THE *ERIE* ENIGMA: APPELLATE REVIEW OF CONCLUSIONS OF LAW

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In Matter of McLinn,[1] a sharply divided *en banc* United States Court of Appeals for the Ninth Circuit concluded, contrary to the great weight of authority, that district court determinations of state law pursuant to the *Erie* doctrine are subject to *de novo* review in the same manner as any other question of law. I suggest that the majority of the *en banc* panel was wrong and that their error is to be found in the intrigue that surrounds the *Erie* doctrine rather than with any pragmatic factors relating to standards of appellate review.

The question in *McLinn* was whether a fifteen-foot commercial fishing skiff that was temporarily being used for recreational purposes was "devoted to recreational pursuit" within the meaning of an Alaska statute. The trial court had held that the skiff was "devoted" to commercial purposes as part of the equipage of a commercial salmon fishing boat. On appeal, the panel of the court of appeals to which the case was assigned suggested a hearing *en banc* to determine the standard to be used to review that determination.

The Erie *Doctrine and Appellate Review*

Nearly twenty-five years ago, when the *Erie* doctrine was already nearing twenty-five years of age, I was a young law review writer struggling to make sense out of the complexities and inconsistencies that had developed since that fateful day in 1934 when Harry Tompkins was "catapulted into immortality" by a passing Erie boxcar. The *Erie* decision was at that time one of the most widely discussed and cited cases in the history of the Supreme Court. Even today as we near the fiftieth anniversary of the decision, the doctrine and its ramifications continue to be elusive and debatable. What is there about such a seemingly simple procedural rule that makes it so

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1. 739 F.2d 1395 (9th Cir. 1984). A word about the procedural history of *McLinn* is in order. Appeal was initially taken by a three-judge panel of the Ninth Circuit. The three-judge panel requested an *en banc* review because they found the standard of review to be controlling. After determining the standard of review, the *en banc* court of appeals remanded the case to the three-judge panel for disposition.

tantalizing to eminent theoreticions of the law and so difficult in its day-to-day application in the courtroom? The *McLinn* decision offers the opportunity to once again explore the intricacies of the *Erie* doctrine.

The core of Brandeis' opinion in *Erie* held:

> *Third.* Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts . . . .[2]

That ruling, as developed over the years, is far from clear. But whatever the *Erie* doctrine's outer limits may be, the base principle is straightforward: when state law is applicable by its own force in a proceeding in federal court, the federal judge *must* apply state "substantive" law and *may* apply state procedural law unless it conflicts with an applicable federal rule or important federal policy. A number of unanswered questions are apparent in the preceding statement of the rule. Among them:

1. What is the definition of "substantive" law as opposed to procedural law;
2. Should the law of the state include its conflict of laws rules;
3. From which of the several potentially interested states should the appropriate rule of decision be drawn; and,
4. How does the trial judge determine what "the law of the state" is?

The first three questions are primarily the stuff of the enormous literature and case law that makes up the "*Erie* jurisprudence."[3] The final question (which is implicated by the decision in *McLinn*) has not received the same degree of focused attention. The reason for that may be because it deals with the most opaque part of the *Erie* doctrine.

In a recent article in the California Law Review, Professor Timothy Terrell has articulated a theory of legal reasoning which may in part explain the mystification of the *Erie* doctrine.[4] Professor Terrell's theory is significant in his distinction between what he views as a "homocentric three dimensional process" of legal reasoning and what he calls the "fourth dimension" of legal reasoning, which involves the relationship of transcendental values such as truth and justice to traditional legal relationships. Professor Terrell states:

> Perhaps we shall never be able to comprehend in full measure that which is by definition beyond our logical capacities. In other words, it may be inevitable that the best understanding of the fourth dimension we can achieve — the best picture of the elusive tesseract of hypercube

2. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938).
3. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS §§ 55-60 (4th ed. 1983).
4. T. Terrell, *Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles*, 72 CAL. L. REV. 288 (1984).

> of legal reasoning we can make—is one without substantive content. But this conclusion cannot simply be assumed. Instead, we must ask these fundamental questions: What *is* the best approximation of multidimensional reality that we can make in our three-dimensional world? And what effect does the debate about this approximation have on *legal* argument?[5]

Federalism, Erie *and the Fourth Dimension*

The notion of federalism is an antecedent to the unique form of government that developed out of the Confederacy. It is a concept pregnant with meaning drawn from history, and philosophy drawn from experience. There is wide agreement that the *Erie* doctrine is, to use Justice Harlan's phrase, "one of the modern cornerstones of our federalism."[6] It is precisely that "federalism" component of the *Erie* doctrine that invites invocation of a "fourth dimensional" analysis.

Federalism, though not explicitly mentioned in the Constitution, is implicit throughout the document. When it is invoked as a principle for the decision of cases it is always in the vaguest of terms. It seems clear that federalism fits neatly into Justice Hughes' famous phrase "[b]ehind the words of the constitutional provision are postulates that limit and control."[7]

Federalism is called upon primarily to limit and control the exercise of governmental power in a number of situations. It limits the power of a federal court to enjoin a state court proceeding.[8] It limits the power of a state court to assert extraterritorial jurisdiction[9] and apply its own law to the controversy.[10] It controls the power of one state to call another state before its courts[11] and, in its most explicit form, it deprives the federal courts of the power to entertain suits in which a state is a party.[12] Finally, federalism informs and defines the relationship between the states and the federal government in regard to matters such as interstate commerce,[13] admiralty law[14]

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5. *Id.* at 328 (emphasis in original).

6. Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

7. Principality of Monoco v. Mississippi, 292 U.S. 313, 322 (1934). Justice Rehnquist, with whom Chief Justice Burger joined, recently made a similar journey into the "fourth dimension" in Nevada v. Hall, 440 U.S. 410 (1979):

> [W] the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by that ordering are as much ingrained in the fabric of the document as its expressed provisions . . . .

Id. at 433 (Rehnquist, J., dissenting).

8. *See* Younger v. Harris, 401 U.S. 37, 44-45 (1971).

9. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 497 (1980).

10. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 307 (1981).

11. *See* Nevada v. Hall, 440 U.S. 410, 425 (1979).

12. *See Ex parte* Ayers, 123 U.S. 443, 444 (1887).

13. *See generally* Stern, *The Commerce Clause, and the National Economy,* 59 HARV. L. REV. 645 (1946); Garcia v. San Antonio Metro. Transit Auth., S. Ct. (1985). *Garcia* overrules National League of Cities v. Usery, 426 U.S. 833 (1976), on "federalism" grounds. The various opinions constitute a remarkable debate regarding intuitive concepts of federalism.

14. *See generally* Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158.

and international relations.[15]

What all of those things have to do with the *Erie* doctrine may not be immediately clear. And, whatever the relationship is, how they relate to the problem of appellate review of district court conclusions of law is less evident still. It is here that I ask your indulgence of a brief excursion into the fourth dimension of legal reasoning.

When district judges attempt to divine the content of state law they do so by utilizing all of the sources at their disposal including their knowledge of the techniques and biases of the state judicial system. The role of the court is "not to choose the rule that it would adopt for itself, if free to do so, but to choose the rule that it believes the state court, from all that is known about its methods of reaching decisions, is likely in the future to adopt."[16] A district judge engaged in such a task functions in Professor Terrell's fourth dimension in the sense that the court's role is not to exercise power but to use intuition and judgment to predict what the state courts would "do in fact." Justice Holmes' famous dissent in the *Taxicab* case made that clear in regard to common law issues:

> Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeals, from the State Courts, from England and the colonies of England indiscriminately, and criticize them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgments as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else . . . .[17]

That notion of common law as an exercise of governmental authority was adopted by Brandeis in *Erie* when he sought to limit the scope of federal government power to regulate basic right/duty relationships between persons. If we were to rephrase the *Erie* doctrine today, we might do so by defining the federal court's power to interpret and apply federal law to the exclusion of state law, rather than focusing on when that power is vested in the state. By thus inverting the traditional *Erie* analysis, it is clear that a

15. *See* Banco Nacional de Cuba v. Sabbation, 376 U.S. 398, 423-24 (1964).

16. C. WRIGHT, FEDERAL COURTS § 59 (3d ed. 1976) (quoted in Judge Schoreder's dissenting opinion in *Matter of McLinn*, 739 F.2d at 1404).

17. Black and White Taxicab Co. v. Brown and Yellow Taxicab Co., 276 U.S. 518, 533-34 (1928) (Holmes, J., dissenting).

federal court has the power to interpret and apply a federal rule of decision to the exclusion of state law only in a limited number of circumstances:

1. When Congress, pursuant to an expressly granted constitutional power, has supplied the applicable rule of decision;[18]
2. When Congress, while not supplying the rule of decision, has authorized the federal courts to assume common law jurisdiction;[19]
3. Where the Constitution in the first instance deprives the states of common law jurisdiction;[20]
4. Where some constitutional limitation upon the exercise of state common law making power applies;[21] or,
5. Where the constitutional scheme, by necessary implication, deprives the states of authority to act.[22]

In each of the above instances the presumptive deference to state law is displaced by a constitutionally valid federal governmental interest that has been expressed in a statute or the Constitution itself. By the *Erie* hypothesis, all other instances of common-law-making power exercised by the federal courts are based upon reference to the appropriate state common-law.[23] The federal court has no power to engage in common-law making in *Erie* cases. It must do what the appropriate state court would do rather than to apply to or make federal common law. When the state common law is clear, the role of the district courts is equally clear and ministerial. But, when the common law is vague, blurred, or nonexistent, the district courts' role becomes more difficult. Indeed, the decision in regard to what the state's highest appellate court would do in regard to a matter it has not yet considered often involves the exercise of "fourth dimensional" reasoning.

The federal courts of appeal have, until *McLinn*, always recognized the intuitive, impressionistic nature of the district judges' task; trial judges who are nurtured in a state's legal system have, more likely than not, a better predictive "feel" for the processes of the state judicial system than appeals courts who bring the cold objectivity of ignorance to the task.[24] Thus, fed-

18. McColloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

19. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448 (1957).

20. *See* U.S. CONST. art. I, § 8 (The War Power).

21. As, for example, where a state common law rule is alleged to violate the equal protection clause.

22. Zschernig v. Miller, 389 U.S. 429 (1968). *Compare*, Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

23. As will be discussed *infra*, there are a number of instances in which state law is borrowed for federal purposes. Such cases are not *Erie* cases. As Justice Jackson said in his famous concurring opinion in D'Oench, Duhme and Co. v. Federal Deposit Insurance Corp. 315 U.S. 447, 471-72 (1942):

> A federal court sitting in a nondiversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not on that of any state. Federal law is no juridical chameleon changing complexion to match that of each state wherein lawsuits happened to be commenced because of the accidents of service of process and of the application of the venue statutes.

24. As Judge Schroeder noted in her dissent in *McLinn*: "The [majority] holding is not only a major departure from our own practice, but is contrary to all the reported decisions of the other circuits as well as the views of scholarly authorities on the question."

739 F.2d at 403. The appendix to Judge Schroeder's dissent lists five pages of decisions in which some form of deference was given. *See* Appendix, 739 F.2d at 1407.

eral courts of appeal have historically accorded special deference to the district courts' determinations of state law. If the law is clear and the district court is wrong, there is, of course, clear error. But, if there is room for doubt because of ambiguity or the absence of considered decision making in the state court, the analytic nature of the *Erie* mandate precludes a conclusion of clear error. One cannot assert the truth or nontruth of the results of such analysis. Rembrandt was not a clearly better painter than Picasso. William O. Douglas was not a clearly better judge than Felix Frankfurter, and oranges do not taste better than apples. So too, decisions regarding the unknowable state of state law are "wrong" only when it is clear that they are so. Rembrandt was clearly a better painter than I, and William O. Douglas was clearly a better judge than Francis X. Morrisey. Oranges do taste better than green persimmons, and district judges may be clearly wrong about the state of state law. There is really little debate about those propositions, though I am sure that Francis X. Morrisey had his partisans and that somewhere in the world there lives a man who lusts only for green persimmons. The fact that absolutes are often subject to exception, however, does not require that they be reconsidered each time they are relied upon. And, the fact that a district judge may be wrong does not require an appellate court to engage in *de novo* review of the trial court's decision regarding the meaning of state law. When the trial court's decision is clearly wrong, review is appropriate, but when the decision is the product of considered "fourth dimensional" analysis and thus an honest effort to follow the spirit of *Erie*, it should be left alone.

Judge Hug suggests in *McLinn*, however, that the splendid isolation of the court of appeals and its opportunity for reflection make it a superior vehicle for determining questions of law. It must have, therefore, the power of *de novo* review.[25] Whether the courts of appeal have more time for reflection than the district courts is not the point, even if it is true. Nor is the suggestion that a panel of appellate judges is wiser in the ways of the common law or are possessed of better judgment either true or relevant to the problem.[26] The issue is how to implement the *Erie* policy of reposing basic common-law-making power in state courts when the decision regarding the content of that law is to be made by a federal judge whose decision will not be subject to direct state review. Until 1984, all courts of appeal had determined that question by insuring that each decision was, to use Professor

25. 739 F.2d at 1398.

26. *See* United States v. McConney, 728 F.2d 1195, 1201 n.8 (9th Cir. 1984). In a passage quoted in *McLinn*, the *McConney* court noted:

> Structurally, appellate courts have several advantages over trial courts in deciding questions of law. First, appellate judges are freer to concentrate on legal questions because they are not encumbered, as are trial judges, by the vital, but time-consuming, process of hearing evidence. Second, the judgment of at least three members of an appellate panel is brought to bear on every case. It stands to reason that the collaborative, deliberative process of appellate courts reduces the risk of judicial error on questions of law. Thus, de novo review of questions of law, like clearly erroneous review of questions of fact, services to minimize judicial error by assigning to the court best positioned to decide the issue the primary responsibility for doing so.

Id. at 1201.

Corbin's apt phrase, "a live cell in the tree of justice";[27] and, they did that by exercising appellate review only in those cases where error was clear. The Ninth Circuit's exercise of absolute *de novo* review power is contrary to that long-standing tradition and reflects the nineteenth century view of the nature of the common law described by Justice Holmes in the *Taxicab* case.[28] Even today the ghost of *Swift v. Tyson* haunts the land.[29]

Supreme Court Precedent Relied Upon in McLinn

Having explored the policy implications of unrestricted *de novo* review of district court determinations of state law in *Erie* cases, the court of appeals turned for support to three recent United States Supreme Court cases. None of the cases relied upon are *Erie* cases and each is clearly distinguishable from *McLinn*.

Runyon v. McCrary[30]

Runyon was a section 1981 civil rights suit that sought declaratory and injunctive relief and damages. The trial court held that the damage claims of two of the plaintiffs were barred by the statute of limitations. Since there is no federal statute of limitations applicable to section 1981 actions, federal law requires that the state statute of limitations be adopted as part of the federal claim.[31] The court in *Runyon* made that quite clear:

> Had Congress placed a limit upon the time for bringing an action under section 1981, that would, of course, end the matter. But Congress was silent. And "[a]s to actions at law" which a damage suit under section 1981 clearly is, "the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation."[32]

When state statutes of limitations are borrowed to supplement federal substantive law, the *Erie* doctrine is plainly inapplicable. State law may, indeed, be rejected if it conflicts with the general federal policy underlying the legislation involved.[33] No one has ever argued, until the decision in *McLinn*, that any special deference is due in such a context. As a matter of policy, the Supreme Court has said it will accept the lower courts' determinations of state law since there is no reason why it should do otherwise. Obviously, the United States Supreme Court does not sit to engage in academic debate about state law so long as that law does not conflict with applicable federal policy. The context of *Runyon* thus makes it clear that the issue decided in *McLinn* was not, and could not have been, before the

27. A. Corbin, *The Laws of the Several States*, 50 YALE L.J. 762, 776 (1941).

28. Black and White Taxicab Co. v. Brown and Yellow Taxicab Co., 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting). *See also supra* note 17.

29. With apologies to Judge Magruder, writing for the panel in Sampson v. Channell, 110 F.2d 754, 761 (1st Cir. 1940): "the ghost of Swift v. Tyson . . . still walks abroad, somewhat shrunken in size, yet capable of much mischief."

30. 427 U.S. 160 (1976).

31. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975). *See also supra* note 23.

32. 427 U.S. at 180 (citations omitted).

33. *See supra* note 31.

Supreme Court for decision. The language cited by the court in *McLinn* is, therefore, not merely *obiter dicta*; it is, quite simply, irrelevant.

Butner v. United States[34]

Butner is a bankruptcy case dealing with the question of whether a lien creditor is entitled to the income from property during bankruptcy administration. That question is a matter of federal law. Some courts, however, have held that the federal law ought to be interpreted in conformity with the rights accorded a mortgagee under state law. In *Butner* that issue was determined by a factual question. If the mortgagee had taken certain steps to protect his interest, the federal court would recognize his entitlement to the rent notwithstanding the onset of bankruptcy. The district court held that the mortgagee was not required formally to request sequestration of rents because such a request "would have been an exercise in futility . . . since that was already being done."[35] The court of appeals concluded that the statement was "erroneous": "Manifestly, what the district court thought was being done was not being done; and had [the mortgagee] desired it to be done, it was incumbent upon him to make a specific request for the appointment of a receiver in the sequestration of rents."[36]

As an alternative ground for the decision, the district court had concluded that the mortgagee was entitled to rent as a matter of equity. The court of appeals reversed that decision on the ground that the district court "failed to articulate the equitable considerations that it thought required the result that it reached."[37] The dissenting judge in the court of appeals agreed with the district court. The Supreme Court affirmed and in so doing utilized language remarkably similar to the language it had used in the *Runyon* case:

> The constitutional authority of Congress to establish "uniform laws on the subject of bankruptcies throughout the United States" would clearly encompass a federal statute defining the mortgagee's interest in the rents and profits earned by property in a bankrupt estate but Congress has not chosen to exercise its power to fashion any such rule . . . . Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interest by both state and federal courts within a state serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy."[38]

Once again the Court was confronted with a body of state law that was adopted as a part of federal law, this time in order to carry out federal bankruptcy policy. The case does not implicate *Erie* issues and once again is simply irrelevant to the question before the *McLinn* court.

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34. 440 U.S. 48 (1979).
35. As quoted in Golden Enter., Inc. v. United States, 566 F.2d 1207, 1210 (7th Cir. 1977).
36. *Id.*
37. *Id.* at 1211.
38. 440 U.S. at 54-55 (citations omitted).

Bishop v. Wood[39]

Bishop involved an allegation that the plaintiff had been wrongfully discharged from his employment as a policeman without a hearing. At issue was the meaning of the ordinance pursuant to which the plaintiff had been hired and fired. The district court construed the ordinance to mean that the plaintiff was an employee at will. An equally divided Court of Appeals for the Fourth Circuit affirmed *en banc* without opinion. The United States Supreme Court accepted the interpretation of the trial judge with the following deferential language:

> We do not have any authoritative interpretation of this ordinance by a North Carolina state court. We do, however, have the opinion of the United States District Judge who, of course, sits in North Carolina and practiced law there for many years. Based on his understanding of state law, he concluded that petitioner "held his position at the will and pleasure of the city."[40]

The Court then pointed out that the court of appeals had concurred in that conclusion and, therefore, under established practice, the Supreme Court would not review the state law question. While *Bishop* is not an *Erie* case, it is a situation where the interpretation of state law is predicate to the consideration of a constitutional issue, and the state law operates on its own force rather than as a derivative form of federal law. The deference to experience and intuition given in *Bishop* is thus instructive.[41]

While the *McLinn* court did not discuss the opinion in *Bishop v. Wood*, it did refer to it as a case "cited in" *Runyon* where it was the primary authority.[42] The court of appeals was thus aware of the substantial deference accorded to lower court interpretations of state law and the clear fact that deference is based upon the lower court judge's particular experience with local law.

Notwithstanding the fact that a careful reading of the above cases indicates no support for the position taken by the Ninth Circuit, that court focused upon the fact that in all of those cases the court of appeals was affirmed. From that obvious truth the Ninth Circuit found:

> Implicit in the Supreme Court's practice of not reviewing the state law question is the assumption that it need not exercise its discretionary

39. 426 U.S. 341 (1976).

40. *Id.* at 345-46 (citations omitted).

41. The Supreme Court specifically quoted the following in *Bishop*:

> In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusion are shown to be unreasonable. Propper v. Clark, 337 U.S. 472, 486-487. (1948).
>
> On such questions we pay great deference to the views of the judges of those courts "who are familiar with the intricacies and trends of local law and practice." Huddleston v. Dwyer, 322 U.S. 232, 237 (1943).
>
> In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges who circuit includes Michigan. MacGregor v. State Mut. Life Assur. Co., 315 U.S. 280, 281 (1941).

426 U.S. at 346 n.10.

42. *McLinn*, 739 F.2d at 1399.

> jurisdiction to do so because the *appellate panel has exercised its mandatory appellate jurisdiction by giving full and independent review to the decision of the trial judge.*[43]

With all due respect to the Ninth Circuit majority, its conclusion regarding the purposes behind the Supreme Court's consistent refusal to review questions of state law is neither implicit nor tenable. As Judge Schroeder pointed out in her dissent, the holding of the majority in *McLinn* "is contrary to all the reported decisions of the other circuits as well as the views of scholarly authorities on the question."[44] Thus, by hypothesis, all court of appeals decisions heretofore rendered in cases of this type were decided pursuant to one form or another of the deferential standard. Thus, in every court of appeals decision upheld by the Supreme Court, the court of appeals itself had given deference to the district judge. And, where the court of appeals had found "manifest" error on the part the district judge, as in *Butner*, the refusal of the Supreme Court to review that determination cannot fairly be read as approving a *de novo* standard of review.

In short, as far as Supreme Court precedent is concerned, the decision in *McLinn* is wrong. As an example of *Erie* federalism the decision is unsound. As a matter of federal judicial policy the decision is unfortunate.

What is really at stake in the *McLinn* case does not become apparent until the end of the opinion. There, it is revealed that one of the members of the three-judge appellate panel, Judge Boochever, is a former member of the Alaska Supreme Court.[45] His opinion on the state law question obviously differed from that of the trial judge. When the case was remanded to the three-judge panel, it overturned the district court, notwithstanding the court of appeal's characterization of the issue as speculative. No Alaska legislative history was found and no Alaska cases interpreted the same or similar statutes. Judge Boochever, for the three-panel court stated:

> A close question is presented, and we cannot say that the learned trial judge clearly erred. Nevertheless, applying a de novo standard of review, we concluded that the statutory provisions were intended to cover non-documented vessels temporarily devoted to recreational pursuits, even though generally used commercially.[46]

Who knows whether Judge Boochever, a former Alaska Supreme Court Justice, has a better feel for the intent of the Alaska legislature than does Judge von der Heydt, a former Alaska trial judge? It is as unseemly to second guess the first decision as it would be for the Supreme Court to "third guess" the court of appeals. Unless the trial judge was clearly wrong, his feel for Alaska law is as good as anybody's and should be taken as a given for the remainder of the case.

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43. *Id.* (emphasis added).
44. *See supra* note 24.
45. 739 F.2d at 1400.
46. Complaint of McLinn, No. 82-3644, Oct. 3, 1984, United States Court of Appeals, 9th Cir. (slip opinion) at p. 4443.

The Certification Statutes—A Partial Solution

One of the most disturbing aspects of the *McLinn* decision is the refusal of the three-judge panel to certify the question to the Alaska Supreme Court, pursuant to the Alaska certification statute. That refusal to certify the question was bottomed primarily on the failure of the plaintiff to request certification at the trial level:

> We believe that particularly compelling reasons must be shown when certification is requested for the first time on appeal by a movant who lost on issue below. Ordinarily such a movant should not be allowed a second chance at victory when, as here, the district court employed a reasonable interpretation on state law. . . .[47]

No authority is invoked for the courts expressed belief. A moments reflection suggests that if any such authority did exist, it would be based upon the differential weight that should be given to district court determinations of state law questions.[48] When the standard to be applied is *de novo* review, however, it would seem evident that the court of appeals is no less interested in an authoritative determination of state law then was the district court. If certification is available, as it is in an increasing number of states,[49] it should be routinely used in close cases such as *McLinn*. Moreover, as soon as it becomes apparent that "fourth dimensional" questions of state law may be determinative of the litigation, there is no reason why principles of judicial administration ought not dictate the duty of a court to refer such questions of state law to the state supreme court *sua sponte*.[50]

In 1974 the Supreme Court declined to impose such a standard on the federal courts:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.[51]

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47. *Id.* at 4441-42. It seems obvious that if the district court employed a reasonable interpretation of state law thus removing the need for certification, by the same measure there should be no need for *de novo* review.

48. Thus the higher level of certainty that attaches to the district court's familiarity with local law may argue against engaging in the expense of a certification proceeding to the state court. Obviously as certainty increases, the need for certification decreases.

49. Over half of the states have adopted certification procedures. *See* 17 C. WRIGHT, A. MILLER & E. COOPER, JURISDICTION § 4248 n. 29-32. In the last session of the legislature, Arizona adopted the Certification of Questions of Law Act, ARIZ. REV. STAT. ANN. 12-1861 (1984).

50. The Supreme Court itself utilized the certification procedure *sua sponte* in Elkins v. Moreno, 435 U.S. 647 (1978). In so doing the Court noted:

> Although it is our frequent practice to defer to a construction of state law made by a District Court and affirmed by a Court of Appeals whose jurisdiction includes the state whose law is construed, see, *e.g.*, Bishop v. Wood . . . we do not do so here for two reasons [both of which relate to the especial interests of the state in this particular case] . . . . In a federal system, it is obviously desirable to questions of law which, like domicile, are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts. This may not always be possible nor is it always required, but where as here there is an efficient method for obtaining a ruling from the highest court of a State we do not hesitate to avail ourselves of it.

Id. at 662-63 n.16.

51. Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974).

Perhaps the time has come to reconsider that standard. If the Ninth Circuit decision in *McLinn* is upheld, *de novo* review in the court of appeals will promote additional appellate litigation. It would seem sensible to have that additional litigation at the the trial level and in the state court that has the authority to make a determination, rather than in a federal court that must "speculate," as did the *McLinn* panel. One bite of the apple should be enough even if you lust for persimmons.