings clause exempts from preemption a state law that "regulates insurance." § 1144(b)(2)(A). The Court reasoned thus: "The Ninth Circuit concluded that California’s notice-prejudice rule ‘regulates insurance’ as a matter of common sense. We do not normally disturb an appeals court’s judgment on an issue so heavily dependent on analysis of state law, and we lack cause to do so here.” UNUM Life Ins., 526 U.S. at 368 (citations omitted). The description of the Supreme Court’s action as simply “not . . . disturbing” the court of appeals’ state law determination suggests that the proper allocation of judicial resources, and not deference, underlay the Court’s decision. Also, the Court in Ward did not highlight—or indeed even mention—the fact that the state whose law was at issue (California) lies within the geographic reach of the court of appeals that rendered the decision, the Ninth Circuit. Note that none of the three judges on the panel had chambers in California, and that it was District Judge Bruce S. Jenkins of the District of Utah, sitting by designation, who authored the Ninth Circuit’s opinion. See Ward v. Mgmt. Analysis Co. Employee
To similar effect is the Court’s opinion in Phillips.96 There, the Court sought to discern Texas law to determine the applicability of a Takings Clause claim.97 Again speaking through Chief Justice Rehnquist, the Court rejected the petitioners’ use of analogous areas of state law to demonstrate that the federal court of appeals had gotten the Texas law wrong. The Court found the analogous examples “insufficient to dispel the presumption of deference given the views of a federal court as to the law of a State within its jurisdiction.”98 As in McMillian, as if to highlight that the Court truly was affording substantive deference to the court of appeals’ interpretation of state law, the Court emphasized that “two of the three” court of appeals judges were “Texans.”99

One might argue that the holdings in McMillian and Phillips accord with a narrowing reading of Leavitt—that is, that the Court afforded deference in these cases because the district judge and the appellate judges agreed on the proper interpretation of state law. There are two problems with this argument. First, in neither case did the Court suggest, let alone

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95. *McMillian*, 520 U.S. at 786 n.3. The panel consisted of Circuit Judges Emmett Ripley Cox of Alabama, Rosemary Barkett of Florida, and District Judge Robert B. Propst of the Northern District of Alabama, sitting by designation. *McMillian v. Johnson*, 88 F.3d 1573, 1575 (11th Cir. 1996), *aff’d sub nom. McMillian*, 520 U.S. at 781. Judge Cox wrote the opinion of the court. *Id.* Judge Propst “concur[red] in Judge Cox’s well-reasoned opinion.” *Id.* at 1585 (Propst, J., concurring specially). In addition to its comment on the panel composition, the Court noted that the decision it was reviewing was “the second Eleventh Circuit panel to have reached this conclusion.” *McMillian*, 520 U.S. at 786 n.3.


97. *See id.* at 160. The Court has held that the question of whether the Takings Clause applies to a property interest is not resolved by reference to the Takings Clause, but rather by reference to some independent source of law, such as state law. *See id.* at 164. At the same time, the reasoning of the Court in *Phillips* seems to turn on “general” conceptions of property law as opposed to the law of any particular state. *See id.* at 165, 167–68; *id.* at 173 (Souter, J., dissenting) (describing the majority as concluding that “the relevant state law... embrace[s] the general principle that property in interest income follows ownership of the principal on which the interest is earned”). *See also* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 896–98 (2000) (criticizing the *Phillips* Court for asserting that the proper procedure is to determine the scope of Takings Clause protection by following state law, yet at the same time deciding the case based upon more general principles of property law); *id.* at 952–95 (arguing that federal “patterning definitions” of property set a floor below which state law cannot go for purposes of determining the scope of protection afforded by the Constitution’s Property clauses).


state, that this was the justification for deference. Second, while the McMillian case can be seen in such a way, Phillips cannot; the court of appeals in Phillips explicitly rejected the district court’s interpretation of state law.101

Thus, in both McMillian and Phillips, the Court afforded substantive deference to interpretations of state law issued by courts of appeal because their jurisdiction included the state in question and judges on the panel were from the state in question. In neither case did the Court attempt to distinguish Leavitt; indeed, in neither case did the Court cite Leavitt or Salve Regina.102

In short, even in the wake of Salve Regina and Leavitt, the Supreme Court on occasion continues to defer substantively to state law conclusions

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100. The state law question at issue in McMillian was originally decided in the negative by the Eleventh Circuit in Swint v. City of Wadley, 5 F.3d 1435 (11th Cir. 1993), modified on other grounds, 11 F.3d 1030 (1994), vacated on jurisdictional grounds sub nom. Swint v. Chambers County Comm’n, 514 U.S. 35 (1995). The appellate court in Swint conducted its own independent inquiry into the state law question, and noted that its resolution squared with the conclusion reached by the three Alabama-based federal district court judges who had considered the question. See id. at 1450–51.

The Supreme Court vacated the Eleventh Circuit’s opinion in Swint on jurisdictional grounds. Before that happened, however, the district judge in McMillian ruled that a sheriff is not a county policymaker in his capacity as enforcer of the law. The district judge relied on the then-valid decision announced in Swint. See McMillian, 88 F.3d at 1576. While reliance on Swint obviated the need for the McMillian district court to conduct its own analysis of the state law question, the presiding judge—Judge W. Harold Albritton, III—was one of the district judges whom the Eleventh Circuit identified in Swint as having reached the same resolution in an earlier case. See Swint, 5 F.3d at 1451.

When the Supreme Court vacated the Eleventh Circuit’s decision in Swint, the court of appeals in McMillian (consisting of a different panel than in the Swint case) was obligated to reconsider the validity of Swint’s substantive holding. See McMillian, 88 F.3d at 1578 (“[B]ecause the Supreme Court held that we lacked jurisdiction in Swint and vacated our decision, Swint is not binding precedent.”). But the court in the end adhered to the same conclusion: sheriffs are not county policymakers in their capacity as law enforcers under Alabama law. See id. at 1578.

In sum, then, in the posture in which McMillian reached the Supreme Court, it was the culmination of a series of cases in which four district judges (including one sitting by designation on the panel in McMillian) and five circuit judges (including one senior Eighth Circuit judge, sitting by designation on the panel in Swint) agreed on the proper interpretation of Alabama state law. The Supreme Court, however, never so much as alluded to this background in explaining its decision to afford deference to the Eleventh Circuit’s decision.

101. See Wash. Legal Found., 94 F.3d at 996, rev’g in part 873 F. Supp. 1 (W.D. Tex. 1995) (concluding that interest on lawyers’ trust accounts did not constitute a property interest), aff’d sub nom. Phillips, 524 U.S. at 156.

102. The Court’s action in Phillips actually is consistent with Salve Regina’s explicit holding, in that the state law interpretation of the Texas district court was afforded no deference. Indeed, it was rejected, both by the court of appeals and by the Supreme Court. See supra note 101 and accompanying text. Note, however, that while the district court treated the question of whether there was a property interest protected by the Takings Clause as “a question of state law,” it did not cite any state law authority in reaching its conclusion. See Wash. Legal Found., 873 F. Supp. at 5–8.
reached by regional courts of appeals that include the state whose law is in question in their geographic reach (at least where judges on the panel hail from that state). Furthermore, the Court apparently does so not simply as a matter of efficient allocation of resources. While *Salve Regina* questions whether experience can ever justify deference, and *Leavitt* facially appears to preclude substantive deference to courts of appeals' determinations of state law, *McMillian* and *Phillips* both suggest that *Salve Regina* and *Leavitt* should not be read so broadly. In addition, the reasoning of *Leavitt* itself seems to draw back somewhat and question *Salve Regina*'s rejection of the traditional deference rule. At the same time, the federal courts of appeals have followed *Salve Regina* and abandoned the notion of reviewing district court interpretations of state law under a deferential standard.

**IV. FEDERAL COURTS' *ERIE* OBLIGATION AND THE IMPORTANCE OF GENERAL EXPERTISE WITH STATE JUDICIARIES AND JURISPRUDENCE**

The preceding Part described the current questionable state of deference to lower federal courts on questions of state law. Before undertaking a more thorough analysis of *Salve Regina College v. Russell*'s effect on deference (which I do in the succeeding Part), I first take a step back and examine one point that is especially pivotal to the question of deference: the question of whether general expertise with the state judiciary and state jurisprudence helps in resolving questions of state law under *Erie Railroad Co. v. Tompkins*. I focus in this Part on the importance of this expertise to federal courts' *Erie* analysis. First, I outline different understandings of federal courts' role under *Erie*. Next, I demonstrate that general expertise with the state court system and state jurisprudence is valuable under the various conceptions of federal courts' *Erie* obligation.

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103. See, e.g., Ed Peters Jewelry Co. v. C & J Jewelry Co., 215 F.3d 182, 191 (1st Cir. 2000) ("[N]o deference on the applicable local law is owed the district court."); Elliott Assocs., L.P. v. Banco de la Nacion, 194 F.3d 363, 370 (2d Cir. 1999) ("[N]o deference [is due] to district court interpretations of state law."); Paramount Pictures Corp. v. Metro Program Network, Inc., 962 F.2d 775, 778 n.6 (8th Cir. 1992) (concluding that *Salve Regina*'s holding applies to consideration of federal district court determinations of pendent state law claims and state law claims falling under federal diversity jurisdiction); CHILDRESS & DAVIS, supra note 48, § 2.15, at 2-89 ("Following *Salve Regina*, lower courts routinely apply de novo review over decisions on state substantive law."). To the contrary is the post-*Salve Regina* decision in *Raju v. Rhodes*, 7 F.3d 1210, 1212 (5th Cir. 1993) ("[S]ome deference is due to the district court's interpretation of the law in the state in which it sits."). The court in *Raju* cited a pre-*Salve Regina* Fifth Circuit case, *Schuster v. Martin*, 861 F.2d 1369, 1371 (5th Cir. 1988), but not *Salve Regina*. But see Am. Waste & Pollution Control Co. v. Browning-Ferris, Inc., 949 F.2d 1384, 1386 n.2 (5th Cir. 1991) (recognizing that *Salve Regina* overruled the Fifth Circuit's prior rule of deference to federal district court judges).
As an initial matter, one might ask why expertise with respect to state law and the state judiciary should be useful in predicting how a state high court would resolve a novel issue of state law. Charles Alan Wright, Arthur Miller, and Edward Cooper highlight the relationship between a judge’s “personal acquaintance with the law of the state”\textsuperscript{104} and his or her ability “to resolve complex questions regarding the law of that state.”\textsuperscript{105} Indeed, they explicate it is “[f]or this reason”\textsuperscript{106}—that is, because of this relationship between expertise and predictive ability—that federal appellate courts—both the Supreme Court and various courts of appeals—frequently have voiced reluctance to substitute their own view of the state law for that of an experienced federal district judge, or have accorded that judge’s view of the forum state’s law ‘great,’ or ‘substantial,’ or ‘considerable’ weight or deference.\textsuperscript{107}

Support for the notion that expertise assists in predicting the “proper” resolution of state law issues comes from the somewhat analogous Supreme Court jurisprudence governing abstention in favor of state court adjudication of state regulatory issues. Randall Bezanson has argued that in \textit{Burford v. Sun Oil Co.}\textsuperscript{108} and its progeny, the Supreme Court “has emphasized the reliability of the state court adjudicatory process in the resolution” of state regulatory issues.\textsuperscript{109} Among the “sources” Bezanson identifies for “this reliability” are state courts’ “superior appreciation of


\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.} (emphasis added).

\textsuperscript{107} \textit{Id.} Compare the comments of Winton Woods about the experience of federal appellate judges:

\textit{De novo} review is typically thought appropriate in the federal system because of the expertise that federal appellate courts develop in regard to federal law. Because of this special expertise, \textit{de novo} review allows the appellate court to substitute its judgment for that of the trial court, or other juridical entity, if it determines that the trial court is wrong for any reason. But the federal Courts of Appeals have no special expertise in matters of state law and under \textit{Erie} are constitutionally impotent to even have an opinion about what that law “ought” to be. Their task is simply to replicate the state court procedure for the particular parties before them.


\textsuperscript{108} \textit{Burford v. Sun Oil Co.}, 319 U.S. 315 (1943).

and sensitivity to the issues presented and the underlying state policies bearing on the controversy."110

While Bezanson highlights superior state court expertise111 in this regard as a justification for federal court abstention, his reasoning is useful in understanding the value of federal judge expertise with respect to state law and the state judiciary in resolving matters of state law.112 Like state courts resolving complex regulatory issues, a federal judge’s “superior appreciation of and sensitivity to the [state law] issues . . . and the underlying state policies bearing on [those issues]” should be a source of greater reliability.113

To understand the importance of expertise in resolving questions of state law, it is important first to understand exactly what *Erie* and its progeny ask federal courts to do. Federal courts must attempt to resolve the state law issues as they believe the relevant state high court would resolve them. To the extent that the issues of state law are novel, the federal courts necessarily will have to engage in what some might call “divination”114 and others might call “guesswork.”115 Wright, Miller, and Cooper identify several factors that federal courts may take into account in undertaking

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110. Id. at 1124. Other sources identified by Bezanson are “substantial experience adjudicating the issues raised in the litigation; superior factfinding abilities . . . or greater power to order relief and expeditious resolution of the case.” Id. (footnotes omitted).


112. Extension of Bezanson’s argument clearly establishes the state courts as the preferred expositors of state law, a result that accords with *Erie*. But, as discussed above, there are limits on the circumstances under which a federal court may leave the resolution of state law issues to state courts. See supra text accompanying notes 15–25. Given those limits and accepting the desirability of having federal courts resolve matters of state law under certain circumstances, the importance of a federal forum may outweigh state courts’ greater expertise in resolving state law issues. Cf. Woolhandler & Collins, supra note 111, at 691–92 (making such an argument in respect to state law fact-finding expertise).

113. Bezanson, supra note 110, at 1123.


such analyses, including signals from state high court cases, rulings from lower state courts, state court dicta, opinions of the state attorney general, and silence of the state legislature. At bottom, the federal courts must predict, as best they can, how the state high court would rule on the issues.

Indeed, an understanding of federal courts' *Erie* obligation is not monolithic. Evan Caminker, Bradford Clark and Michael Dorf outline different possible approaches that federal courts might undertake in resolving issues of state law. I take no position here on which of these approaches (if any) are more appropriate for federal courts to take in conducting *Erie* analyses; I merely expound the various approaches to demonstrate that for a wide spectrum of possible approaches, general expertise in the state judiciary and state jurisprudence is a valuable commodity.

One approach identified by Clark is the "static approach." Under this approach,
when state law applies in a determinate fashion—for example, by clearly establishing a cause of action or a defense in favor of one party or another—a federal court must apply such law to the case before it. On
the other hand, when state law is indeterminate, the static approach instructs federal courts to refrain from making the significant policy choices necessary both to resolve such indeterminacies and to recognize a novel claim or defense. In other words, the static approach counsels federal courts to adjudicate the rights and duties of the parties without regard to novel rules proposed by the parties, but not yet recognized authoritatively by an appropriate organ of the state. Thus, unless the proponent of a novel rule is able to establish that the state itself—acting through its legislature, its courts, or other appropriate agents—has already exercised the policymaking discretion necessary to adopt the rule in question, a federal court employing the static approach will simply refuse to recognize the proposed rule. In this sense, the proponent of a proposed rule must establish that the rule in fact constitutes a sovereign command of the state and thus bears the risk of nonpersuasion.124

Similar to Clark’s static approach is Dorf’s execution model. A federal court applying the execution model understands its Erie obligation as simply to “execute the law as found in already decided cases, but not to craft novel interpretations.”125

Also substantially similar to Clark’s static approach is Caminker’s “precedent model”: According to this model, all judges . . . are “to decide cases before them based on their best current understanding of the law.” This interpretive process embraces two interactive steps: Judges must identify relevant sources of enacted law such as constitutional provisions, statutes, and administrative regulations, and they must apply some combination of various methods of interpretation in order to discern the meaning of those sources. The judicial objective is to construct the best interpretation of the legal materials and to apply this interpretation to adjudicate each particular case.126

Caminker’s precedent model, Clark’s static approach, and Dorf’s execution model afford federal courts comparatively little leeway in interpreting state law. They contrast with other approaches that offer greater leeway: Caminker’s “proxy model,” Clark’s “predictive approach,” and Dorf’s “prediction” and “elaboration” models.

125. Dorf, supra note 118, at 664. Thus, under the execution model, a federal court would take the position that “arguments of policy, as opposed to doctrine, cannot form the basis for [its] decisions, even while recognizing that policy arguments may legitimately be addressed to the high court.” Id. at 664–65.
Under Clark's predictive approach, the federal court "attempts to forecast the development of state law by asking what rule of decision the state's highest court is likely to adopt in the future." Clark details that federal courts might rely on the predictive approach to predict novel state law causes of action, predict novel state law defenses, and predict that existing state law precedent will be overruled.

While Clark offers only the predictive approach as an alternative to the static approach, Dorf indulges a fuller set of data on which a federal court (that does not rely upon the execution model) might rely in expanding on existing state law. Dorf notes that the federal court might approach a novel state law question as would the high court of the state—the elaboration model. Thus, a federal court applying the elaboration model does not simply look up the correct decision for each case in a book of self-applying legal precedents. The process is more open-ended. As the model's title suggests, the . . . [federal court] must elaborate the reasons for [its] decision, drawing upon a range of arguments that go well beyond settled doctrine strictly construed.

In the alternative, the federal court might try to predict how the actual judges on the state high court would vote were they faced with the question before the federal court—the prediction model. Under Dorf's prediction model, the federal court "strives . . . to predict what a majority of the relevant [state high] court would do."

Dorf identifies "the written opinions, concurrences, and dissents of the sitting Justices" as "most obvious" data that a predicting court likely would consult. But he adds that [i]t is important to understand . . . that . . . these statements are relevant, not because they contribute to the content of some transcendent conception of law; rather, they are significant because they provide evidence of how the individual judges currently sitting on the high court will decide the case. Thus, there is no obvious reason to limit the data

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127. Clark, supra note 12, at 1497. Indeed, even where the state law on point is seen as determinate, that is simply a prediction that the law will not change.
128. See id. at 1502–08.
129. See id. at 1508–13.
130. See id. at 1514–16.
131. Dorf, supra note 118, at 665. Dorf explains that "the models will generally rank, in decreasing order of accuracy of prediction, as follows: prediction model; elaboration model; execution model." Id. at 667. He provides an example, however, where the elaboration model is in fact the worst predictor. See id. at 666–67.
132. Id. at 663.
133. Id.
relevant to a prediction to published opinions. To discern how the high
court judges would rule, the . . . [federal court] could also consider their
non-judicial writings and speeches, their general ideological
commitments, or even reflect upon casual conversations with them.\textsuperscript{134}

Dorf’s prediction model differs from Clark’s predictive approach in
that it explicitly envisions judges looking to “nonjudicial” sources in
predicting how a state high court would rule on an issue. Indeed, Dorf’s
model focuses on determining how the actual judges on the state high court
probably would vote. While Clark’s predictive approach does not rule out
such considerations, it seems that Clark’s approach is more similar to
Dorf’s elaboration model.\textsuperscript{135}

Like Clark, Caminker offers only a single alternative to his precedent
model: the proxy model. Caminker explains that “[a]ccording to the proxy
model, [a federal] court discharges its duty to ‘say what the law is’ by
applying the dispositional rule that the [state high] court . . . predictably
would embrace.”\textsuperscript{136} He elucidates four “types of predictive data”\textsuperscript{137} to
which a court might look in predicting under the proxy model:
“dispositional rules endorsed by individual [judges] in prior written
opinions deciding cases;”\textsuperscript{138} “dicta contained in various [judges’]
opinions;”\textsuperscript{139} judges’ “declarations of their legal positions in public fora
other than written judicial opinions . . . includ[ing] . . . law review articles,
confirmation-hearing testimony, and public speeches;”\textsuperscript{140} and “other

\textsuperscript{134} Id. at 663–64.

\textsuperscript{135} Dorf notes as follows:
In principle, the federal courts look to “all available data” to predict how a state high court
would resolve a novel legal question. This test suggests that federal judges consider the
individual views of particular state high court judges. In practice, however, federal courts
typically rely upon impersonal materials in “predicting” state high court rulings.
Id. at 701 (footnote omitted) (quoting State Farm Mut. Auto. Ins. Co. v. Davis, 937 F.2d 1415, 1418
(9th Cir. 1991)). Thus, Dorf understands the typical federal court conducting an \textit{Erie}
analysis to employ the elaboration model. Dorf does recount some exceptions to this general rule. See \textit{id.} at 702–05
(describing exceptional cases in which federal courts conducting \textit{Erie} analyses have employed the
prediction and execution models). See also Dolores K. Sloviter, \textit{A Federal Judge Views Diversity
Jurisdiction Through the Lens of Federalism}, 78 VA. L. REV. 1671, 1677 (1992) (noting that the author,
the Chief Judge of the Third Circuit, and her court “turn to ‘analogous decisions, considered dicta,
 scholarly works, and any other reliable data tending convincingly to show how the highest court in the
state would decide the issue’”) (quoting McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 663 (3d Cir.
1980)).

\textsuperscript{136} Caminker, supra note 123, at 16 (footnote omitted) (quoting Marbury v. Madison, 5 U.S. (1
Cranch) 137, 177 (1803)).

\textsuperscript{137} Id. at 17.

\textsuperscript{138} Id.

\textsuperscript{139} Id. at 18.

\textsuperscript{140} Id.
informal information concerning particular [judges'] general ideological commitments or proclivities that might bear on their approaches to particular legal issues."\textsuperscript{141} Because it envisions courts both elaborating on existing law and taking into account extrajudicial sources, the proxy model seems like a cross between Dorf's prediction and elaboration models.

Dorf considers the execution and elaboration models to represent only two possible points "along a spectrum" of "conventional legal reasoning."\textsuperscript{142} In fact, it seems that Dorf's three models identify two axes of federal court freedom along which \textit{Erie} approaches might vary: freedom to consider extrajudicial sources, and freedom to vary from and elaborate on established state law. Figure 1 presents a graphic representation of these two axes and locates Caminker's, Clark's, and Dorf's approaches on the spectral plane.

\textbf{FIGURE 1. Federal court freedom in undertaking an \textit{Erie} analysis}

\begin{center}
\begin{tikzpicture}
\def\xaxis{2.5} \def\yaxis{2.5} \def\margin{0.5}
\draw[<->] (0,0) -- (0,\yaxis) node[below] {Freedom to Consider Extrajudicial Sources};
\draw[<->] (0,0) -- (\xaxis,0) node[right] {Freedom to Elaborate Upon Existing, Clear State Law Precedent};
\draw (0,\margin) -- (\xaxis,\margin) node[below] {A = Caminker's Precedent Model, Clark's Static Approach, and Dorf's Execution Model};
\draw (\margin,0) -- (\margin,\yaxis) node[right] {B = Clark's Predictive Approach and Dorf's Elaboration Model};
\draw (\yaxis,\margin) -- (\yaxis,\xaxis) node[above] {C = Dorf's Prediction Model};
\draw (\xaxis,\yaxis,\margin) -- (\xaxis,\yaxis) node[above] {D = Caminker's Proxy Model};
\end{tikzpicture}
\end{center}

Points A, B, C, and D in Figure 1 correspond generally to Caminker's, Clark's, and Dorf's various approaches to the \textit{Erie} analysis. Point A, at or near the origin, represents Caminker's precedent model, Clark's static approach, and Dorf's execution model, all three of which constrain federal

\textsuperscript{141} Id. at 18–19.
\textsuperscript{142} Dorf, supra note 118, at 664.
courts simply to apply state law as it clearly exists at the moment; here federal court leeway is at its lowest ebb.

Point B, along the x-axis, corresponds to Clark’s predictive approach and Dorf’s elaboration model. Under these approaches, the federal court enjoys the freedom to build on existing state law and to anticipate future developments even though the state courts (including, in particular, the state high court) have yet to endorse such developments.

Point C, along the y-axis, corresponds to Dorf’s prediction model. Here the federal court enjoys the freedom to consider all extrajudicial sources to anticipate exactly how the state high court would resolve an issue (including, if necessary, the actual vote in the high court on the issue).

Point D corresponds to Caminker’s proxy model, a hybrid of Dorf’s execution and elaboration models.

As Figure 1 makes clear, the models identified by Caminker, Clark, and Dorf hardly exhaust the universe of possible Erie approaches; indeed, they barely scratch the surface. The approaches do, however, represent paradigmatic polar examples of potential approaches. Thus, if it is true that general expertise with the state judiciary and state jurisprudence would be valuable under these approaches, then it seems clear that such expertise would be valuable under the numerous possible hybrid approaches. Thus, I turn now to the question of the value of that expertise under Caminker’s, Clark’s, and Dorf’s approaches.

Begin with point A—Caminker’s precedent model, Clark’s static approach, and Dorf’s execution model. Here, the federal court is to uncover the clear, existing state law on point and to rule accordingly. It seems that the most useful ability in this endeavor is ‘lawfinding ability’—that is, a particular ability to cull from judicial decisions and statutes (and probably aided by attorneys’ briefs and oral argument) the current state of the law. At the same time, it seems that general expertise with the state judiciary and state jurisprudence also would be of some value. As bright as Clark and Dorf might like to paint it, the line between clearly established state law and novel state law simply is not altogether bright. Caminker concedes some ambiguity, noting that “application of the precedent model must entail some criteria by which a precedent can be identified, let alone

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143. Dan Coenen refers to this as “lawfinding expertise.” See Coenen, supra note 43, at 930. As explained below, the word “ability” is more appropriate than the word “expertise” in this context. See infra text accompanying notes 241–43.
interpreted."\textsuperscript{144} Even if, as Clark puts it, "the proponent of a proposed rule must establish that the rule in fact constitutes a sovereign command of the state and thus bears the risk of nonpersuasion,"\textsuperscript{145} there will doubtless be many cases which fall into a gray area—even after a court has used its lawfinding ability to gather all pertinent materials. General expertise with the state judiciary and the development of state jurisprudence would aid a court in determining whether the proposed rule has risen to the level of a "sovereign command of the state."\textsuperscript{146}

Consider now the approaches represented by point B in Figure 1—Clark's predictive approach and Dorf's elaboration model. Dorf sees the elaboration model as a more attractive option than the execution model. Under the elaboration model,

fewer disparities exist between the functions of a [federal] court and the [state] high court than exist under the execution model. With the exception of its inability to overrule [state] high court cases, a [federal] court using the elaboration model will have at its disposal all of the legal tools that the [state] high court has. As a consequence, there will not appear to be one meaning of law for the [federal] courts, and a different meaning for the [state] high court.\textsuperscript{147}

As with the static and execution approaches, the importance of lawfinding ability under the predictive and elaboration approaches seems clear. But if a federal court has "the same tools at its disposal as the state high court," how would general expertise with state courts and jurisprudence be valuable in undertaking an \textit{Erie} analysis? The answer to this question is that, even under such circumstances, the federal court must account for policy concerns and the like that the state high court would consider important. In other words, the focus of the analysis remains at some level a prediction of how the state high court would approach—if not resolve—the problem.

The benefit of general expertise with state courts and jurisprudence is highlighted by Clark's critique of the predictive approach. Clark notes that, under the predictive approach, federal courts "frequently" will consult "diverse materials," including "state trial court decisions, unreported decisions, dictum, 'considered dictum,' state attorney general opinions,

\textsuperscript{144} Caminker, \textit{supra} note 123, at 13.
\textsuperscript{145} Clark, \textit{supra} note 12, at 1537.
\textsuperscript{146} \textit{ld}.
\textsuperscript{147} Dorf, \textit{supra} note 118, at 665–66.
state agency constructions, [and] public policy.” 148 It seems clear that expertise with the state judiciary and state jurisprudence would be helpful in analyzing these factors. But Clark further asserts that “[b]ecause state law generally fails to provide meaningful guidance regarding what weight, if any, to give such materials, a federal court’s ‘prediction’ of state law frequently devolves into little more than a choice among competing policy considerations.” 149 It is for this reason that Clark finds the predictive approach problematic in terms of judicial federalism. 150

Without addressing its merits, Clark’s critique of the predictive approach serves to explain the importance of an understanding of state court concerns. A court that enjoys an expertise in the state judiciary and state jurisprudence is more likely, in balancing competing policy considerations, to be attuned to those policies that matter most to the state high court. To that extent, at least, Clark’s concern that federal courts may improperly be creating state law is ameliorated; at least, the policies being balanced, and the weight given to those policies in the balancing, are more likely to be similar to the policies and weights used by a state court.

Consider next Dorf’s prediction model, represented by point C in Figure 1. Again without addressing the merits of the model as a valid approach for undertaking Erie analyses, 151 the benefits of general expertise with state courts and jurisprudence under the prediction model seem clear. 152 One who has experience with the state judiciary is in a far better position to predict how the judges on the state high court would vote than one who lacks such experience.

Caminker’s proxy model, represented by point D, is typical of other points in Figure 1 that consist of various mixes of Dorf’s elaboration and prediction models. Because state judicial and legal expertise is useful under both the elaboration and prediction models, it is useful for hybrid approaches, such as Caminker’s proxy model.

At bottom, all these approaches—and by extension other possible ones—require at some level that the federal court anticipate what another body would do in response to the question at issue. Seen in this light, it is

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148. Clark, supra note 12, at 1499. Other potential sources identified by Clark include “decisions from other jurisdictions, the majority rule, restatements, treatises, and law review articles.” Id.

149. Id.

150. See id. at 1498–1501.

151. See Dorf, supra note 118, at 679–89 (critiquing the prediction model); id. at 695–709 (critiquing the prediction model in the context of Erie).

152. Lawfinding ability may be of less importance here than under the other approaches, given the more practical nature of the inquiry.
not surprising that all approaches will be more successfully undertaken by
courts that enjoy not only lawfinding ability, but also general expertise with
state judiciaries and jurisprudence.153

One final potential, and ultimately unpersuasive, objection to the view
that state judicial and jurisprudential expertise is valuable is that it
presupposes a legal positivistic interpretation of Erie. Jack Goldsmith and
Steven Walt argue that commentators have incorrectly understood the
Court's opinion in Erie to have evolved because of, to rest on, and to be
justified by legal positivism.154 To the extent that the value of expertise
turns on the notion that state law is exactly what the state courts say it is,
then the argument for the value of expertise can be said to rest on an
unfounded extension of Erie.

But the argument above about the value of expertise does not depend
on the notion that state law is exactly what state courts say it is. Even if
some of the approaches to federal courts' Erie obligation may suggest such
a view of state law,155 the breadth of approaches shows that expertise
remains valuable even under conceptions of Erie that clearly reject a legal
positivistic approach. One such example is Caminker's proxy model. As
Goldsmith and Walt elucidate, in the context of Clark's predictive approach
it is clear that legal positivism alone has no consequences for the debate [over how federal courts should undertake Erie analyses]. A
predictive approach to ascertaining state law enjoins a federal court to
discern state law in a particular manner—by prediction. Legal positivism
is a thesis about the nature of law, not about how judges ought to go
about discerning it. Hence legal positivism is perfectly consistent with a
predictive approach to ascertaining state law. Because positivism has
nothing to say about how law is to be discerned, it is also consistent with
Clark's preferred highly deferential approach.156

In short, the argument that expertise is valuable does not depend on
the notion that there is one, objectively correct answer to every question of

153. I address below another form of expertise—expertise with the subject matter of the particular
legal question at issue. See infra text accompanying notes 193–95.
154. See Jack Goldsmith & Steven Walt, Erie and the Irrelevance of Legal Positivism, 84 VA. L.
155. For example, Dorf argues that by rejecting the analogy between review of findings of fact
and review of determinations of state law, "the Court in Salve Regina seemed to reject a central premise
of the prediction approach to diversity cases—that state law is reducible to whatever state court judges
say in particular cases." Dorf, supra note 118, at 706. But Dorf then adds, "[n]onetheless, Salve Regina
did not expressly disturb the rule that absent a definitive state high court ruling, federal judges sitting in
diversity must attempt to predict how the state high court would rule." Id.
156. Goldsmith & Walt, supra note 154, at 706–07.
The argument simply maintains that expertise makes it more likely that a federal court undertaking an *Erie* analysis will approach, and therefore resolve, the problem as would the state high court. In effect, there is a pool of possible correct answers at which the state high court could arrive; expertise makes it more likely that the federal court will reach one of the answers in that pool.

**V. EVALUATING THE CONTINUING VIABILITY OF DEFERENCE**

The preceding Part established a critical normative point for the viability of deference to lower federal courts' resolutions of state law. Still, from a jurisprudential standpoint, *Salve Regina College v. Russell* at the very least draws into question the possibility of such deference. In this Part, I critically examine arguments made by the Court in *Salve Regina*, as well as arguments made by Coenen in his article (on which the *Salve Regina* Court relied). I conclude that, while the Court in *Salve Regina* correctly eschewed a bright-line rule under which federal courts of appeals should defer to district judge's interpretations of state law, *Salve Regina* should not be read to preclude deference in all circumstances.

The Court's opinion in *Salve Regina* contains four separate strands of reasoning rejecting deference to lower federal court judges' determinations of state law: (1) Lower federal court judges as a general matter have no expertise in the law of the state in which they sit (or, in the case of circuit judges, in the law of a state that lies within the geographic reach of the circuit on which they sit); (2) Even if lower federal court judges do have such expertise, the Court's holding in *Erie Railroad Co. v. Tompkins* precludes deference based upon that expertise; (3) Even if *Erie* does not preclude deference based upon expertise, the expertise that lower federal court judges have is not in any event helpful in resolving questions of state law, so that deference is not warranted; And (4) a balancing of factors suggests that deference based upon expertise is not warranted in particular cases. In this Part, I examine each of these strands of reasoning. I demonstrate that the first strand is valid in some circumstances, but is not valid as a general matter; the second and third statements are simply incorrect; and the fourth statement is accurate, but even according to its own terms, depends upon the particular circumstances.

157. This is consistent with *Salve Regina's* rejection of the notion that deferential review of findings of fact by trial courts is analogous to appellate review of district court determinations of state law. See *supra* note 75.
A. LOWER FEDERAL COURT JUDGES’ EXPERTISE

The expertise rationale for deference has some facial appeal. Wright, Miller, and Cooper explain as follows:

As a general proposition, a federal district court judge who sits in a particular state, especially one who has practiced before its courts, may be better able to resolve complex questions regarding the law of that state than is a federal appellate judge who has no such personal acquaintance with the law of the state.158

The notion that lower federal court judges generally are likely to have expertise in the law of the state in which they sit finds support in Supreme Court statements on the subject. First, the Supreme Court on numerous occasions before Salve Regina commented favorably on the expertise of lower federal court judges in matters of state law.159 The Court in Salve Regina and Leavitt v. Jane L. did not disavow those earlier statements.160

158. See 19 WRIGHT et al., supra note 104, § 4507, at 211.
159. See supra text accompanying notes 39–42. Coenen questions the import of the Supreme Court’s statements about district court expertise. In critiquing courts of appeals’ reliance on such statements to justify the traditional rule of deference, Coenen asserts the following in passing: “It is understandable that in the eyes of a Court that virtually never sees state law issues, federal district courts do appear to possess expertise on matters of state law.” Coenen, supra note 43, at 915 (emphases added). While Coenen seems only to mean that the Supreme Court has far less state law expertise than district courts, one might argue that, in fact, the Supreme Court’s view of the district courts is largely the result of its lack of expertise, rather than true substantial expertise on the part of the district courts. In other words, the Supreme Court’s statements about the special expertise of district court judges on matters of local law should be discounted. Insofar as the Supreme Court has no particular expertise in state law issues, it is poorly situated to identify other tribunals that might have greater expertise.

This is a curious argument and, ultimately, an unconvincing one. First, there is no reason to equate expertise in a particular subject matter with an ability to identify that expertise in others. For example, individuals may know little about plumbing, but nonetheless may be in a position to identify others’ expertise in plumbing. Consider also the fact that courts sometimes appoint special masters to help them resolve issues in which the members of the court lack a particular expertise. See FED. R. CIV. P. 53(a); FED. R. APP. P. 48. If courts could identify masters with expertise only as well as they could resolve the issues themselves, then the exercise of appointing special masters would be quite pointless.

Second, even if it is true that the Supreme Court lacks particular ability to identify expertise on matters of local law, that fact does not generally excuse lower federal courts from adhering to the statements of the Supreme Court. For example, the mere fact that no Supreme Court Justice is an expert in tax law does not provide a legal basis for lower federal courts to ignore statements by the Supreme Court about tax law. In short, if the Supreme Court were to hold that courts of appeals were obligated to defer to determinations of state law made by district judges because they have greater expertise in such circumstances, then it seems clear that the courts of appeals would have little choice but to follow that rule.

Evidently, Coenen himself does not put much stock in this argument. Following his assertion that the Court lacks the ability to identify expertise in matters of local law, he comments that it “is beside the point.” Coenen, supra note 43, at 915.

160. See supra note 76. Indeed, the Court in Salve Regina indicated that de novo review by the court of appeals of district court determinations of state law was entirely consistent with district court
Moreover, the Court's language and practice in the wake of *Salve Regina* and *Leavitt* continue to recognize the state law expertise at least of federal appellate court judges.161

The Supreme Court in *Salve Regina* observed that the notion that district court judges have expertise in state law matters "seems . . . to be founded fatally on overbroad generalizations."162 The force of this statement is somewhat blunted by the subsequent quotation of Wright, Miller, and Cooper's comment that lower federal court judges enjoy expertise "[a]s a general proposition."163 It seems fair to say, both as a matter of interpreting *Salve Regina* and as a matter of fact, that some lower federal court judges have general expertise in state law. Surely, however, the *Salve Regina* Court was correct to conclude that this does not justify deference to every state court finding by a lower federal court judge.164 I return to the question of the proper circumstances under which deference might be afforded below, in Section D.

expertise on matters of state law: "Any expertise possessed by the district court will inform the structure and content of its conclusions of law and thereby become evident to the reviewing court." *Salve Regina* Coll. v. Russell, 499 U.S. 225, 232 (1991). The Court in *Leavitt* declined to defer to the court of appeals' determination of state law only because it felt that the conclusion followed inexorably from the decision in *Salve Regina*. See *Leavitt* v. Jane L., 518 U.S. 137, 145 (1996). Moreover, the *Leavitt* Court characterized "the dissent's appeal to the supposed greater expertise of courts of appeals regarding state law" as "particularly weak (if not indeed counterindicative)" on the ground that a "Court of Appeals panel consisting of judges from Oklahoma, Colorado, and Kansas ha[d] reversed the District Court of Utah on a point of Utah law." *Id.* at 145. This does not suggest that lower federal court judges lack expertise in matters of state law; rather, it suggests that district judges have greater expertise in the law of the state in which they sit than circuit judges have in the law of a state that falls within the geographic reach of their circuit, but in which they do not maintain chambers.

161. *See supra* Part III.C.

162. *Salve Regina*, 499 U.S. at 238.

163. *Id.* at 239 n.5 (quoting WRIGHT et al., *supra* note 75, § 4507, at 106).

164. Coenen launches a broader assault on district court expertise. He asserts that especially given the increasing complexity and expanse of state law, "no one possesses expertise in an entire body of state law." *Coenen, supra* note 43, at 922. He argues that

[d]istrict court judges, through exposure to state law cases in practice and on the bench, will gain familiarity with some particulars of their own states' law. It strains credulity, however, to leap from that proposition to the conclusion that district court judges possess a *meaningful* expertise in a *substantial* portion of *all* state law.

*Id.* This contention, while accurate, is in an important sense beside the point. It doubtless is true that district judges often encounter questions of state law outside their personal expertise. But at issue here is expertise not with particular areas of law, but rather with the workings of the state judiciary and the fundamental, overarching policies and attitudes that inform state jurisprudence as a whole. *See infra* text accompanying notes 193–99. It does seem likely that some district judges would possess that sort of general expertise as a general matter.

Note that Coenen seems to use the word "meaningful" to mean "helpful"—as in helpful in accurately predicting how the state judiciary would resolve issues of state law. I address the question of whether lower federal courts' expertise in state law matters is helpful below, in Section C.
B. Erie Does Not Preclude Deferece

Even assuming that lower federal court judges generally enjoy a certain expertise in state law, the Salve Regina Court suggested that Erie precludes affording deference to lower federal court judges' state law determinations.\textsuperscript{165} The Court advanced this argument in two forms, neither of which is convincing.

First, the desire to maintain doctrinal coherence was one of the Court's primary reasons for rejecting the traditional rule of deference. The Court explained that "appellate deference to the district court's determination of state law is inconsistent with the principles underlying . . . Erie."\textsuperscript{166} A complete understanding of this argument rests upon elucidation of the policies underlying Erie and its progeny.

Erie directs that federal courts resolve state law issues as they predict state courts hearing those issues would resolve them. The Erie regime replaced the regime of Swift v. Tyson, under which federal courts might resolve claims brought nominally under state law using a "national law" standard.\textsuperscript{167} As Erie and its progeny make clear, the availability of national law in the federal courts, potentially distinct from the state law applied in state courts, gave rise to "twin evils":\textsuperscript{168} inequity in administration of the laws across federal and state forums, and the resulting incentive for forum shopping\textsuperscript{169} (exacerbated by the right to choose between state and federal forums that Congress has conferred upon nonresidents\textsuperscript{170}). Eradication of these twin evils forms the "twin aims of the Erie rule."\textsuperscript{171} The Court's decision in Erie endeavored to rein in these evils and vindicate the corresponding aims by mandating that federal courts apply state law as a state court would.

\textsuperscript{165} See supra text accompanying notes 65--67, 71.
\textsuperscript{166} Salve Regina, 499 U.S. at 234.
\textsuperscript{167} Swift v. Tyson, 42 U.S. (16 Pet.) 1 (1842).
\textsuperscript{168} Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735, 738 n.95 (2001) (discussing the "twin evils" against which Erie and its progeny were aimed).
\textsuperscript{169} See Hanna v. Plumer, 380 U.S. 460, 467 (1965).
\textsuperscript{170} Assuming that all jurisdictional and other ancillary requirements are met, a plaintiff may bring suit in either state or federal court. If a case in which the federal diversity jurisdictional requirements are met is brought in state court, a nonresident defendant, but not a resident defendant, may remove the case to federal court. See 28 U.S.C. § 1441(b) (2000). Thus, a nonresident plaintiff who sues a defendant in the defendant's home state has the ability to choose between the state and federal forum, while the nonresident defendant sued in state court has the same ability.
\textsuperscript{171} Hanna, 380 U.S. at 468.
The Court in *Salve Regina* described analogues to *Erie's* "twin evils" to which the traditional rule of deference might give rise:

[D]eferential appellate review invites divergent development of state law among the federal trial courts even within a single State. . . . Moreover, by denying a litigant access to meaningful review of state-law claims, appellate courts that defer to the district courts' state-law determinations create a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum. Neither of these results, unavoidable in the absence of independent appellate review, can be reconciled with the commands of *Erie*.172

The *Salve Regina* Court was quite correct to recognize that a legal regime giving rise to inequitable administration of the laws (through the divergent development of state law within the federal system) and the resulting incentive for forum shopping is problematic. The Court was also correct that both of these results are largely "avoidable" through independent appellate review.173 But the Court was incorrect to assert that these results are "unavoidable in the absence of independent appellate review."174 While independent appellate review will ameliorate the problems, so too might other approaches; indeed, other approaches can be more effective.

The problem underlying the issues of inequitable administration of the laws and forum shopping is the lack of a single tribunal that can resolve in all cases all questions of state law. This is inevitable in the *Erie* context, to the extent that state high courts simply do not have an opportunity to resolve state law issues in most federal court cases. But *Erie* recognized that the problem was exacerbated by federal courts' freedom, under the *Swift* regime, to decide cases under "national law," separate and apart from what state law might dictate. By requiring federal courts to resolve state law issues as would the relevant state high court, the Court in *Erie* tried to effect an illusion of a single tribunal to decide matters of state law (the state high court), despite the need to retain federal court jurisdiction over some state law matters. In effect, the Court sought to restrict inequitable administration of the laws and forum shopping by limiting the practical effect of resolving some state law issues resolved in federal court.

173. I say "largely avoidable" because, as I discuss below, the potential remains for different federal appellate courts to interpret the law of a given state differently. See infra note 176 and accompanying text.
Independent appellate review of federal district court determinations of state law is one way to reduce the number of different—and potentially divergent—“final word” interpretations of state law, and, thus, to ameliorate the problems of inequitable administration of the laws and forum shopping. But independent appellate review is not a full response to the problem, insofar as the potential remains for different federal appellate courts to interpret the law of a given state differently.

My description below of a possible intrafederal certification procedure, with deference afforded to tribunals assigned to determine matters of state law, would avoid even this sort of divergent development of state law by vesting a single federal tribunal with authority to interpret definitively state law (for federal courts). For present purposes, it suffices to observe that the Court’s objection to the traditional rule of deference on *Erie* grounds is not a valid blanket objection to deference in any and all settings; it is merely an argument in favor of restricting deference to situations in which inequitable administration of the laws and forum shopping are likely to arise.

The *Salve Regina* Court also presented a second argument that the reasoning in *Erie* precludes deference. The Court explained as follows:

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175. One possibility that the *Salve Regina* Court did not address is that even under a general standard of deferential review, an appellate court might—and, indeed, some did—apply more searching review where district judges in a particular judicial district had reached different interpretations of state law amongst themselves. See Coenen, *supra* note 43, at 1018 app. II (“[A] number of [federal appellate] courts have declined to apply deferential review in the face of a [sic] ‘a sharp conflict among the judges of the district.’”) (quoting Ramirez de Arellano v. Alvarez de Choudens, 575 F.2d 315, 319 (1st Cir. 1978)).

176. The Supreme Court presumably would not resolve such circuit splits. See *supra* text accompanying notes 86–88 (noting the Court’s strong general inclination to decline to review pure questions of state law). But the potential for circuit splits to arise would be ameliorated to the extent that circuit courts follow a rule of deferring to the state law interpretations of the circuit court whose geographic reach includes the state whose law is in question. See *Wright et al.*, *supra* note 104, § 4507, at 218–20 (discussing the view of the majority in *Factors Etc., Inc. v. Pro Arts, Inc.* 652 F.2d 278 (2d Cir. 1981), that the Second Circuit should have deferred to the Sixth Circuit on an interpretation of Tennessee law, and the view of the dissent that it should not). Wright, Miller, and Cooper suggest another approach:

Arguably, it was wrong for either [the majority or the dissent] to make an independent judgment as to the weight to be accorded the Sixth Circuit’s ruling or an independent determination of Tennessee law. Perhaps the critical question that should be asked by a federal court in a case like *Factors Etc., Inc. v. Pro Arts, Inc.* is what weight New York’s highest court would have given to the Sixth Circuit’s construction of Tennessee common law in deciding what the content of Tennessee law was for purposes of administering the New York choice-of-law rule.

*Id.* at 220.

177. *See infra* Part VII.
The very essence of the *Erie* doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge. . . . Similarly, the bases of state law are as equally communicable to the appellate judges as they are to the district judge.\(^{178}\)

There are two problems here. First, the Court's opinion conflates the communicability of arguments—and in effect legal authority to resolve them—with expertise to resolve the arguments. It is certainly true that *Erie* and, more generally, federal diversity jurisdiction contemplate that federal courts have jurisdiction to hear and resolve matters of purely state law. But equal legal authority to resolve questions does not imply equal expertise to resolve the questions. To be sure, since federal courts often decide matters of state law unaided by input from the state judiciary,\(^{179}\) it must be presumed that federal courts have some adequate level of expertise to resolve state law questions.

At the same time, the approach and steps that federal courts take to resolve state law questions dispel the notion that federal and state courts have equal expertise to resolve matters of state law. First, where appropriate federal courts invoke procedural devices, such as abstention and certification, that allow for explicit state court input on the proper resolution of state law questions.\(^{180}\) There would be little point to these procedures if federal courts possessed the same expertise as state courts on state law matters.\(^{181}\) To the contrary, these procedures remain popular; indeed, some commentators and courts have recently advocated expanding their use.\(^{182}\)

More fundamentally, even where a federal court resolves a state law question 'on its own' without direct input from the relevant state judiciary, the federal court looks—indeed, it is obligated by *Erie* to look—to existing state court holdings relevant to the question at issue. If the state's high

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\(^{178}\) *Salve Regina*, 499 U.S. at 238–39. One might read the Court's statement as an argument that federal district judges have no greater expertise in state law than do federal appellate judges. But on reflection, the Court seems to say not that federal district judges in fact lack greater expertise, but rather that *Erie* precludes recognition of that greater expertise—that is, that *Erie* precludes deference to district court judges even if they possess greater expertise.

\(^{179}\) Indeed, the Supreme Court has interpreted Congress's extension of diversity jurisdiction to impose "a duty" on federal courts "to decide questions of state law whenever necessary to the rendition of a judgment." *Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943). See supra text accompanying note 10.

\(^{180}\) These procedures are explicated above. See supra text accompanying notes 6–14.

\(^{181}\) Indeed, the use of abstention reflects an understanding that since most cases in state court are not reviewed by the state high court, even lower state courts have greater expertise in resolving state law questions than do federal courts generally.

\(^{182}\) See supra text accompanying note 29.
court has already spoken directly on the issue, the federal court has no option but to apply the high court's ruling. If the state's high court has yet to resolve the issue definitively, the federal court must try to divine how the high court would resolve it. This suggests that the expertise required of federal courts is in analyzing existing state court jurisprudence and predicting how the state high courts would resolve the issues. Since only the state court system can resolve matters of state law definitively, it must be that the state court system as a whole has greater expertise in this regard than do the federal courts. Hence, the Salve Regina Court erred in suggesting that Erie presumes equal expertise on the part of state and federal courts to resolve matters of state law.

A second problem with the Salve Regina Court's reasoning is the suggestion that federal appellate and district judges have equal expertise to resolve state law matters. First, as discussed above, the mere fact that state law arguments may be "communicable" to both appellate and district judges does not establish that both sets of judges have equal expertise to resolve those questions.

Second, the Court is wrong to suggest that, accepting the equal expertise of state and federal courts to resolve state law matters, the conclusion that federal district and appellate judges have equal expertise follows "similarly." In effect, the Court assumes that a horizontal comparison between distinct judicial systems—the state and the federal systems—is similar to a vertical comparison within one system. Such a view is unwarranted, as an understanding of the policies underlying Erie and its progeny demonstrates. As elucidated above, the Court in Erie tried to eradicate the twin evils of inequitable administration of the laws and forum shopping. But there are no corresponding evils within the federal system. While it is possible for a trial court and an appellate court to reach different conclusions about the proper interpretation of state law, the interpretation reached by the appellate court trumps the trial court's interpretation. There is, therefore, no risk of inequitable administration of the law. Moreover, litigants generally have no ability (and accordingly no incentive) to choose between a federal district court forum and a federal

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183. See Grover ex rel. Grover v. Eli Lilly & Co., 33 F.3d 716, 718–19 (6th Cir. 1994) (holding that a district court should have applied the "binding" answer received to a certified question and ruled in favor of the defendants).

184. See supra text accompanying notes 114–21.

185. See supra text accompanying notes 178–82.
The risk of forum shopping between federal trial and appellate forums is nonexistent, regardless of whether appellate courts review lower court resolutions of state law under a deferential or de novo standard. Thus, to whatever extent *Erie* forces the presumption that federal and state courts have equal expertise in matters of state law, the policy reasons that underlie that presumption are absent in the context of review by different courts within the federal system.

In sum, deferring to lower federal judges' interpretations of state law will not, under appropriate circumstances, give rise to the evils of inequitable administration of the laws and forum shopping. Further, while there may be valid reasons to have federal appellate courts review federal district court interpretations of state law under a de novo standard—and, thus, presume that state law is "equally communicable to . . . appellate judges . . . and district judges"—that conclusion is not mandated by *Erie*. Indeed, *Erie* does not even suggest such a result.

**C. THE UTILITY OF LOWER FEDERAL COURT JUDGES' STATE JUDICIAL AND JURISPRUDENTIAL EXPERTISE IN RESOLVING QUESTIONS OF STATE LAW**

Even accepting that (1) some lower federal court judges have general expertise as to state law and the state judiciary, and (2) *Erie* does not absolutely preclude deference to lower federal court judges, the Court's opinion in *Salve Regina* suggests that such deference is not warranted. This argument manifests itself in two ways. First, as a threshold matter, one might argue that lower federal court judges' expertise is simply not at all helpful for resolving state law issues. Second, one might argue that even if such expertise would be helpful in resolving state law questions, deference ought only to obtain in particular circumstances where expertise in fact exists. I address the threshold question in this Section, and the "particular circumstances" point in the succeeding Section.

The threshold argument asserts that whatever expertise lower federal court judges may enjoy in state law, that expertise simply does not help with the job that *Erie* directs federal courts to undertake: resolving state law questions as would the state high court. As a result, the argument continues, deference is not warranted.

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186. As a case wends its way through the system, the litigants may get both, perhaps even in multiple iterations.
I broadly addressed this threshold argument in the preceding Part. I established the utility of general expertise with state judiciaries and jurisprudence under various conceptions of federal courts’ *Erie* obligation. The expertise is of value because, under any conception of what *Erie* calls for, the federal courts at bottom must predict, as best they can, how the state high court would rule on the issues.

The Supreme Court in *Salve Regina* advanced the threshold argument against the usefulness of lower federal court expertise in slightly different terms. The Court explained it thus: “To the extent that the available state law on a controlling issue is so unsettled as to admit of no reasoned divination, we can see no sense in which a district judge’s prior exposure or nonexposure to the state judiciary can be said to facilitate the rule of reason.”

The Court’s argument is wanting. Its statement creates an unworkable dichotomy: at one end, cases in which “the available state law on a controlling issue is so unsettled as to admit of no reasoned divination,” and at the other end, cases in which the available case law *does* admit of a reasoned divination. As to the first category of cases, the Court is quite correct that expertise would be of little use where state law is so unsettled “as to admit of no reasoned divination.” Note, however, that the Court’s argument here is entirely conclusory. If, as the Court assumes, there is simply no hope of reasoned divination, then it is hardly surprising that expertise (in any form) would be of little value.

The Court’s unitary treatment of the second category of cases is also troubling, albeit for a different reason. According to the Court’s dichotomous approach, a case that does not fall into the first category must be a case in which the available case law *does* admit of a reasoned divination. Although the Court does not articulate the point explicitly, it seems clear that it believes that expertise would not be of any use in such a case *precisely because* the available case law admits of a reasoned divination. But that assumes—quite incorrectly—that where case law admits of a reasoned divination, it admits of *only one* such reasoned divination—in other words, there is an apparent “right answer.” In effect, the Court is assuming that all cases fall into one of two categories: cases in which there is no reasoned way to reach the “right answer,” and cases in which the case law is clear enough that reasoned divination will necessarily

187. *See supra* Part IV.
and inexorably lead one to the "right answer." Given this dichotomy, it is no wonder that the Court concludes that expertise is irrelevant.

But the dichotomy is artificial, for there are likely to be many cases in which the state case law is not so unsettled as to admit of no reasoned divination, yet also not clear enough to yield a singular outcome by reasoned divination. In these cases—where reasonable judicial minds examining the relevant state case law might reasonably disagree as to the outcome that reasoned divination yields—it is quite likely that expertise with state law and the state judiciary would be useful in determining which outcome is the "right" one.

Of greater facial appeal, though ultimately unavailing, is an argument advanced by Coenen. Coenen concedes that "[d]istrict court judges... will gain familiarity with some particulars of their own states' law," but adds that "[i]t strains credulity... to leap from that proposition to the conclusion that district court judges possess a meaningful expertise in a substantial portion of all state law." Coenen in part advances the threshold point that lower federal court judges lack expertise in state law matters as a general proposition. But he makes the further point that even granting lower federal court judges' expertise as a general matter, that expertise will not be "meaningful"—that is, helpful—in resolving state law questions as a general matter.

By emphasizing that lower federal court judges are unlikely to have a meaningful expertise in a substantial portion of state law, Coenen suggests that the only sort of expertise that would be helpful is expertise in the precise area of law at issue. For example, an expertise in state property law would be helpful in predicting how the state high court would resolve a novel state property law question. The problem, according to this argument, is that there is no basis for assuming that lower federal court judges have gained expertise in particular with state property law or any other area of law; thus, there is no basis for deference.

This argument suffers from two flaws. First, as the previous Part establishes, abilities other than subject matter expertise are useful to federal court judges engaged in Erie analyses.

189. Indeed, Dolores Sloviter notes that "[e]ven when there is a state supreme court decision on point, that direction is not always crystal clear." Sloviter, supra note 135, at 1676.
191. Id.
192. See supra Part IV.
Second, the argument substantially overestimates the value of subject matter expertise in undertaking an *Erie* analysis; indeed, subject matter expertise is of comparatively little value. The task of a federal court under *Erie* is to attempt to predict how another body—the high court of a state whose law is at issue—would resolve a legal question. Even under those understandings of *Erie* that allow federal courts the greatest leeway in predicting state law, the fundamental focus remains on predicting how a state high court would rule on the issue."193 In situations where the law is quite unclear, federal courts may have to turn to more tangential considerations in rendering an *Erie* prediction."194 Subject matter expertise may be useful in translating prevailing state judicial and jurisprudential attitudes and policies, which a judge might glean from general expertise with state courts and jurisprudence, to the particular setting of the legal issue in question. While a federal court’s subject matter expertise might be useful if there were no obligation under *Erie* to look to state law, in fact subject matter expertise should play much less of a role where the court’s primary obligation is fealty to state law and the state court system. Indeed, a federal court’s reliance on subject matter expertise runs the risk of overshadowing its more important obligation to predict as accurately as it can (under whatever standard accuracy might be measured"195) how the state high court would rule on the issue."196

D. EXPERTISE MAY WARRANT DEFERENCE IN CERTAIN CIRCUMSTANCES

Among the reasons the *Salve Regina* Court offered for rejecting the traditional rule of deference are reasons particular to the specific context of federal courts of appeals reviewing holdings of federal district judges. In this sense, the Court highlighted when deference is inappropriate but also,
by implication, left the door open for circumstances in which deference might be appropriate.

In essence, the Court’s opinion in Salve Regina lauds the lawfinding ability of federal appellate courts over that of district courts. The Court identifies four reasons for appellate courts’ comparative lawfinding advantage: (1) district judges’ schedules generally are heavier than appellate court judges’; (2) appellate court judges generally hear cases once factual records have been established, allowing them to focus on legal questions; (3) appellate briefs “can be expected . . . to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge”; and (4) courts of appeals sit in multijudge panels, which allows for “reflective dialogue and collective judgment.”

As I discussed above in Part V, lawfinding ability is valuable to a federal court undertaking an Erie analysis. Thus, the Supreme Court’s focus on lawfinding ability is reasonable. Moreover, the Court’s conclusion that district court judges’ lawfinding ability is likely to be low in the typical case seems a valid one. But, by omission, the Court suggests that there might be other circumstances in which deference would be valid.

E. SUMMARY

The Court in Salve Regina was correct to conclude that not all federal district judges have expertise in the state judiciary and jurisprudence of the state in which they sit, even if it is correct also to say that they often do. The Court was wrong to suggest that Erie precludes deference, and to suggest that general expertise with state courts and law is not useful to federal courts conducting Erie analyses. The Court was correct to note that the particular circumstances of federal appellate review of district court findings of state law are ill-suited to deference, but the nature of this holding suggests that deference might be appropriate in other circumstances. In short, Salve Regina should be read narrowly.

I turn in the next Part to the question of when deference on questions of state law is normatively defensible.

197. *See supra* note 143 and accompanying text.
VI. WHEN IS DEFERENCE NORMATIVELY DEFENSIBLE?

Part IV establishes that general expertise with state law and judiciaries, along with lawfinding ability, is useful in undertaking *Erie* analyses. Part V concluded that the Court's opinion in *Salve Regina* should not be read to preclude deference in all cases. The question remains, then, when, if ever, is deference appropriately extended to interpretations of state law? Which courts should give deference, and to which courts should deference be given?

At the outset, it seems that deference ought not to be given to a court unless it is substantially more likely to reach the "right" result than is the tribunal that would defer.199 In *Salve Regina*, the Court emphasized the importance of comparative institutional advantage in making this determination:

Those circumstances in which Congress or this Court has articulated a standard of deference for appellate review of district-court determinations reflect an accommodation of the respective institutional advantages of trial and appellate courts. In deference to the unchallenged superiority of the district court's factfinding ability, Rule 52(a) commands that a trial court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In addition, it is "especially common" for issues involving supervision of litigation to be reviewed for abuse of discretion. Finally, we have held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is "better positioned" than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine.200

Comparative institutional advantage is also a justification for another form of federal court deference: deference to administrative agencies'  

199. Coenen is thus correct to reject a justification for deference based solely upon cost-benefit analysis and supposedly efficient allocation of federal judicial resources. See infra note 254.


Most of the Supreme Court's recent explorations of the law-fact distinction or other allocative tasks have turned on the proper institutional assignment given the varying competencies. The Court increasingly assigns standards of review by focusing on the comparative functional capacities of each court, and usually finds more deference to be proper.


For a critique of the standard view that appellate courts should afford greater deference to trial courts' findings of fact, see Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 449–66 (2004).
regulatory actions. Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,\(^{201}\) federal courts afford deference to an agency’s reasonable statutory interpretations where Congress has explicitly or implicitly invited an administrative agency to fill a gap by elucidating an ambiguous statutory provision.\(^{202}\)

It is true that the setting of *Chevron* type deference differs fundamentally from the setting of deference to lower federal courts on questions of state law. In the former case, Congress has delegated to an agency authority to elucidate the law in a particular area with which the agency has special and extensive subject matter expertise. In the latter case, by contrast, (1) there is no delegation by Congress,\(^ {203}\) and (2) *Erie* and its progeny call upon the federal courts not to elucidate the law, but rather to predict what another body would do with the questions posed. Nonetheless, the agency deference setting is not wholly inapplicable to the question of deference to lower federal courts on questions of state law. First, while *Chevron* appears to be based largely on notions of delegation, the Court has described it as grounded in agency expertise as well.\(^ {204}\) Moreover, as the Court recently clarified in *United States v. Mead Corp.*,\(^ {205}\) some deference to agency interpretation might be due even where there is no congressional delegation: “The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.”\(^ {206}\) And, while the charge to elucidate the law differs from the obligation to predict how another body would interpret it, the fact remains that a particular kind of expertise makes one more confident in the actions taken by the relevant bodies in each case.\(^ {207}\)

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202. *See id.* at 843–44.

203. Nor is there a delegation by the state whose law is at issue; indeed, Congress’s decision to vest the federal courts with diversity jurisdiction effectively divests the state and its courts of the opportunity to delegate authority.


206. *Id.* at 228 (footnotes omitted) (citing Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)).

207. *See* Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 826 (2001) (noting that “[a]n analogy to *Skidmore* weight is what courts afford precedents of a coordinate, inferior, or foreign jurisdiction—if and to the extent they are persuasive, and bearing in mind the affirmative values of uniformity and how*
As the discussion in Part IV established, there are two primary determinants of comparative institutional advantage in the setting of federal court resolution of state law questions: general expertise with state law and judiciaries and lawfinding ability. Part V.A established that federal district judges often—if not always—have general expertise with state jurisprudence and judiciaries. The problem with the federal courts of appeals deferring to federal district judges on matters of state law, as expounded by the Court in Salve Regina, lays with the advantage that federal courts of appeals enjoy in lawfinding ability.

The Court in Salve Regina emphasized that courts of appeals, as compared to district courts, are “structurally suited to the collaborative juridical process that promotes decisional accuracy.” The opinion suggests four indicia of lawfinding ability: (1) few time constraints on judges while deciding legal questions; (2) the ability of judges to focus on legal questions to the exclusion of factual questions; (3) the opportunity of judges to benefit from well-constructed and well-argued briefs that bring to bear substantial information and comprehensive analysis on the legal issues pending; and (4) the opportunity of judges to sit in multijudge panels.

Each of these indicia clearly relates to lawfinding ability. A judge who has time to render a decision is in a better position to produce a thoughtful one than a judge who must render it on the fly. Similarly, a judge who is free to focus on legal issues is in a better position than a judge who is burdened also with making factual determinations. And a judge who can count on thorough and effective briefs and oral argument is more likely to render a better decision than a judge who cannot.

The Salve Regina Court described the fourth indicium—the opportunity of judges to sit in multijudge panels—as “[p]erhaps most important.” In reaching this conclusion, the Court observed that multijudge panels “permit reflective dialogue and collective judgment.”

Though the Court did not acknowledge it, there is another respect in which multijudge panels may facilitate lawmaking, especially in the
context of *Erie* analysis: the applicability of the Condorcet Jury Theorem. The theorem provides the following: if it is the case that each voter has better than a 50 percent chance of voting for the correct outcome, then "the probability that a majority vote will select the correct alternative approaches [100 percent] as the number of voters gets large."214 In the context of appellate court judicial decisionmaking, a debate exists as to whether the theorem is properly applicable, at least partly because of doubt that "correct" answers to the questions faced by appellate courts exist.215 But in the context of an *Erie* analysis there is at least a pool of possible "correct" outcomes.216 Thus, assuming (as the Court effectively assumed in *Phillips v. Washington Legal Foundation* and *McMillian v. Monroe County*) that each appellate court judge has a better than 50 percent chance of reaching a possible "correct" result,217 the use of multijudge panels to resolve state law questions receives support from the Condorcet Jury Theorem, as well as from the promised benefits of reflective dialogue and collective judgment.

Relying on the four indicia, the *Salve Regina* Court had little trouble concluding that courts of appeals enjoy a comparative advantage over district judges in terms of lawfinding ability.218 The four indicia similarly suggest that the Supreme Court enjoys a comparative advantage over district judges in terms of lawfinding ability: the Court generally is free to address legal questions without the pressure of a hectic schedule, the Court rarely addresses factual questions, the Court generally enjoys briefs of the highest quality,219 and the Court always hears cases in multijudge panels (with the exception of single-Justice applications220).


216. See supra text accompanying notes 154-57.

217. See Edelman, supra note 214, at 333–34 (describing the "aggregation model" of the Condorcet Jury Theorem, under which each voter will vote "right" on more than 50 percent of the questions posed, "although different voters might vote differently on any given issue"). Cf. id. at 341 (questioning the applicability of the aggregation model to the ordinary setting of appellate review).


219. Indeed, some law firms feature specialty Supreme Court and appellate practices. See, e.g., http://www.appellate.net (last visited July 25, 2004) (describing Mayer Brown Rowe & Maw's Appellate and Supreme Court Practice Group); http://www.gdclaw.com/practices/detail/id/610 (last visited July 25, 2004) (describing Gibson Dunn & Crutcher's Appellate and Constitutional Law Practice Group, and noting that "a Gibson Dunn client was . . . quoted as stating that 'Gibson, Dunn has an exceptional ear for arguments that resonate with appellate and Supreme Court justices'.")

220. See SUP. CT. R. 22, 23.
With respect to its own lawfinding ability and that of the courts of appeals, the Court addresses factual questions far less frequently than the courts of appeals, and it seems safe to say that the briefs submitted to the Supreme Court are, on average, at least of as good quality as those submitted to the courts of appeals. Thus, these indicia suggest that the Court's lawfinding ability would be at least as good as, if not greater than, the courts of appeals.

Table 1 presents a summary of the relative general state law expertise and lawfinding ability of federal district courts, federal courts of appeals, and the United States Supreme Court. District courts' state law expertise is excellent but, in keeping with the logic of Salve Regina, district courts' lawfinding ability is poor. Courts of appeals excel in lawfinding ability, while their state law expertise is very good, albeit not quite as good as their district court counterparts. At the same time, the district courts' comparative advantage in state law expertise may be offset somewhat by the greater likelihood that district judges may be biased against out-of-state litigants. Coenen explains that

[c]ourts of appeals are largely insulated from political, personal, and other extraneous pressures, a fact that helps explain why appellate courts exist. District courts are more subject to these influences because they are "local" courts. Litigants may be prominent local citizens; cases may stir strong local feeling; counsel may be on friendly terms with the resident district court judge.

In addition, panels of court of appeals judges almost always include at least one judge with chambers from a state other than the state whose law is at issue. Thus, to the extent that local bias is a concern, court of appeals review may be preferable to district court resolution of state law issues.

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221. This assumes, of course, that the district judge in question hails from the state whose law is at issue.

222. Cf. Calabresi, supra note 29, at 1304 ("The intermediate courts of any state... are not experts on federal law and, with great respect to them, they are not good at it."). But see Woods, supra note 107, at 780 (asserting that "Federal Courts of Appeals have no special expertise in matters of state law"). Indeed, courts of appeals' state law expertise is good enough for the Supreme Court to defer substantively to courts of appeals' interpretations of state law where the state whose law is in question lies within the geographic reach of the circuit. The expertise of circuit judges who hail from the state presumably would be greater still.


224. I am grateful to David Shapiro for raising this point.
Last, the state law expertise of the Supreme Court—which rarely deals with the law of any state—is poor. The Supreme Court is aptly designed to resolve questions of law—though perhaps it is not quite as skilled at lawfinding in the *Erie* “predictive” sense as are the courts of appeals or even district courts, insofar as the Court ordinarily is not called on to resolve an issue by deciding how another court would resolve it.

### TABLE 1. Comparison of federal courts’ state law expertise and lawfinding ability

<table>
<thead>
<tr>
<th>General State Jurisprudential and Judicial Expertise</th>
<th>Federal District Courts</th>
<th>Federal Courts of Appeals</th>
<th>United States Supreme Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawfinding Ability</td>
<td>Poor</td>
<td>Excellent</td>
<td>Good</td>
</tr>
</tbody>
</table>

This information is expressed graphically in Figure 2. The farther away a point is from both axes, the more accurate one generally would expect a federal court’s predictions of state law to be.\(^{225}\)

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\(^{225}\) Figure 2 suggests that the two factors—general expertise with state jurisprudence and judiciaries and lawfinding ability—are of equal importance. In fact, that may not be the case. See, *e.g.*, *supra* note 152 (making a similar suggestion with respect to one approach to determining state law). But, in any event, it remains clear that both factors are useful. The general point remains that the farther a court’s position in the figure is from both axes, the more accurate that court’s state law predictions are likely to be.
Figure 2 makes clear the propriety of the Court's holding in *Salve Regina*: while district courts have marginally better state law expertise than courts of appeals, the courts of appeals have a tremendous advantage in terms of lawfinding ability. As such, there is no reason to think that district courts will be better able than courts of appeals to reach the "correct" resolution of state law. As a corollary, then, courts of appeals should not defer to district courts on matters of state law.

Figure 2 also explains the proclivity of the Supreme Court to defer to courts of appeals on matters of state law—despite its holding in *Leavitt v. Jane L*. The Supreme Court is poorly suited to the task of predicting how a state high court will resolve a question of state law, while the courts of appeals are better suited to the task, in terms of state law expertise and perhaps also lawfinding ability.

But Figure 2 suggests something else: a decision making process that somehow arrived at point X would be better suited than the courts of

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226. Dan Coenen was thus correct to reject the rationale for the traditional rule of deference presupposing that district courts are "superior decisionmakers" on matters of state law to courts of appeals. See Coenen, supra note 43, at 920.
appeals' process to resolve matters of state law. In the next Part, I evaluate various procedural devices to determine the extent to which they may be used accurately to assess state law with the lessons of Figure 2 in mind.

VII. MAXIMIZING FEDERAL COURTS' LIKELIHOOD OF ACCURATELY ASSESSING STATE LAW

In this Part, I survey procedural devices that are, or might be, employed by a federal court to try to determine accurately the proper resolution of a question of state law. I evaluate them in terms of their feasibility, cost, and probable accuracy. I consider devices by which the federal court leaves resolution of the state law question to the state courts (abstention and certification); and devices by which higher federal courts substantially leave the resolution of the state law question to lower federal courts (deference). In addition to these existing devices, I describe the possibility of creating federal tribunals to resolve questions of state law; I argue that deference to the panels' resolution of state law questions would be appropriate.

As I have discussed above, abstention and certification are two devices that allow federal courts to leave resolution of pending state law questions to the state courts. Both devices—but particularly abstention—tend to impose substantial additional litigation costs on parties. Further, the circumstances under which both devices may be invoked are limited. In short, while they may prove useful in some cases, abstention and certification are not the answer to the problem in the vast majority of cases.

Consider now the ordinary use of deference by higher federal courts regarding state law determinations reached by lower federal courts. As observed above, Figure 2 accords with the Salve Regina Court's rejection of the traditional deference rule under which courts of appeals would defer to district courts' state law determinations. Figure 2 supports, to some degree, the Supreme Court's continuing penchant (even in the wake of Leavitt v. Jane L.) to defer substantively to state law determinations reached by the courts of appeals.

Figure 2 lends even more support to the older, more stringent deference rule under which the Supreme Court defers to lower federal courts' interpretations of state law where the court of appeals' and district

227. See supra text accompanying notes 7–14.
228. See supra text accompanying notes 15–18.
court's interpretations are in accord. Consideration of the state law question both by the district court and de novo by the court of appeals combines the benefits of the district court's general state law expertise and the court of appeals' lawfinding ability. Such review thus locates the review process, taken as a whole, close to point X on Figure 2.

The fact remains, however, that these rules of deference are of limited value in practice. Both rules justify only the Supreme Court granting deference to lower federal courts' state law determinations. These rules offer nothing to federal courts of appeals and district courts—and it is the courts of appeals and district courts that, in a practical sense, resolve almost all state law questions that arise within the federal system. Indeed, even where neither rule of deference applies, the Supreme Court will not address state law questions. It will either adhere to the almost impervious standard of not granting review in cases where only state law questions are raised, or it will accept the lower federal courts' state law interpretations not on deference grounds, but on the ground that the Supreme Court's limited resources are better allocated to other issues.

In light of the limited scope of appropriate deference under the existing federal judicial structure, one might think of the possibility of modifying the present system to increase courts' ability to afford deference. One way to accomplish this is through the introduction of new tribunals to which other federal courts appropriately might afford deference on state law matters. One possible structure is outlined below.

Congress might enact a regime under which tribunals of federal judges would be assembled for each state—each a "Federal Tribunal for State Law Review" or "FTSLR"—to hear and resolve novel issues of state law, much as state high courts respond to certified questions of state law. Each

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230. But see Leavitt v. Jane L., 518 U.S. 137, 144–45 (1996) (per curiam) (explaining that the Supreme Court granted certiorari “solely to review what purports to be an application of state law” because “the alternative is allowing blatant federal-court nullification of state law”).

231. See supra text accompanying notes 86–87.

232. While some state high courts have authorized certification merely by enacting court rules, see, e.g., N.Y. R. 500.17 (McKinney 2004), the fact remains that the court that would respond to the certified questions—for example, the state high court—already exists. Thus, it seems that a mere court rule would not be sufficient to create the new federal tribunals. But a statutory enactment should be sufficient. See 28 U.S.C. § 158(b)(1) (2000) (directing the establishment of "a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the [circuit’s] judicial council" to hear appeals of rulings by individual bankruptcy judges); Michael Abramowicz, En Banc Revisited, 100 COLUM. L. REV. 1600, 1618 (2000) (proposing a statutory enactment that would assemble en banc panels randomly from among the various federal courts of appeals); id. at 1623 (“[E]nacting my proposal would free Congress to pick the number [of judges for en banc panels that] it finds optimal.”); Daniel J. Meador, Enlarging Federal Appellate Capacity
tribunal would be composed of federal district judges with chambers in the tribunal’s home state. To the extent that local bias on the part of district judges is a concern, circuit judges, especially those with chambers outside the tribunal’s home state, might be included on the tribunal.

The tribunals’ composition and procedures should be designed to maximize the panels’ ability to predict state law. Begin with the goal of maximizing lawfinding ability. The Court’s opinion in *Salve Regina* suggests that resort be had to the four indicia of lawfinding ability. It follows that the tribunals in question should (1) be allowed to address questions of state law outside the demands of a harried schedule, (2) not be burdened with resolving factual issues, (3) enjoy the benefits of quality briefing and oral argument, and (4) hear cases in multijudge panels. These ideal requirements largely mirror the circumstances under which state high courts hear and resolve certified questions of law.233

To maximize state judicial and jurisprudential expertise, district judges, and perhaps also circuit judges, from across the tribunal’s home states should be chosen to serve.234 Indeed, the best response to the complaint that district judges’ state law expertise is based upon “overbroad generalizations” would be specifically to appoint judges to the tribunal who do enjoy such expertise.235 It is, moreover, quite reasonable to expect that judges who serve on the tribunal for a state would develop even greater expertise over time as they heard and decided more cases.

Regarding which courts could certify questions to the FTSLR for a state, there seems little reason to restrict certifying power, provided that an ample factual record exists. The Supreme Court, federal courts of appeals (from the circuit that includes the state in question, and from other circuits), and district courts (including district judges, magistrate judges, and

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233. See supra text accompanying notes 13–14; Nash, supra note 6, at 1690–96.

234. The appointment process could be handled, for example, by the chief judge of the relevant court of appeals, or by a panel consisting of the chief judges of all the federal district courts within the state. Judges’ tenure on the tribunals could be set by fixed terms.

235. Senior judges might be especially appropriate in this regard.
bankruptcy judges from any district) could invoke the intrafederal certification procedure.\footnote{236}

Thus constituted, the FTSLR for a state would feature superlative lawfinding ability and enjoy state jurisprudential and judicial expertise. The arguments in the previous Part, as expressed graphically in Figure 2, would suggest that federal courts that certify questions to the tribunal would be justified in deferring its resolution of the questions. But there remain two arguments against deference to the tribunal: These arguments assert that even if deference could be appropriate, there nonetheless are factors that weigh against it. I address these arguments now.

First, one might argue that the Court's reasoning in \textit{Salve Regina} forecloses the possibility of deferring to district judges on matters of state law under any circumstances, even when they are sitting as members of a multijudge tribunal specifically designed to resolve questions of state law. Because three of the indicia of lawfinding ability are different in the context of the FTSLR for a state as opposed to the ordinary setting of a single district judge hearing a case, this argument relies heavily on the notion that district judges' schedules are heavier than the schedules of circuit judges. The argument also draws support from two factors that Coenen identified as relevant to courts of appeals' lawfinding edge over district courts, but that the \textit{Salve Regina} Court did not adopt. First, district judges often "rely on proposed conclusions of law that self-interested parties submit,"\footnote{237} while appeals courts routinely draft opinions.\footnote{238} Second, while district courts may be particularly susceptible to the influence and pressure exerted by local actors, courts of appeals are more likely to be free of local influence than are district courts.\footnote{239}

To the extent that this argument applies across the board, it turns on the assumption that district judges suffer from certain lawfinding deficiencies that are inherent—that is, that there are deficiencies that remain even when district judges sit in a capacity other than their usual capacity. But that assumption is refuted at least by Supreme Court precedent and current judicial practices. While at least the Court itself

\footnote{236}{One might also conceive of allowing state courts of one state to certify questions to the FTSLR for another state, where the second state does not provide for certification of questions from other state courts. Such a construct might raise concerns both about federal courts issuing advisory opinions and about whether such action properly falls within the constitutional federal judicial power. These interesting questions lie beyond the scope of this Article.}

\footnote{237}{Coenen, \textit{supra} note 43, at 925.}

\footnote{238}{\textit{Id.} at 925–26.}

\footnote{239}{\textit{Id.} at 926.}
never held that it was appropriate to defer to state law interpretations issued by single district judges, the Court did at one point find it appropriate to defer to three-judge district court panels.\textsuperscript{240} Presumably, the presence of a multijudge panel (and perhaps the inclusion of a circuit judge on the panel) warranted this distinction.

Furthermore, the Court in \textit{Salve Regina} did not describe the indicia of lawfinding ability as inherent in judges of particular levels. Rather, the Court explained that "[c]ourts of appeals . . . are structurally suited to the collaborative juridical process that promotes decisional accuracy."\textsuperscript{241} In effect, it is lawfinding \textit{ability}, not lawfinding \textit{expertise}, that the Court found important.\textsuperscript{242} For this reason, an emphasis on district judges' propensity to rely on orders drafted by parties and their greater susceptibility to local influence\textsuperscript{243} is misplaced.

Third, the notion that district judges inherently have less lawfinding ability than circuit judges is belied by the common practice of having district judges sit by designation on federal appellate court panels. Presumably, any structural problems that affects district judges' lawfinding ability when they preside alone as trial judges are removed when they function as appellate court judges.\textsuperscript{244}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{240} See supra text accompanying note 39.
\item\textsuperscript{242} See id. at 233 (noting the key role of "the respective institutional advantages of trial and appellate courts" in determining whether deference is appropriate) (emphasis added). In other words, the \textit{Salve Regina} Court identified reasons why legal actors filling a particular role were more likely than other legal actors to succeed in their mission. \textit{Cf.} Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 536 (1958) (giving the decision about an affirmative defense to the jury where state case law "furnish[ed] no reason for selecting the judge rather than the jury").
\item\textsuperscript{243} This argument can be extended further with curious results. If federal district judges are susceptible to local influence, and if that is sufficient ground not to defer to their determinations of state law, then surely the same argument can be made about the judges of a state high court. See Nash, supra note 6, at 1740-48 (making such an argument). But if that is true, then federal courts also should be wary of deferring to state high courts' answers to certified questions, at least where one of the parties hails from out-of-state.
\item\textsuperscript{244} Analogously, circuit judges sitting by designation as trial judges are entitled to deference by a reviewing court on determinations of fact. See \textit{Fed. R. Civ. P. 52(a)}; \textit{Salve Regina}, 499 U.S. at 233 (quoting Rule 52(a)'s directive that a trial court's findings of fact "shall not be set aside unless clearly erroneous," and noting that it relates not to the expertise of the trial judge, but to the "opportunity of the trial court to judge of the credibility of the witnesses"). Indeed, if lawfinding \textit{expertise} were truly the issue, then one could argue that the notion that all district judges have fact-finding expertise is subject to the same claim of "overbroad generalization" that the Court used to critique district judge state law expertise. See supra text accompanying note 69. \textit{But cf.} Richard B. Saphire & Michael E. Solimine, \textit{Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals}, 28 \textit{U. Mich. J.L. REFORM} 351 (1995) (questioning the use of district judges on appellate panels, although not on grounds of ability); Carl Tobias, \textit{Some Cautions about Structural Overhaul of the Federal Courts}, 51 \textit{U. Miami L. Rev.} 389, 403 (1996) ("The process
In any event, leaving Supreme Court precedent and current judicial practices to the side, the problem of local district judge bias could be addressed in the context of the FTSLR by including on each tribunal at least one circuit judge, especially one with chambers outside the state.\footnote{245}

A second argument against broad deference to federal tribunals for state law review extrapolates from Coenen's rationale that substantive law expertise is of critical value in undertaking an \textit{Erie} analysis—yet it makes a more forceful claim: if courts as a general matter do not extend deference based upon substantive law expertise, then they similarly ought not to extend deference based upon local law expertise. No form of expertise, in other words, deserves preferential treatment. This argument, while facially appealing, ultimately proves wanting.

As a general matter, the fact that a judge has substantive expertise in a particular area does not entitle that judge (at least explicitly\footnote{246}) to deference as to resolutions of legal issues arising under that area of law. Indeed, one would probably think it rather strange if an appellate court, having discovered that the trial judge whose judgment the court was reviewing had been a criminal prosecutor, were to announce that as a consequence it was deferring to the trial judge's determinations of legal issues in a criminal case.\footnote{247} The argument proceeds that if deference is not offered in that

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of selecting most current federal judges has emphasized different qualifications for appointment to the appellate and trial tiers. For instance, few district judges have been members of appeals courts or have actively participated in appellate practice.”) (footnote omitted).
\footnote{245. \textit{See supra} text accompanying note 223.}
\footnote{246. This Article does not explore the possibility that judges may defer sub rosa to a colleague with an expertise in a particular substantive area. \textit{See}, e.g., Ira Bloom, \textit{The Aftermath of Mistretta: The Demonstrated Incompatibility of the United States Sentencing Commission and Separation of Powers Principles}, 24 \textit{AM. J. CRIM. L.} 1, 18 n.80 (1996) (noting that then-Circuit Judge Stephen Breyer and Circuit Judge William W. Wilkins, Jr., both former members of the United States Sentencing Commission, had authored influential opinions interpreting the Sentencing Guidelines that the Commission had issued).}
\footnote{247. The notion, however, is not as strange as one might think. For example, the Supreme Court originally held that reviewing courts should afford deference to the Tax Court's interpretations of the federal tax law. \textit{See} Dobson v. Comm'r of Internal Revenue, 320 U.S. 489, 502 (1943) (“Where no statute or regulation controls, the Tax Court’s selection of the course to follow is no more reviewable than any other question of fact.”). Congress, however, overruled the Court shortly thereafter. Today, the Tax Code specifically provides that federal courts of appeals shall “review the decisions of the Tax Court... in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.” I.R.C. § 7482(a)(1) (2000). \textit{See} Vukasovich, Inc. v. Comm'r of Internal Revenue, 790 F.2d 1409, 1413 (9th Cir. 1986) (noting that courts of appeals review the Tax Court’s legal holdings \textit{de novo}). But \textit{see} InverWorld, Ltd. v. Comm'r, 979 F.2d 868, 875–76 (D.C. Cir. 1992) (describing \textit{Vukasovich} as “emphasizing that, even though review in this context is \textit{de novo}, circuit courts should defer to Tax Court decisions when uniformity and expertise concerns are significant”);}
\end{quote}
situation, then it ought not to be offered in the context of lower federal courts' interpretations of state law.

This argument is, on balance, unconvincing. Even where a trial court enjoys useful subject matter expertise, it is burdened with the same lawfinding deficiencies that burden trial courts considering matters of state law.\textsuperscript{248} As in the ordinary case of appellate review of district judges' state law interpretations, the appellate court's lawfinding ability is a valuable addition to the judicial process.\textsuperscript{249} In short, there are valid reasons for denying deference to federal district courts based on subject matter expertise. Moreover, even if deference should be granted based upon a lower court judge's subject matter expertise, but it is not, that is not necessarily a reason to preclude affording deference in other worthy circumstances.

Assuming that deference appropriately could be afforded to them, FTSLRs would be valuable, both from an efficiency standpoint and from the perspective of federal courts appropriately fulfilling their obligations under \textit{Erie} and its progeny. Federal courts would have the option of certifying for resolution unresolved questions of state law to panels of federal judges whose chambers lie within the state in question. Because the questions would be resolved by federal, not state, court judges, the system would not offer absolutely definitive resolution of state law questions. It would, however, offer several advantages.


\textsuperscript{248} See \textit{supra} text accompanying notes 58–60. Contrast this with administrative agencies: agencies have a greater opportunity for deliberative lawmaking and are generally accorded deference. See \textit{supra} text accompanying notes 201–07.

\textsuperscript{249} \textit{Cf.} \textit{Spencer v. NLRB}, 712 F.2d 539, 563 (D.C. Cir. 1983) (noting that with respect to the district court's conclusions that particular interpretations of a law are plausible or colorable, "the special expertise and experience of appellate courts in assessing the relative force of competing interpretations and applications of legal norms makes the case for \textit{de novo} review of judgments of this order even stronger than the case for such review of paradigmatic conclusions of law"), \textit{superseded by statute on other grounds}, 28 U.S.C. § 2412(d)(2)(D) (2000); \textit{Woods}, \textit{supra} note 107, at 780 ("De novo review is typically thought appropriate in the federal system because of the expertise that federal appellate courts develop in regard to federal law."). In support of the quoted language, Winton Woods relies on a broad reading of \textit{Spencer}, reading the case to stand for the proposition that in the context of the specialized bodies of federal law, both common and statutory, 'the special expertise and experience of appellate courts in assessing the relative force of competing interpretations and applications of legal norms makes the case for de novo review of judgments [of whether the Government's legal position was substantially justified] even stronger than the case for such review of paradigmatic conclusions of law.' \textit{Woods}, \textit{supra} note 107, at 780 n.40 (quoting \textit{Spencer}, 712 F.2d at 563).
First, federal judges with chambers in a state are more likely to be familiar with current state jurisprudence and, thus, more likely to predict accurately how the high court of the state would resolve issues. Therefore, even though the system would not guarantee definitive resolution of state law questions by state court judges, it would offer an improvement over the current system of prognostication by judges often quite unfamiliar with the state law at issue. The inclusion of federal circuit judges with chambers in other states would offset any residual local bias on the part of the judges with chambers in the state.

Second, retaining cases entirely within the federal system would eliminate the specter of jurisdictional problems associated with certifying questions outside the federal system.250 A FTSLR authorized by Congress clearly would be exercising the federal judicial power appropriately, and the underlying function of diversity jurisdiction—to have diversity cases heard in a neutral federal forum—would be fulfilled.

Third, having an established tribunal that is expected to respond to certified questions should lower the costs and delays associated with certification. It also offers the promise of a guaranteed response. Some states do not offer certification as an option,251 and even if a state does, the state high court is free to decline to answer certified questions.252 Those issues would not arise under the proposed system. Importantly, if proposals to expand certification gain support,253 those issues would loom even larger.

Fourth, the propriety of deference to FTSLRs would free certifying courts to focus their attention on matters other than state law issues, matters with which they presumably are better suited to deal. In this sense, federal judicial resources would be employed more efficiently.254

While one might question whether the benefits of the FTSLR system would outweigh the costs, there is reason to believe that they would. The largest financial cost associated with the system would be the addition of

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250. See supra text accompanying notes 21–25.
251. See supra text accompanying note 20.
252. See supra text accompanying note 19.
254. Coenen criticized the "cost-benefit" rationale for the traditional rule of deference, arguing that the mere fact that appellate courts' judicial resources might be more cost-effectively employed in considering matters other than issues of state law was insufficient to warrant abdication of the appellate courts' obligation to review trial court decisions. See Coenen, supra note 43, at 929–36. The difference here is that appellate courts' judicial resources can be employed more effectively, while at the same time increasing the effectiveness of the federal courts' Erie obligation.
judges to create the FTSLR. But it does not seem that many, if indeed any, new judges would be required: to the extent that the federal courts are already deciding state law issues, the FTSLR proposal would simply shift that responsibility from some federal judges to other federal judges. The creation of panels of judges to decide state law issues might increase the federal judicial workload (to the extent that individual federal district judges were otherwise issuing state law rulings), but the magnitude of the increase seems likely to be slight. Any such cost would likely be outweighed by the efficiency gains resulting from the reallocation of the workload.

One other cost that the FTSLR system might impose is a reduction in interjurisdictional dialogue. Commentators have lauded as a benefit of federal diversity jurisdiction the opportunity for federal and state courts to engage in dialogue over complex issues of state law. On this view, the fact that a federal diversity court gets a difficult question of state law "wrong"—in the sense that a state high court ultimately reaches a different resolution of the question—is not problematic. While some of the litigants in the federal court case may feel that there was an injustice, one might argue that notwithstanding the ultimate "correct" resolution of the question by the state court notwithstanding, the federal court's answer was a wiser one. Further, the scope of "damage" resulting from the federal court's decision is limited, insofar as it has no permanent impact on the development of state law. Moreover, the federal court's decision may prove to be influential; indeed, it may be so persuasive that it convinces the state high court later to rule similarly, whereas it would have ruled differently had the federal court decision not been available.

While increased use of certification would put this interjurisdictional dialogue more at risk than the FTSLR proposal, one might argue that the FTSLR proposal would decrease the quality of interjurisdictional dialogue. The basis for this argument is that it is more likely that the federal state-law tribunals would function as mere "ventriloquist's dummies" for the state


256. See Richardson v. Comm'r of Internal Revenue, 126 F.2d 562, 567 (2d Cir. 1942) ("[W]e are not here compelled by [Erie] to play the rule [sic] of ventriloquist's dummy to the courts of some particular state; as we understand it, 'federal law,' not 'local law,' is applicable."); Dorf, supra note 118, at 655 ("[N]o judge ought to be anyone's 'ventriloquist's dummy,' and any doctrine that does not recognize this merits serious reexamination.") (quoting Richardson, 126 F.2d at 567); John P. Frank, For Maintaining Diversity Jurisdiction, 73 YALE L.J. 7, 13 (1963) (noting that the continuation of federal diversity jurisdiction is subject to the "ventriloquist's dummy criticism," and noting that the criticism "may have merit").
high courts. The FTSLRs would be less likely to function as independent interpreters of law, and instead feature too much fealty to how state courts would decide the issues of law before them.  

An initial response to this "cost" is that it is not a cost at all: at least under some understandings of federal courts' obligations under *Erie*, federal courts ought not to be deciding cases in ways other than how they believe the relevant state high courts would decide them. A second response—and one that accepts that the deterioration in interjurisdictional dialogue would be a cost—is that the extent of this cost under the FTSLR system would be minor. Unlike simply expanding the use of certification to the exclusion of federal court consideration of state law issues, the FTSLR proposal would maintain interjurisdictional dialogue intact. Moreover, while the delegation of matters of state law to tribunals composed largely of federal judges might temper federal judicial independence, it cannot be gainsaid that the federal tribunals would simply jettison federal judicial independence and resort purely to parroting how they believe the state high court would resolve the issues. Federal judicial independence, and the resulting quality of interjurisdictional dialogue, could be further secured by including federal circuit judges (less beholden to local interests) on the tribunals. Finally, a state high court might be more likely to be persuaded by rulings of federal tribunals dedicated to the law of that state than by rulings of individual federal judges or random federal court of appeals panels. In other words, the FTSLR proposal might increase the effectiveness of interjurisdictional dialogue on matters of state law.

In sum, deference to lower federal court judges' determinations of state law can be a useful tool. Supreme Court deference to a court of appeals' state law determination can be appropriate, especially where the court of appeals has reviewed de novo, and affirmed, the district court's state law determination. The ability of federal courts other than the Supreme Court to take advantage of deference would be enhanced by the introduction of the FTSLR system to the federal judicial structure. It would allow federal courts to approximate more accurately state court treatment of legal questions as well as conserve federal judicial resources, all without running afoot of either Supreme Court precedent or normative arguments.

257. *Kremen v. Cohen*, 325 F.3d 1035, 1053 (9th Cir. 2003) (Kozinski, J., dissenting) (asserting that the issue of law before the Ninth Circuit, though technically one of state law, was in fact one that should be determined on a technological, and implicitly national, basis).

258. Indeed, a combination of the FTSLR proposal with Judge Calabresi's proposal to require the federal system to resolve state law issues before employing certification would guarantee that interjurisdictional dialogue. See Calabresi, *supra* note 29, at 1301-02.
against granting deference to lower federal court judges on matters of state law.

VIII. CONCLUSION

In this Article, I have argued that deference to lower federal courts on matters of state law is not, and ought not be read as, a dead letter. While deference to federal trial judges on matters of state law may not be appropriate, there are other settings in which deference might be appropriate. First, deference by the Supreme Court is appropriate to a state law determination reached by a court of appeals, especially where the court of appeals' determination accords with the determination reached by the district court. Deference might also be appropriate in respect of a new certification method that would exist entirely within the federal court system. Such a procedure would offer resolution of state law questions by an expert body without frustrating the principles underlying federal diversity jurisdiction.