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Federal Questions, State Courts, and the Lockstep Doctrine

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FEDERAL QUESTIONS, STATE COURTS, AND THE LOCKSTEP DOCTRINE

INTRODUCTION

State courts have adopted the doctrine that if presented with a federal question, they are not bound by the decisions of any federal court interpreting that law except the United States Supreme Court. The theory is that federal courts were originally created to be coordinate with state courts; with the exception of the highest court in the land, federal courts were not seen as superior to their state counterparts. As such, state courts are presumed to be free of precedent of the federal courts that decided federal law in the jurisdiction in which the state court sat, even if the circuit court had ruled on the matter. State courts adopted several approaches in their interpretation of the law, some more deferential to federal decisions than others, but the overwhelming majority of courts viewed the federal decisions as merely persuasive.

In 2004, the Pennsylvania Supreme Court addressed the issue of whether Pennsylvania state courts would be bound by the pronouncements of federal law by inferior federal courts or whether the courts would decide these issues independently. In *Hall v. Pennsylvania Board of Probation and Parole*,[1] the prisoner Hall filed a pro se petition for a review in the nature of a request for mandamus to challenge application of the 1996 amendments of the Federal Parole Act. Hall had been serving time for a variety of assault-related convictions.[2] From 1996 through 1999, Hall appeared before the Parole Board, each time having his parole request rejected.[3] In 2002, Hall filed his pro se petition in the Pennsylvania Commonwealth Court, claiming that the Parole Board's application of the 1996 amendments to the Parole Act to his parole requests violated the

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[1] 851 A.2d 859, 860 (Pa. 2004).
[2] *Id.*
[3] *Id.*

constitutional prohibition against ex post facto laws.[4] The Commonwealth Court ultimately denied the petition, and Hall appealed to the Pennsylvania Supreme Court for review.[5] Pennsylvania courts had rejected the ex post facto argument raised by the prisoner in *Winklespecht v. Pennsylvania Board of Probation and Parole*[6] and in *Finnegan v. Pennsylvania Board of Probation and Parole*.[7] Seven weeks after *Winklespecht*, the Third Circuit Court of Appeals rejected the *Winklespecht* rationale in a case with an identical substantive contention, holding that applying the 1996 amendments of the Parole Act to the defendant violated the ex post facto prohibitions of the United States Constitution.[8] Hall, recognizing the divergence in state and federal rulings, asked the Pennsylvania Supreme Court to consider his ex post facto argument in light of the Third Circuit's recent decision.[9]

The Pennsylvania Supreme Court, in considering the merits of the appeal, was faced with the question of whether or not their court—a state court—had any responsibility to treat the pronouncements of inferior federal courts on matters of federal law as binding, namely the amendments to the Parole Act at issue.[10] The Pennsylvania Supreme Court recognized that states had varying approaches to this issue, with only a very small minority of states treating lower federal court's rulings as binding on federal matters.[11] As for Pennsylvania's historical approach to the issue, the court considered its ruling in *Commonwealth v. Negri*[12] in 1965. In *Negri*, the court had to decide whether it would follow a state interpretation of *Escobedo v. Illinois*[13] or the conflicting analysis of the Third Circuit Court of Appeals. The *Negri* court considered some of the policy implications of not treating the Third Circuit's pronouncements as binding and therefore dispositive:

> If the Pennsylvania courts refuse to abide by [the Third Circuit's] conclusions, then the individual to whom we deny relief need only to "walk across the street" to gain a different

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[4] *Id.* at 860–61.

[5] *Id.* at 861.

[6] 813 A.2d 688, 692 (Pa. 2002).

[7] 838 A.2d 684, 690 (Pa. 2003).

[8] *See* Mickens-Thomas v. Vaughn, 321 F.3d 374, 393 (3d Cir. 2003).

[9] *Hall*, 851 A.2d at 863.

[10] *Id.*

[11] *Id.* at 863–64.

[12] 213 A.2d 670 (Pa. 1965).

[13] 378 U.S. 478 (1964) (ruling on right to counsel, interrogation, and confessions in the context of Constitutional constraints as a predecessor to Miranda v. Arizona, 384 U.S. 436 (1966)).

> result. Such an unfortunate situation would cause disrespect for the law. It would also result in adding to the already burdensome problems of the Commonwealth's trial courts, which look to us for guidance. Finality of judgments would become illusory, disposition of litigation prolonged for years, the business of the courts unnecessarily clogged, and justice intolerably delayed and frequently denied.[14]

Despite these concerns of unevenness in the law, lack of judicial economy, judicial confusion, and overall disrespect for the federal law, the Pennsylvania Supreme Court in *Negri* chose to dispense with the Third Circuit's interpretation of *Escobedo* and stick with the state's version of the law.[15] Since *Negri*, a number of decisions affirmed *Negri*'s conclusion that Pennsylvania state courts were not bound by lower federal courts' rulings on matters of federal law brought into a state courtroom.[16] As such, the Pennsylvania Supreme Court in *Hall* elected to continue the doctrine that the court could decide federal matters independently of the Third Circuit, or any federal circuit courts of appeals for that matter,[17] for reasons of keeping continuity with precedent.[18] The *Hall* court affirmed the order of the Commonwealth court and its use of the *Winklespecht* analysis.

This Note argues that there is a better way for state courts to interpret federal law when a federal question is presented to a state court than the one the Pennsylvania Supreme Court has adopted. This approach is called the Lockstep Doctrine. This doctrine is premised on the idea that one court will treat as binding another court's interpretation of a law not because it has to, but because of the benefits that such an approach generates. When state courts follow the decisions of an inferior federal court on an issue of federal law, the federal law sees improvement: a reduction in the abuses of forum

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[14] *Negri*, 213 A.2d at 672.

[15] *Id.* at 676.

[16] *See, e.g.*, Commonwealth v. Ragan, 743 A.2d 390, 396 (Pa. 1999) ("[I]n interpreting federal case law, this Court is not bound by decisions of federal courts inferior to the United States Supreme Court."); Commonwealth v. Chester, 733 A.2d 1242, 1256–57 n.14 (Pa. 1999) ("[A]lthough we may look to decisions of the intermediate federal courts for guidance in interpreting federal case law, those decisions are not binding on this court."); Commonwealth v. Laird, 726 A.2d 346, 359 n.12 (Pa. 1999) ("[A]lthough we may look to decisions of the intermediate federal courts for guidance in interpreting federal case law, those decisions are not binding on this court."); Commonwealth v. Cross, 726 A.2d 333, 338 n.4 (Pa. 1999) ("This court is not bound by a lower federal court's interpretation of United States Supreme Court decisions, but is bound only by the United States Supreme Court.").

[17] *See* Breckline v. Metro. Life Ins. Co., 178 A.2d 748 (Pa. 1962) (ruling that a Ninth Circuit decision is not binding on the court).

[18] Hall v. Pa. Bd. of Prob. and Parole, 851 A.2d 859, 865 (Pa. 2004).

shopping, better consistency in the application of the federal law, a higher quality in the adjudication of federal laws generally, and the promotion of equal protection of the law.

This Note will begin with a historical review of how state courts have addressed federal questions, and then will examine the current approaches by way of an analysis of case law. Second, this Note will demonstrate the Lockstep Doctrine in practice as it is currently used by state courts in the adjudication of state constitutional rights. Finally, this Note will propose an application of the Lockstep Doctrine to federal questions brought before state courts and discuss the benefits that would flow from such an approach.

I. HISTORICAL REVIEW

There is no serious dispute that state courts are available to hear matters of federal law. The Constitution created a Supreme Court and gave it jurisdiction over all cases in law and equity arising under the Constitution, laws, and treaties of the United States.[19] The Constitution, of course, did not mandate the creation of any inferior federal courts, putting the creation of lower federal courts in the sole discretion of Congress.[20] Though Congress instituted a system of lower federal courts,[21] the early inferential understanding was that state courts could decide issues of federal law, since, theoretically, federal courts were discretionary and not necessary. Moreover, even though the First Congress created a system of lower federal courts, it did not give the lower federal courts general civil jurisdiction.[22] As such, nearly all civil cases arising under federal law had to be brought in state court.[23] Moreover, the Supreme Court has held that "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."[24] This view that state courts are competent to hear federal questions was recognized very early. In *Martin v. Hunter's Lessee*,[25] the Supreme Court held that state courts are presumptively capable of hearing federal questions since there is no mandate for inferior federal

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[19] U.S. CONST. art. III, §§ 1–2.

[20] *Id.*

[21] Judiciary Act of 1789, ch. 20, §§ 2–4, 1 Stat. 73, 73–75 (creating federal district and circuit courts).

[22] For a detailed overview of the history of the early jurisdiction of federal courts, see Donald. H. Zeigler, *Gazing Into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1147 n.14 (1999) (examining the history that litigants were forced to bring civil cases in state court).

[23] *Id.*

[24] Tafflin v. Levitt, 493 U.S 455, 458 (1990).

[25] 14 U.S. (1 Wheat.) 304 (1816).

courts to hear them: "[federal courts] may not exist; and, therefore, the appellate jurisdiction must extend beyond appeals from the courts of the United States only. The state courts are to adjudicate under the supreme law of the land, as a rule binding upon them."[26] Unless exclusive jurisdiction is express or implied, state courts have concurrent jurisdiction to decide federal matters.[27]

Over time, the number of federal laws has grown substantially, affected by such events as the Civil War, Reconstruction, and the Great Depression. Before these seminal historical events, Congress used its legislative powers sparingly.[28] Since then, the federal government has become much more active, and with that activity came thousands more federal statutes. In the early part of the nation's existence, the low number of federal statutes naturally meant that state courts did not deal with the issue of deciding matters of federal law very often. Nowadays, with so many federal laws and regulations on the books, state courts are more likely to be faced with a federal question in a state courtroom.

II. CURRENT APPROACHES

While it is clear that state courts have the inherent power to decide cases brought under federal law, there is no prevailing standard for how states should interpret the law. *Hall v. Pennsylvania Board of Probation and Parole* recognized four schools of thought addressing the issue of how states treat the pronouncements of inferior federal courts on federal law: (1) a decision of an inferior federal court is persuasive authority, but not binding; (2) a decision of an inferior federal court should be followed, if reasonably possible, to avoid a conflict between state and federal interpretations of the same law; (3) a decision of an inferior federal court is binding on the state court; and (4) the state court is bound by inferior federal court decisions on the law in question if they are "numerous and consistent."[29]

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[26] *Id.* at 315; *see also* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). The operative word is "may": inferior federal courts are not required by the Constitution to hear cases, so it follows that state courts are competent tribunals.

[27] *Tafflin*, 493 U.S. at 459; *see also* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477–78 (1981) ("The general principle of state-court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication."); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507 (1962) ("[N]othing in the concept of our federal system prevents state courts from enforcing rights created by federal law.").

[28] *See* Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1020 (1977) (examining the short supply of federal statutes during the first century of the republic).

[29] Hall v. Pa. Bd. of Prob. and Parole, 851 A.2d 859, 863 (Pa. 2004).

Most courts follow the first approach that inferior federal court decisions are merely persuasive authority. A survey of some of the recent cases in states that adopt the Persuasive Authority Theory is instructive, as a doctrinal matter, to understand the reasoning behind this approach. In *Bogart v. CapRock Communications Corp.*,[30] the Oklahoma Supreme Court stated firmly:

> We also recognize that nothing in the concept of supremacy or in any other principle of law requires subordination of state courts to the inferior federal courts. Subject to decisions of the United States Supreme Court, state courts are free to promulgate judicial decisions grounded in their own interpretation of federal law.[31]

In *ACE Property Casualty & Insurance Co. v. Commissioner of Revenue*,[32] the Supreme Judicial Court of Massachusetts affirmed that Massachusetts would follow the Persuasive Authority Theory[33] and would "give respectful consideration to such lower Federal court decisions as seem persuasive."[34] In *Custom Microsystems, Inc. v. Blake*,[35] the Arkansas Supreme Court flatly stated that "[t]he Eighth Circuit Court of Appeals, of course, is not binding authority for this court."[36] Other states that adhere to the Persuasive Authority Theory include Alaska, Colorado, Georgia, Indiana, Louisiana, Nebraska, New Jersey, Nevada, and Wisconsin.[37]

The prevailing rationale for the Persuasive Authority approach among many states rests on the idea that states have concurrent jurisdiction with inferior federal courts on issues of federal law. As such, "state courts, when adjudicating federal questions, form an integral part of the national judicial hierarchy and apply their own law, not that of another sovereign."[38] Further, while the Supreme Court maintains ultimate review of the issue, the lower federal courts

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[30] 69 P.3d 266 (Okla. 2003).

[31] *Id.* at 271 (relying on Akin v. Mo. Pac. R.R. Co., 977 P.2d 1040, 1052 (Okla. 1998), which held that because state courts and inferior federal courts were coordinate, not subordinate, federal decisions of inferior federal courts were persuasive only).

[32] 770 N.E.2d 980 (Mass. 2002).

[33] *Id.* at 986 n.8 ("[W]e are not bound by decisions of Federal courts (other than the United States Supreme Court) on matters of Federal law.").

[34] *Id.* (quoting Commonwealth v. Hill, 385 N.E.2d 253, 255 (Mass. 1979)).

[35] 42 S.W.3d 453 (Ark. 2001).

[36] *Id.* at 457.

[37] Hall v. Pa. Bd. of Prob. and Parole, 851 A.2d 859, 863–64 (Pa. 2004).

[38] *Authority in State Courts of Lower Federal Court Decisions on National Law*, 48 COLUM. L. REV. 943, 946 (1948) (citing Kersting v. Hardgrove, 48 A.2d 309 (Somerset County Ct. 1946)).

do not enjoy any ability of review of the state courts' pronouncements on federal law.[39] Therefore, "[d]ecisions of a lower federal court are no more binding on a state court than they are on a federal court not beneath it in the judicial hierarchy."[40] Since state courts are coordinate with federal courts, state court judgments on federal questions are just as legitimate as federal court judgments, and there is no inherent superiority that allows for federal courts to review the state court. This rationale that lower federal courts have no reviewing authority over the judgments of state courts has been affirmed by the Supreme Court in what is called the *Rooker-Feldman* doctrine. This doctrine springs from the rule that federal district court jurisdiction is "strictly original" and that district courts have no subject matter jurisdiction to review a state court's determination of a federal question absent a Congressional statute enabling such review,[41] and that "[r]eview of such determinations can be obtained only in [the Supreme] Court."[42] Based on the *Rooker-Feldman* doctrine, the Persuasive Theory finds its moorings: since state courts do not answer to any lower federal court in the judicial hierarchy, state courts have the discretion to treat the federal courts' opinions as persuasive authority as they would any other nonsuperior court.[43]

A second school of thought, called here the Semi-Binding Theory, is the doctrine that the state court owes the federal appeals court of the circuit where the state is located a higher deference than merely persuasive authority. Recognizing the problems in divergent bodies of federal law, the Supreme Court of Connecticut stated that "[i]t would be a bizarre result if this court [adopted one analysis] when in another courthouse, a few blocks away, the federal court, being bound by the Second Circuit rule, required [a different analysis]."[44] As such, the court adopted the analysis of the Second Circuit Court of Appeals to the federal law at issue.[45] In *Littlefield v. State, Department of Human Services*,[46] the Supreme Judicial Court of Maine stated that "in the interests of existing harmonious federal-state relationships, it is a wise policy that a state court of last resort accept, so far as reasonably

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[39] *Id.*

[40] *Id.* at 947.

[41] Rooker v. Fid. Trust Co., 263 U.S. 413, 416 (1923).

[42] D.C. Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983).

[43] For a recent endorsement and application of the *Rooker-Feldman* doctrine, see Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005).

[44] Red Maple Properties v. Zoning Comm'n, 610 A.2d 1238, 1242 n.7 (Conn. 1992) (quoting Tedesco v. Stamford, 588 A.2d 656, 660 (Conn. 1991)).

[45] *Id.*

[46] 480 A.2d 731 (Me. 1984).

possible, a decision of its federal circuit court on such a federal question."[47]

While this doctrine certainly demonstrates deference to the relevant federal court of appropriate jurisdiction, it falls short of treating the federal decision as binding. The language is clear to leave a theoretical "escape hatch" in the event the state court prefers a different outcome under federal law. For example, in *Littlefield*, the court is careful to reserve itself room to be as independent as it ultimately wants to be: the court will adopt the federal court decision "so far as reasonably possible."[48] But when would interpreting federal law not be reasonably possible for a state court? What obstacles would prevent a state court from adopting what is a pronouncement on federal law by a competent court, outside of the preferred statutory interpretations of the individual judges sitting on the state court bench? In short, there is little obvious difference between this approach and the Persuasive Authority Theory. The state court still reserves the right to decide federal law any way it wants. What can be gleaned from this approach, however, is that some courts are concerned about a disharmony between a state version of federal law and a federal version, at least when the state is within the geographical jurisdiction of the federal court in question.

A third school of thought is that the state court is bound by inferior federal court decisions but only when those decisions are "numerous and consistent." In *Bishop v. Burgard*,[49] the Illinois Supreme Court stated that "[t]his court need not follow precedent of a particular federal circuit court where, as here, the Supreme Court has not ruled on the precise question presented, there is uncertainty among the federal circuit courts of appeals, and we believe a case is wrongly decided."[50] The implication is that where there is certainty in the lower federal courts, the Illinois Supreme Court would need to follow it. In *Ex parte Bozeman*,[51] the Alabama Supreme Court stated that "if all federal circuits were in agreement on this issue, we would accept the [federal courts' interpretation]."[52] And in *Etcheverry v. Tri-Ag Service, Inc.*,[53] the California Supreme Court held that "where the decisions of the lower federal courts on a federal question are 'both

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[47] *Id.* at 737.
[48] *Id.*
[49] 764 N.E.2d 24 (Ill. 2002)
[50] *Id.* at 33.
[51] 781 So. 2d 165 (Ala. 2000).
[52] *Id.* at 168.
[53] 993 P.2d 366 (Cal. 2000).

numerous and consistent,' we should hesitate to reject their authority."[54]

It should be noted that this theory is still predicated on the idea that the interpretation of federal law is essentially within the complete control of the state court. The caveats offered by the state courts adhering to this theory insure that they really have not accepted as binding the decisions of lower federal court at all. After all, what constitutes "uncertainty among the federal court"? Is it uncertainty among district courts in the relevant jurisdiction? Is it uncertainty among the circuit courts of appeals? Of course, the Alabama Supreme Court was clear that the threshold for following federal decisions was unanimity among the lower federal courts on the issue.[55] What is the likelihood that all the federal circuits would be in agreement on a federal issue? In effect, the Alabama Supreme Court would spend most of its time treating lower federal decisions are merely persuasive.

Regardless of where an individual state court decided to draw and apply a line of the "numerous and consistent" theory of analysis, it is clear that state courts under this theory are concerned about inconsistency of the meaning of federal law in the same jurisdiction. California, Illinois, and Alabama have, at the very least, recognized that it is in the best interests of the federal law not to have two independent bodies of interpretation. It is arguable as to whether this third school of thought actually ameliorates the problem with a workable doctrine, but the concern is part of their jurisprudence, and is a problem in need of a solution.

A fourth school of thought simply adopts lower federal court interpretations of federal law as binding. In *Columbus Paper & Chemical, Inc. v. Chamberlin*,[56] the Mississippi Supreme Court held that "[t]his Court, when enforcing rights created under federal law, must follow the interpretations of those rights provided by federal courts."[57]

In *Desmaris v. Joy Manufacturing Co.*,[58] the Supreme Court of New Hampshire stated that "we note that in exercising our jurisdiction with respect to what is essentially a federal question, we are guided and bound by federal statutes and decisions of the federal courts interpreting those statutes."[59]

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[54] *Id.* at 368.
[55] *Ex Parte Bozeman*, 781 So. 2d at 168.
[56] 687 So. 2d 1143 (Miss. 1996).
[57] *Id.* at 1147.
[58] 538 A.2d 1218 (N.H. 1988).
[59] *Id.* at 1220.

But neither court discusses any policy reasons for their decision to treat federal court decisions on federal law as binding. It could be considered a matter of administrative convenience. Instead of an original, painstaking analysis of the law, the state courts more quickly and more easily reach decisions by applying the work already done by other courts. It could be considered a matter of deference to federal courts in that they are presumed to have more expertise in matters of federal law. Whatever the reason, both Mississippi and New Hampshire see value in treating federal decisions as binding.

In sum, the four schools of thought elucidated in *Hall v. Pennsylvania Board of Probation and Parole* demonstrate that, by and large, most state courts adopt a doctrine that federal court interpretations of federal law are, more or less, merely persuasive, and the differences arise only in what degree the state court should be deferential. Only two states have stated that they treat lower federal court decisions as binding, and they did not expound on the matter.

Given the four schools of thought examined in *Hall v. Pennsylvania Board of Probation and Parole* and the myriad of possible variations, an important question needs to be asked: which method of interpretation is better? Which doctrine of deciding federal law serves the interests of the federal law best? This Note argues that Mississippi and New Hampshire have the superior doctrine of interpretation: marching in lockstep with the federal circuit court in their respective federal jurisdiction.

III. PUBLIC POLICY CONSIDERATIONS: WHAT GOALS SHOULD THE COURTS SEEK TO ACCOMPLISH?

The history is clear that there is no historical or textual determination that state courts are bound by federal precedent in their circuit on questions of federal law. Modern courts are still of a mind that they can interpret federal law any way they see fit. But practical problems arise that create challenges to public policy when state courts create their own version of federal law unencumbered by federal precedent. Mirroring the concerns that led to the *Erie* doctrine used by federal courts interpreting state law in diversity cases, problems arise when the federal law in a given jurisdiction has multiple meanings dependent on the court. First, there are concerns about the abuses of forum shopping. Second, there are concerns about consistency in the law. Third, in a day and age where federal law is so prominent in its scope, the chances of creating disputes in the law that must ultimately be settled by the Supreme Court are higher, thus creating inefficiencies and confusion in the judiciary.

A. Forum Shopping

When state courts are allowed to decide federal matters completely independent of the interpretations of the federal court whose jurisdiction the state court resides within, the lack of uniformity in the federal law encourages forum shopping. That forum shopping is an undesirable practice is recognized in one of the seminal Supreme Court cases of the twentieth century. The abuses of forum shopping were a major policy concern that led to the adoption of the *Erie* doctrine in *Erie Railroad Co. v. Tompkins*.[60] The Court recognized that under the doctrine of *Swift v. Tyson*, which allowed unrestrained forum shopping between state and federal courts on a matter of state law through diversity jurisdiction, rights varied according to whether the enforcement was sought in a state or federal court.[61] Moreover, this lack of uniformity of rights based on forum choice under *Swift* "rendered impossible equal protection of the law." [62] The *Erie* Court announced that federal courts were bound to adhere to the state's highest court interpretation of the state law rather than independently develop one of their own. Although the holding rested on the rule that "[t]here is no federal general common law"[63] and the idea that the Constitution confers no power to federal courts to independently interpret state law matter in a diversity suit, the case was decided with a desire to decrease the abuses of forum shopping.[64]

The *Erie* doctrine demonstrates that forum shopping is a practice to be discouraged. There is an innate sense of unfairness when the outcome of a trial turns on the choice of forum rather than on the merits of the law and facts in a given case.[65] Further, not only does the inherent inconsistency in two independent bodies of law raise questions of equal protection because of its unfairness[66] but it also creates other practical problems. Forum shopping leads to inefficiency: "[t]he more the two sides in a lawsuit see the costs or outcome depending on [the court] where the case is litigated, the more there will be fights over venue and jurisdiction."[67] Aggressive wrangling over which type of court the law will be litigated in

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[60] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[61] *Id.* at 74–75.

[62] *Id.* at 75.

[63] *Id.* at 78.

[64] *Id.* at 74–78.

[65] Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 782 (1995).

[66] *Erie*, 304 U.S. at 75.

[67] Chemerinsky & Friedman, *supra* note 65, at 782.

naturally leads to lengthy and costly fights over location.[68] Moreover, because lawyers must familiarize themselves with the procedural requirements depending on the court, this adds to the inefficiency of litigation.[69]

The forum shopping problems addressed in diversity cases by *Erie* also arise when states decide questions of federal law in a way inconsistent with federal court decisions. The issue at hand is nothing more than a reversed *Erie* dilemma. Litigants can now do exactly what *Erie* tried to prevent in diversity jurisdiction lawsuits: they can shop for the forum that best suits their preferences based on the differences in the law itself as adjudicated by different courts.

Erie makes clear that forum shopping is not desirable as public policy and should be remedied. If unbridled forum shopping in a diversity lawsuit created intolerable "mischievous results"[70] in *Erie*, it certainly follows that the same mischievous results are something to be avoided when there is a choice between state or federal court interpretations of a federal law. But how? Unlike *Erie*, there is no constitutional mechanism to blunt the pernicious effects of forum shopping by demanding that state courts follow an inferior federal court's ruling on federal law. It has been well established that state courts are not constitutionally required to follow an inferior's court's ruling on a federal matter. As such, forum shopping remains open to abuse so long as state courts interpret federal law without regard to any precedent by a federal court. Discouraging forum shopping is a policy that state courts should adopt, but the current policy of deciding federal matters free of any precedential restraints does nothing to systematically address the problem.

B. Consistency and Uniformity

Consistency in the interpretation of law is one of the hallmarks of the American legal system. Just as the Constitution outlaws ex post facto laws[71] as a matter of fundamental fairness,[72] the values underpinning consistency in law—predictability, transparency, and rationality—are all essential to a successful legal system.[73] Further, the very concept of the use of precedent in our legal system is built on the idea that like cases should be treated alike: "[w]e achieve fairness

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[68] *Id.* at 783.

[69] *Id.*

[70] *Erie*, 304 U.S. at 74.

[71] U.S. CONST. art. I, § 9, cl. 3.

[72] *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 396–97 (1798) (discussing ex post facto laws).

[73] Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 485 (1986).

by decisionmaking rules designed to achieve consistency across a range of decisions."[74] While consistency and predictability in application of the law cannot be achieved with mathematical precision, it is a goal fundamental to the American conception of rule of law.[75] After all, the basic function of certiorari jurisdiction is to establish uniformity on questions of federal law.[76]

When state courts develop their own interpretation of federal laws free of any influence of the federal court decisions in the appropriate district, the goal of consistency in the federal law is thwarted. In the Sixth Circuit, for example, Kentucky, Ohio, Michigan, and Tennessee could all have their independent version of what a federal law means along with the prevailing authority of the federal courts in the circuit. Having the possibility, in the case of the Sixth Circuit, of five distinct interpretations of a federal law does not promote consistency or uniformity in the federal law. Theoretically, two neighbors located on the same street could have completely different applications of the same federal law, all because of this inconsistency in the way it is construed between independent state and federal courtrooms. This asymmetry between state and federal courts is an obstacle to the decisional uniformity desired by the Supreme Court.[77]

C. Efficiency.

A third problem is that the Supreme Court does not have the practical ability to smooth out these inconsistencies in the federal law, despite such suggestions by some commentators. In theory, the Supreme Court, as the court of last resort on all questions of federal law, can resolve any conflicting interpretations of federal law achieving national uniformity because state courts are bound by the Supreme Court. In the case of a state court interpreting federal law, the argument goes, there is no fear that two distinct bodies of law could emerge because the Supreme Court can ultimately resolve the dispute.[78]

But this theoretical view ignores the kind of practical problems that give rise to divergence in the law. It is true that "only a decision

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[74] Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 596 (1987).

[75] Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 852 (1994).

[76] Robert L. Stern, Comment, *Denial of Certiorari Despite a Conflict*, 66 HARV. L. REV. 465, 465 (1953) (analyzing the various reasons the Supreme Court will not grant certiorari despite conflicts in the lower courts).

[77] Andrew A. Matthews, Jr., *The State Courts and the Federal Common Law*, 27 ALB. L. REV. 73, 76 (1963).

[78] *Id.*

of the Supreme Court . . . can completely assure uniformity of federal common law."[79] However, as a practical matter, "it is highly improbable that the Supreme Court could effectively undertake the development of detailed substantive rules of law."[80] Writing in 1951, a commentator noted that time limits the number of cases which the Court can decide.[81] Even when there are conflicts in the circuit courts, the Court has practical constraints on being able to resolve the problem.[82]

Of course, that was in 1951. According the Supreme Court's website, the Court had 1,460 cases on the docket in 1945.[83] In 1960, the number of cases on the docket jumped to 2,313.[84] The current total is now more than 7,000 cases per term, nearly seven times that of the presumably overburdened Supreme Court of the 1940s and '50s.[85] Couple that with the fact that we have over fifty titles to the U.S. Code.

So, in the modern era, we have exponentially more federal laws and exponentially more judicial opinions that must interpret those laws. The simple solution that the Supreme Court can neatly tidy up all these disputes because it happens to have jurisdiction over all federal questions is faulty in light of our modern circumstances. It follows that because of these practical restraints, a problematic divergence exists in the law and threatens to get worse. If it is ostensibly bad policy to have such divergent interpretations of federal law, and it is clear that we think so because of the policy considerations in *Erie*, then it stands to reason that a solution must be applied at a lower level rather than waiting on the Supreme Court to rescue the law from itself.

If these public policy concerns were sufficient for the Supreme Court to consider an *Erie* doctrine for federal courts interpreting state law, it stands to reason that state courts interpreting federal law should see the wisdom in creating a doctrine that improves the quality and consistency of interpreting federal law. But, the *Erie* doctrine differed in one respect because the Supreme Court believed that the Constitution did not confer the unrestricted power to interpret state law on the federal courts.[86] State courts, in contrast, have no

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[79] *Id.* at 75.

[80] *Id.*

[81] *The Supreme Court, 1950 Term*, 65 HARV. L. REV. 107, 108 (1951).

[82] *See* Stern, *supra* note 76.

[83] The Justices' Caseload (2005), http://www.supremecourtus.gov/about/justicecaseload.pdf.

[84] *Id.*

[85] *Id.*

[86] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general

constitutional requirement to follow federal precedent of the circuit court for their jurisdiction. In other words, there is no serious argument that state courts independently interpreting federal law is unconstitutional.

So we are left, as a practical matter, to decide if the current doctrines of state courts are tolerable in light of our *Erie*-esque public policy concerns. This Note suggests that there is a better way, a "lockstep" approach: one advocated by the supreme courts of Mississippi and New Hampshire, and one that is consistent with state court jurisprudence in the interpretation of state Bills of Rights. While this doctrine cannot be imposed on a state court, this Note argues that state courts, as a common law and policy matter, should choose this doctrine because it helps alleviate the *Erie*-esque public policy concerns "in the reverse"; that is, when a state court has to interpret federal law. The doctrine suggested here—the Lockstep Doctrine—is one in which states treat circuit court decisions as binding on questions of federal law as if the circuit court were a superior court.

IV. THE RATIONALE FOR THE LOCKSTEP DOCTRINE

Simply stated, a lockstep approach means that one court adopts wholesale the ruling of another court for public policy reasons, even when the first court has no duty to bind itself to the ruling. This is not the same as treating the second court's ruling as persuasive and following suit.[87]

A. State Constitutionalism.

State supreme courts routinely engage in lockstep jurisprudence as a doctrinal matter in some their most important work: interpretation of their own state constitutions and more specifically, the states' respective Bills of Rights.[88] In theory, the state supreme court, interpreting its own Bill of Rights, has authority to interpret the Bill of Rights completely independent of any United States Supreme Court decision on a federal version of the law. But, in practice, state supreme courts do not adopt this independent approach. Instead, though they are not required to by any superior law or court, the state supreme court adopts the United States Supreme Court's

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common law.").

[87] *See* Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98 (1988).

[88] *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 788 (1992).

interpretation of the federal Bill of Rights as their own for the state's Bill of Rights. This state court approach of following the Supreme Court is referred to as the lockstep method.[89]

State supreme courts have routinely opted to follow in lockstep with the Supreme Court's rulings on civil rights despite suggestions that the state courts should expand civil rights and liberties beyond that of the Supreme Court's rulings by way of independent adjudication of their own constitutions.[90] There are many examples of this fidelity to lockstep jurisprudence in the corpus of state court decisions. The Massachusetts Supreme Judicial Court, when adjudicating claims relying solely on the state constitution, has applied the Supreme Court's constitutional standards for a variety of issues, including probable cause, evidence suppression, retroactivity of decision for jury instructions, and urinalysis.[91] In claims where the litigant raised both state and federal constitutional claims, the Massachusetts Supreme Judicial Court held that the Supreme Court's standards governed the state's constitutional standards in such areas as due process, fair trial, use immunity, ineffective assistance of counsel claims, and search and seizure issues.[92] Virginia, Louisiana, Kansas, and New York all defer to the idea that the federal standards enunciated by the Supreme Court control the analysis and outcome under the state constitution to some degree.[93]

Further, as Professor Gardner notes, even as the California Constitution expressly invites the California Supreme Court to develop independent jurisprudence on state constitutional issues,[94] the California Supreme Court, as a doctrinal choice, has opted for the lockstep approach on issues such as the right to a public trial, due process, and the disproportionality of the death sentence.[95]

Why state supreme courts adopt the lockstep is less clear, as state courts almost never explain their reasoning behind it.[96] The Virginia Supreme Court "refuse[d] to give any broader interpretation to the Due Process Clause of the Constitution of Virginia," but went no

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[89] William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550–51 (1986).

[90] *See id.* This idea of 'New Federalism'—the idea that state courts should assert their independence when interpreting a state's bill of rights to expand civil liberties—was analyzed by Supreme Court Justice Brennan. *See* William Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[91] Gardner, *supra* note 88, at 789 n.105.

[92] *Id.* at 788–89.

[93] *Id.* at 789–92.

[94] *Id.* at 789 ("Rights guaranteed by [California's] Constitution are not dependent on those guaranteed by the United States Constitution.") (citing CAL. CONST. art. I, § 24).

[95] *Id.* at 790.

[96] *Id.* at 792.

further.[97] In *People v. Hernandez*,[98] the Court of Appeals of New York, without much elaboration, asserted that the state equal protection clause produced the same protection of law that the federal equal protection clause and that in this case, "no justification for breaking new ground as to [the state] clause by differentiating between this dually protected constitutional right is sufficiently advanced."[99] While the New York court seems to leave the door open that a justification could be raised to differentiate the state and federal equal protection laws, it is clear that the New York court seems comfortably settled on the idea that the state supreme court's jurisprudence will remain in lockstep with the Supreme Court of the United States.

Ohio, too, practices the lockstep approach with regards to its state Bill of Rights. In *Eastwood Mall, Inc. v. Slanco*, the Ohio Supreme Court faced a First Amendment claim regarding picketing and leafleting in a privately-owned shopping mall.[100] Even though the United States Supreme Court held that states could come to their own conclusions and expand free-speech liberties in malls,[101] the Ohio Supreme Court held that "free speech guarantees accorded by the Ohio Constitution are no broader than the First Amendment, and that the First Amendment is the proper basis for interpretation of Section 11, Article I of the Ohio Constitution."[102]

B. Rationales

However, in the absence of explanations, some commonsense rationales come to mind. An obvious theory is that state supreme courts choose to defer to a court that has perhaps a better understanding and expertise on the types of issues being raised on a constitutional claim. Since the Federal Constitution is more fully expounded, both in court cases and academic literature, the bulk of federal constitutional materials "provides a generous source of off-the-shelf standards and analyses for application to state constitutional problems."[103] As such, state judges do not have to "start

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[97] R.G. Moore Bldg. Corp. v. Comm. for the Repeal of Ordinance R(C)-88-13, 391 S.E.2d 587, 591 (Va. 1990).

[98] 552 N.E.2d 621 (N.Y. 1990).

[99] *Id.* at 624.

[100] 626 N.E.2d 59 (Ohio 1994).

[101] Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) ("Our reasoning in *Lloyd*, however, does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.").

[102] *Eastwood Mall*, 626 N.E.2d at 61.

[103] Gardner, *supra* note 88, at 791.

at the beginning" when interpreting their own state constitutions; there is less of a need to plumb the depths of their own state's constitutional history, exhaustively search the legislative records for the intent of several generations of legislatures, or divine the direction of the "evolving standards of decency that mark the progress of a maturing society"[104] of the people of their particular state when an obviously able court has done this kind of work for them.

Further, state and federal constitutions often contain substantially similar language, given they share similar points of origin in history and society. This, logically, would give rise to theoretical and doctrinal symmetry between the two sources of law. As such, some suggest that it only makes sense for state courts to start with a federal analysis and depart from it only for clearly defined reasons.[105]

A combination of reasons is plausible. For reasons of consistency, practicality, and efficiency, state supreme courts think the best approach is to adopt the Supreme Court's law as its own on what are state constitutional questions. The quality of justice is improved when state judges do not have to "reinvent the wheel" on questions that have already been considered by the most prominent court in the American legal system. The lockstep approach is clearly a preferred method of adjudicating state constitutional claims and is a common phenomenon across a variety of states.

Considering that the lockstep approach is an approach in which the state courts are quite comfortable, it stands to reason that if a state supreme court is deferring to the expertise of a federal court in interpreting law that is a pure creation of and by the state itself, it would make eminent sense for a state supreme court to have the same kind of deference, for all the same public policy reasons, to federal courts in matters of federal law. The rationale behind the lockstep doctrine is well settled, and despite plenty of opportunities to strike an independent path on state constitutional questions, state supreme courts have chosen not to do so, deciding in the state's best interest to march in lockstep with the Supreme Court. For the same reasons, this same judicial practice should be applied to federal questions in a state court.

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[104] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[105] *See Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1330–31 (1982) (discussing the 'interstitial' approach to state constitutional adjudication).

V. BENEFITS OF THE LOCKSTEP DOCTRINE

Far from being a radical departure from current interpretation or suggesting a drastic overturning of fundamental state jurisprudence, because of its settled nature as a doctrine, applying this lockstep approach to state interpretations of federal law would be a natural, consistent way of handling the kinds of public policy problems that arise from divergence in federal law between state and federal courts.

A. Combating Forum Shopping Abuses

First, the lockstep doctrine will slow the forum shopping abuses discussed in *Erie*. It should be noted that the point of *Erie* was not to eliminate forum shopping entirely. It did not get rid of diversity jurisdiction and state questions are still available to be adjudicated in either state or federal court, so long as diversity criteria are met.[106] *Erie* wanted to prevent forum shopping based on lack of uniformity in the law.[107] Similarly, the lockstep doctrine here will curtail forum selection on the basis of the substantive law, as the prevailing state of a federal law in the relevant circuit jurisdiction will be the same in a state court as it would be had the case been brought in a federal court. As in a diversity jurisdiction matter, litigants are free to choose a forum based on other factors, such as procedural laws. *Erie* had no objective to demand a harmonization of all considerations in choice of forum, and the Lockstep Doctrine is consistent with that view. But, as discussed above, *Erie* wanted to put a stop to forum shopping within a single state based on the substantive law,[108] and in light of that being a problem in need of a solution for state law questions in diversity, forum shopping on the basis of substantive federal law is also a problem to be remedied. The Lockstep Doctrine creates that remedy in the same way the *Erie* Doctrine did.

B. Improving Uniformity

Second, the Lockstep Doctrine improves consistency, predictability, and ultimately uniformity in the federal law. There has always been a desire to achieve a level of uniformity in the federal law. Alexander Hamilton wrote in the Federalist: "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but

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[106] U.S. CONST. art. III, § 2.

[107] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75–78 (1938).

[108] John B. Corr, *Thoughts on the Vitality of* Erie, 41 AM. U. L. REV. 1087, 1116 (1992) ("*Erie* sought to discourage that kind of legal inconsistency within a state.").

contradiction and confusion can proceed."[109] Of course, Hamilton was discussing the problem of thirteen states. Now, of course, we have almost four times the number of heads of hydra that worried Hamilton, as well as exponentially more federal laws that must be given meaning by judges. The Lockstep Doctrine, by applying the relevant federal court's ruling in place of an independent state court's analysis, helps tame the beast Hamilton worried about in Federalist No. 80: federal law whose meaning was so splintered among varying jurisdictions that no one knew what the law meant.[110]

From a practical lawyering standpoint, a lawyer can more effectively advise his client as to the law not only when his client gets sued, but more importantly, before that, when the lawyer's client is trying to comply with the law to prevent from being sued in a state that adopts the Lockstep Doctrine for federal questions in state court.[111] Without the built-in consistency of the lockstep approach, this task becomes much harder and much more expensive. Furthermore, a state court that refuses to follow as binding federal courts' interpretations of federal law offer an opportunity for its residents to be the victim of a legal "sneak attack."

On a larger scale, when the law can mean two different things based on forum choice in the same jurisdiction, there is a concern that this approach does not comport with the principles of fair play and equal justice. This is the kind of unevenness the *Erie* Court described as flirting with unequal protection of the law.[112] While the *Erie* Court stopped short of deciding *Erie* under an equal protection theory, the

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[109] THE FEDERALIST NO. 80, at 412 (Alexander Hamilton) (G. Carey ed. 2001).

[110] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816) ("If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable[.]"). Though the Supreme Court in *Martin v. Hunter's Lessee* was clearly referencing the result of a state court decision being ineligible for review by the Supreme Court on a question arising under the United States Constitution, the fair point is that uniformity is preferred over such "jarring and discordant judgments" within the laws of the United States.

[111] The theory that "an ounce of prevention is worth a pound of cure" is well settled among attorneys trying to avoid costly and time-consuming litigation. *See, e.g.*, Marcos D. Jimenez & Dana Foster, *The Importance of Compliance Programs for the Health Care Industry*, 7 U. MIAMI BUS. L. REV. 503 (1999) (noting the importance of a good compliance program to avoid litigation for clients in the health care industry); Kevin B. Huff, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 COLUM. L. REV. 1252 (1996) (analyzing the benefits of compliance in the context of criminal liability for corporations); Lucia Ann Silecchia, *Ounces of Prevention and Pounds of Cure: Developing Sound Policies for Environmental Compliance Programs*, 7 FORDHAM ENVTL. L. REV. 583 (1996) (noting that as both criminal and civil penalties for environmental infractions get ever more severe, compliance with the law is the superior alternative).

[112] *Erie*, 304 U.S. at 74–75.

Court kept the door open to a consideration that a lack of uniformity was discriminatory:

> [The *Swift* doctrine] made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State. The discrimination resulting became in practice far-reaching. [113]

While it is difficult to speculate on the success of such a claim, application of the Lockstep Doctrine would preempt that troubling discussion by remedying the kinds of concerns the *Erie* Court mentioned. In the *Hall* case, regardless of the forum in which Hall chose to make his appeal, and regardless of the reasons why—after all, the appeal was done pro se, so it stands to reason Hall might choose a forum based on convenience or accessibility, rather than tactics or strategy—had the Pennsylvania Court adopted as binding the Third Circuit's view of the law, there would be no question Hall would have his federal claim decided the same as any similarly situated appellant in federal court. That approach would create a consistent result regardless of forum, the question of unfairness would be foreclosed, and the Lockstep Doctrine would generate this outcome.

C. Improving the Quality of Adjudication

Third, under the Lockstep Doctrine, state courts can do their part to improve the quality in the adjudication of federal laws. While it has been stated that state courts are competent to hear federal questions,[114] the concept of parity—that is, the assumption that state courts are just as capable of doing a good a job as a federal court in adjudicating a federal law—has been questioned in light of the development of federal laws over time. First, there is the idea that federal judges are of a higher caliber because they are selected from a narrower pool of potential appointees, and therefore comprise a bench of higher legal

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[113] *Id.*

[114] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

talent than the state bench would.[115] As such, it is argued that federal judges are simply the best and brightest among a broader field of adjudicators.[116] Further, the selection process of federal judges tends to insure that federal judges are of a "higher professional distinction": the focus of a federal appointment is on the competence and skill of the nominated judge, whereas a state election has less to do with an exacting review of competence and more to do with rounding up votes and political patronage.[117] Also, it is argued that the caliber of judicial clerks "exerts a substantial impact on the quality of judicial output," and clerks serving at the federal level are themselves considered to be among the best and brightest of their peers.[118] Finally, it is argued that the caseload of state courts is so much larger than that of the federal courts, and that state courts could not possibly give the time, attention, and rigorous analysis required that a nonstate question of law deserves.[119] It follows that even if state and federal judges were of equal ability, this institutional difference in the courts results in better adjudication at the federal level.[120]

Other commentary supporting the idea that parity does not in fact exist is much more candid and blunt. As Judge Guido Calabresi of the Second Circuit recently opined:

> The intermediate courts of any state have other things that they must be more concerned with. [State judges] are not experts on federal law, and, with great respect to them, they are not good at it. Moreover, they are not all that interested in federal law, nor should they be.[121]

Even the American Law Institute has weighed in on the limits of parity in practice, noting that "[t]he federal courts have acquired a considerable expertness in the interpretation and application of federal law which would be lost of federal questions were given to state courts."[122]

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[115] *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121 (1977). However, the idea that federal judges are of higher caliber remains under debate. *See* Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457 (2005).

[116] Neuborne, *supra* note 115, at 1122.

[117] *Id.*

[118] *Id.*

[119] *Id.* at 1122–23.

[120] *Id.*

[121] Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1304 (2003).

[122] AMERICAN LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164–65 (1969).

That is not to say that everyone agrees that parity between state and federal questions does not exist—far from it.[123] But at a bare minimum, the growth and evolution of the federal law since the Founding suggests that while state courts are competent to hear federal questions as a matter of law,[124] there are growing concerns, as indicated above, that changing circumstances—more laws, more complexity—have rendered state courts less equipped to adjudicate federal questions with the highest degree of quality deserving of the federal law as a practical and a policy matter.

It is not the purpose of this Note to resolve the debate on whether or not there is parity between state and federal courts, but rather to demonstrate that the Lockstep Doctrine assuages any concerns that state courts are compromising the federal law with their inevitable inexpertness. If we are truly interested in achieving the highest quality of adjudication of federal law available, and we continue to be open to the argument that federal courts have obvious advantages in providing that higher quality of federal law interpretation, the need for state courts to adopt a Lockstep Doctrine is paramount. The Doctrine leverages the expertise of the federal courts so that the federal law and its judicial construction is the best available.

VI. CONTOURS OF THE LOCKSTEP DOCTRINE IN PRACTICE

Practical problems with any theory naturally arise and the Lockstep Doctrine is no different. For example, should state courts follow as binding rulings made by federal district courts? If so, what about states that have multiple federal districts where there are several district courts to choose from? What about a federal issue that has already been decided by a state court? Should the state reverse its current interpretation if the federal court sees the federal law a different way?

First, this Note suggests that state courts should specifically treat as binding the rulings of the circuit court of the circuit in which the state is situated. In this sense, the state court becomes the equivalent of another federal district court. The state court would view other federal district court rulings as persuasive and would be bound by the law of circuit court decisions. As an illustration, the state courts of Ohio, Michigan, Tennessee, and Kentucky would all treat as binding

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[123] *See generally* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981) (arguing that state courts are competent to hear federal constitutional questions and should continue to play a substantial role in the elaboration of federal constitutional principles).

[124] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

the decisions of the Sixth Circuit on federal questions; all other federal court decisions would be considered persuasive. Under this arrangement, it can truly be said that the state court is coordinate with the federal courts, since the state courts function as the equivalent of the federal district courts. While there is merit in suggesting that even federal district court judges have better qualifications to decide issues of federal law, even at the trial level, this arrangement strikes a decent compromise to respect the state court's ability to hear federal questions and the need for public policy benefits afforded by marching in lockstep with the circuit court. Also, instead of attacking the notion of parity, the Lockstep Doctrine actually acknowledges it and refines the idea. State courts are still as competent as they ever were to hear federal questions, but like their federal district court counterparts, they will be bound to follow the law of the circuit court because of the public policy dividends such an arrangement provides. No one seriously questions a federal district court's competence because it must follow in lockstep with the circuit court, and the same applies to a state court under the Lockstep Doctrine. And, just as federal district courts rely on the expertise of the circuit court, so would the state court. In sum, the state court would take on the role of a federal district court, and it would not be a radical transformation. State courts are now bound to follow the United States Supreme Court, and the Lockstep Doctrine would only move that obligation one "rung" down the hierarchy of courts to include the circuit court.

As for whether or not previous decisions by the state court made on federal questions should be overturned to follow a circuit court's decision, this Note suggests that the state court should, in future cases addressing previously ruled upon federal questions, adopt the circuit court's decision as the controlling one. Though it can be argued that this is a daunting task, there is a concern that unless the state court reverses course and corrects its previous decisions on federal questions to go in the direction of the circuit court, the two paths of federal law will continue to diverge and create the kinds of concerns previously addressed.[125]

As for creating the Lockstep Doctrine, this Note has suggested that state courts adopt the Doctrine as a matter of judicial construction through the common law. As the previous cases have demonstrated, state courts have been deferring to federal courts as a matter of judicial interpretation.[126] However, there is the possibility of having the Lockstep Doctrine enacted as legislation. States could create

[125] *See supra* Part III.

[126] *See supra* Part IV.

jurisdictional requirements for state courts on their own. Federal legislation could be more problematic, as concerns of federalism and constitutionality could be raised because state courts— courts created other sovereign entities—would have their powers determined by the Congress. Though these issues are beyond the scope of this Note, a legislative approach to the Lockstep Doctrine is conceivable.

VII. ADDRESSING FEDERALISM AND OTHER CONCERNS

Critics might argue that such an approach chips away at state's rights or tilts the balance of federalism too much for their liking. Moreover, they might argue that diversity of viewpoints in the law can ostensibly be good thing. This Note argues that while federalism, states' rights, and diversity are good in a nation as large as the United States, these issues do not defeat the Doctrine. First, as for states' rights, there is no suggesting that states must apply this Doctrine. State courts still have the power they always had, so unlike the *Erie* doctrine, there is no compulsion. This Doctrine is hinged upon the benefits it provides as an interpretive device, as a workable solution to public policy concerns that are likely to arise as too many bodies of law exist interpreting federal law. Second, federalism is not under attack. Nothing in the doctrine suggests that states must somehow defer to federal courts on issues of state law. Although, as noted above, doing so is not unusual. States retain their sovereignty and their courts retain their inherent power to determine their own laws; this doctrine is merely another tool in their bag of judicial approaches that generates positive dividends for consistency in the law.

As for a diversity of viewpoints in the interpretation of the federal law: while a diversity of approaches is good in theory, too much diversity is the antithesis of the "rule of law," in which every individual should be treated fairly and equally in the same jurisdiction as a matter of law. An overreach of diverse views creates situations where two people similarly situated are treated completely differently not because of the facts of their respective cases but solely on divergent interpretations of the law. Such an approach does not comport with the objectives of our system of laws, which prefers some diversity but not arbitrariness and inconsistency disguised as diversity. Moreover, while the virtue of "percolation"—that it is ostensibly good for the law to go through a back-and-forth debate with conflicting interpretations before the Supreme Court grants certiorari—is often cited as a good reason for diversity in approaches to federal law, it is not without its limits. The Supreme Court's limited resources "make it incapable of remedying all the distortions

introduced into national law by the competition between geographical and specialist institutions."[127] As such, too much "percolation" creates a situation in which there may develop incurable distortions and "[t]hese are troubling developments for a nation committed, as ours is, to the rule of law."[128] To remedy these fears, a balance between diversity and uniformity is important, and this Note suggests that the Lockstep Doctrine assists in achieving that balance by preventing a descent into the extreme margins of too much diversity.

Further, some have suggested other alternatives to solving the "divergent bodies of federal law" problem that the Lockstep Doctrine purports to address. Professor Donald Zeigler considers the public policy considerations above and proposes a methodology of interpretation: state courts should interpret federal law by making an intelligent prediction of how the Supreme Court would construe the law.[129] Zeigler recognizes that state courts can essentially adopt any approach they want but recommends that the state court "slip into the shoes" of the United States Supreme Court and try to interpret the federal law the way the High Court would. Zeigler notes that since uniformity in the federal law is a goal, "considering how the Supreme Court would decide the issue should provide a unifying perspective."[130]

But arguably any court interpreting federal law, knowing full well that the United States Supreme Court enjoys plenary review of all federal questions, will always rule with an eye toward how the Supreme Court would rule? This is not much of a solution. Any court inferior to the United States Supreme Court should be taking this approach when dealing with a federal question. In reality, Professor Zeigler's approach differs little from Persuasive Theory. The state courts continue to enjoy the complete independence that it currently does, and they would continue to do what they have already been doing, namely making decisions knowing that the United State Supreme Court is standing over their shoulder. In short, the state courts are already doing what Professor Zeigler is suggesting and the problem of "divergent bodies of federal law" continues unabated. Professor Zeigler's solution is merely the status quo. And, as this

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[127] Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources of Judicial Review for Agency Action*, 87 COLUM. L. REV. 1093, 1117 (1987).

[128] *Id.* at 1116.

[129] Donald H. Zeigler, *Gazing Into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1184 (1999).

[130] *Id.*

Note argues, the status quo is exactly what is giving rise to the kinds of problems the Lockstep Doctrine has been offered to fix.

CONCLUSION

In sum, the Lockstep Doctrine is designed to build an interpretive arrangement that brings improved consistency, quality, and fairness to the federal law in a given federal circuit. The focus of this Note's argument is that far from being a radical proposal, the concept of lockstep jurisprudence is not at all unfamiliar to state courts; indeed, it is considered a valuable judicial tool.[131] Applying the Lockstep Doctrine used so often by state supreme courts in matters of adjudicating state-created constitutional rights to federal questions introduced into state courtrooms makes eminent sense for all the same policy reasons. The argument that "state courts should do it their own way because they can" is incomplete. The question is not what state courts can do, but rather, what should state courts do with all the options available? Mississippi and New Hampshire have opted for a version of the Lockstep Doctrine. The sooner the other forty-eight states elect to do the same, the sooner an important step will be taken to improving the adjudication of the federal law in an era where the federal law continues to expand.

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[131] *See supra* Part IV.

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