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Erie and Florida Law Conflict at the Crossroads: The Constitutional Need for Statewide Stare Decisis

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I. INTRODUCTION

“There shall be a district court of appeal serving each appellate district [of Florida].”¹

“The laws of [Florida] . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”²

The Rules of Decision Act,³ the principles of the *Erie* doctrine,⁴ and the Constitution of the United States require that federal courts apply state law in many situations. Perhaps the most familiar of these situations is one in which federal jurisdiction is based on diversity of citizenship. Moreover,

1. FLA. CONST. art. V, § 4(a).

2. Rules of Decision Act, 28 U.S.C. § 1652 (1988).

3. *Id.*

4. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

state property law may be applied in cases in federal courts dealing with federal tax consequences.⁵ State law may determine the content of a federal right in actions arising under bankruptcy law,⁶ or in copyright law,⁷ even though the federal courts' jurisdiction in such cases is exclusive.⁸

The "laws of the several states" that are to "be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply,"⁹ include not only state constitutions and legislative enactments but also judicial decisions.¹⁰ The process by which a federal court determines the content of state law on a particular issue has been discussed in numerous federal decisions and secondary commentaries.¹¹ Where the source of applicable state law is a state constitution or statute the process may not be difficult.¹² Where the highest court of a state has spoken clearly on a matter of state common law, the process may not be difficult. Where the only source of state law is a decision or decisions of one or more state intermediate appellate courts, the process is quite difficult. How does and should a federal court proceed when attempting to ascertain "the law of Florida" when the only source of that law is from one or more of Florida's District Courts of Appeal? How do the structure of the Florida judiciary and the precedential value accorded by Florida state courts to district court decisions affect federal courts' application of Florida law? Where the Florida district courts of appeal disagree within or among themselves, is there a "law of Florida" on point, or is Florida comprised of several sub-states with different laws on the same subject applying in different geographical areas of Florida? For that matter, how are Florida trial courts or courts of appeal to decide what is Florida law when faced with conflicting precedent? Where federal courts must apply unsettled Florida law, is certification by the eleventh circuit to the Supreme Court of Florida the final or appropriate solution? Should the Florida Constitution be amended to provide for more uniformity of state law?

The authors will explore these questions. We presuppose a working

5. *E.g.*, *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967); *Blair v. Commissioner*, 300 U.S. 5, 8-10 (1937).

6. *In re Erickson*, 815 F.2d 1090, 1091-95 (7th Cir. 1987).

7. *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

8. 28 U.S.C. §§ 1334, 1338 (1988).

9. *Id.* § 1652.

10. *Erie*, 304 U.S. at 64.

11. See CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* § 58 (4th ed. 1983) and sources cited therein.

12. Of course, state judicial decisions interpreting state constitutions or statutes may create the same problems as pure state common law.

knowledge of the general concept of *stare decisis*, used here synonymously with precedent, as the principle that a court will stand by its own decisions as well as by those of a higher court in a given judicial hierarchy.¹³ Yet the modern concept of *stare decisis* does not mean that a point of law once decided is settled for all time. *Stare decisis* simply means that a decision will be followed, distinguished, or overruled by the deciding or coordinate court, as well as followed by lower courts in the same judicial system (until that decision is reversed or overruled by a higher court).

Part II will explain the structure of the Florida judiciary and set forth the status quo in terms of the precedential value accorded by Florida courts to decisions of the Florida District Courts of Appeal. Part III will examine the general “*Erie*” problem, including the early history of the doctrine and the doctrine as it was later reformed. The choice of law and forum shopping issues raised by the *Erie* doctrine will be examined not only as to interstate choice of law issues, but also as to intrastate choice of law. We will analyze a remarkable debate between two federal judges in Illinois that raised problems pertinent to Florida federal judges and litigants. Additionally, the Eleventh Circuit position regarding how federal judges should determine the content of Florida law will be discussed. Part IV will recommend amendment of article V, section 4, of the Florida Constitution to achieve statewide precedential effect for the decisions of the courts of appeal.

13. The full phrase is *stare decisis et non quieta movere*: “[t]o adhere to precedents, and not to unsettle things which are established.” BLACK’S LAW DICTIONARY 1406 (6th ed. 1990). “This doctrine embodies a judicial policy that a ‘determination of a point of law by a court will generally be followed by a court of the same . . . rank if a subsequent case presents the same legal problem, although different parties are involved in the subsequent case.’” *Brewer’s Dairy v. Dolloff*, 268 A.2d 636, 638 (Me. 1970) (quoting 20 AM. JUR. 2D *Courts* § 183 (1966)).

The Supreme Court of the United States gives several reasons for the policy of adhering to precedents:

Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

II. STARE DECISIS: FLORIDA COURTS' TREATMENT OF DECISIONS OF DISTRICT COURTS OF APPEAL

A. *Structure of the Florida Judicial System*

The Florida District Courts of Appeal have been constitutionally separate, distinct courts¹⁴ since 1956, when the constitution first authorized appellate level of the state judiciary.¹⁵ In contrast to states with a unitary system comprising a single intermediate appellate court sitting in districts, divisions, or panels, Florida's judicial structure is analogous to the federal judicial system, with separate courts of appeal.¹⁶ There are five district courts of appeal, with headquarters in Tallahassee (First District), Lakeland (Second District), Dade County (Third District), Palm Beach County (Fourth District), and Daytona Beach (Fifth District).¹⁷ Each district court of appeal has its own chief judge,¹⁸ its own clerk,¹⁹ its own marshal,²⁰ and its own official identifying seal.²¹ The geography of the five appellate districts is shown on a map at appendix A to this article.

The foundation for understanding the Florida judicial system is the recognition of its uniqueness. In many respects, the district courts of appeal are courts of last resort, not intermediate appellate courts,²² because the jurisdiction of the supreme court to review district court decisions is extremely limited.²³ The supreme court's mandatory jurisdiction to review

14. FLA. CONST. art. V, § 4(a) provides: "There shall be a district court of appeal serving each appellate district."

15. *Id.* § 1 (amended 1956).

16. See generally MARLIN O. OSTHUS & MAYO H. STIEGLER, *STATE INTERMEDIATE APPELLATE COURTS* 12-15 (1980) (discussing structure of intermediate appellate courts).

17. FLA. STAT. § 35.05 (1991).

18. FLA. CONST. art. V, § 2(c); FLA. STAT. § 35.12 (1991).

19. FLA. CONST. art. V, § 4(c); FLA. STAT. § 35.21 (1991).

20. FLA. CONST. art. V, § 4(c); FLA. STAT. § 35.26 (1991).

21. FLA. STAT. § 35.09 (1991). "Each district court of appeal shall have an official identifying seal as prescribed by the supreme court." *Id.*

22. "The jurisdictional structure of Florida's appellate courts is unique." *State v. Bamber*, 592 So. 2d 1129, 1132 (Fla. 2d Dist. Ct. App. 1991), *jurisdiction accepted*, 602 So. 2d 942 (Fla. 1992).

23. *Jenkins v. State*, 385 So. 2d 1356, 1363 (Fla. 1980) (England, C.J., concurring specially); Ben F. Overton, *District Courts of Appeal: Courts of Final Jurisdiction with Two New Responsibilities—An Expanded Power to Certify Questions and Authority to Sit En Banc*, 35 U. FLA. L. REV. 80, 80 n.5 (1983); John M. Scheb, *Florida's Courts of Appeal: Intermediate Courts Become Final*, 13 STETSON L. REV. 479, 480 (1984); see generally Taylor Mattis, *Stare Decisis Among and Within Florida's District Courts of Appeal*, 18 FLA. ST. U. L. REV. 143 (1990) [hereinafter Mattis, *Stare Decisis Florida*](discussing Florida's

district court decisions is limited to decisions declaring invalid a state statute or a provision of the state constitution.²⁴ The supreme court's discretionary jurisdiction to review district court decisions is limited by article V, sections 3(b)(3) and (b)(4) of the Florida Constitution, which provide that the supreme court:

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or *that expressly and directly conflicts with a decision of another district court of appeal* or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or *that is certified by it to be in direct conflict with a decision of another district court of appeal.*²⁵

A district court of appeal that renders a decision in conflict with that of another district court may prevent review by the supreme court by declining to state or "express" in the opinion that the decision "directly" conflicts (for (b)(3) jurisdiction), or declining to certify that the decision is in "direct conflict" (for (b)(4) jurisdiction).²⁶ Furthermore, a decision of a district court creates precedent. As one district court opinion said, "[w]e are one state with five districts, each of which is authorized to separately evaluate the merits of various legal rules and create legal precedent."²⁷

The Supreme Court of Florida has recognized the precedent-creating function of district courts of appeal: "[T]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by

unique appellate court structure).

24. FLA. CONST. art. V, § 3(b)(1).

25. *Id.* § 3(b)(3), (b)(4) (emphasis added).

26. Victor Lance, Note, *The District Courts of Appeal—After 1980 Jurisdictional Amendment: A New Obligation Toward Decisional Harmony*, 6 NOVA L. REV. 115 (1981); see generally Arthur J. England, Jr., et al., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 147 (1980) (discussing the features of the amendment). "Section 3(b)(3) now places an increased obligation on district court judges who again have some ability to control a party's right to supreme court review." *Id.* at 181.

27. *Bamber*, 592 So. 2d at 1132.

this Court. . . .”²⁸ The operation of district court decisions as precedent must be examined from two perspectives: (1) because the precedent-creating courts are multiple, not unitary, their decisions must be examined on a horizontal plane. Is the decision of one district court of appeal binding on another?; (2) because the precedent-creating courts sit in separate districts, their decisions must be examined on a vertical plane. On what courts below a district court of appeal is its decision binding?

B. *Horizontal Stare Decisis*

The freedom of a district court of appeal to disregard the decision of a “sister” district court is well established among the district courts²⁹ and approved in dicta by the supreme court.³⁰ A refusal to accept coordinate precedent may follow a hat-tipping statement that the coordinate court’s decision is “entitled to great weight,”³¹ or a less deferential statement that the decision is “merely persuasive.”³² But the bottom line over the years consistently has been that district courts are not bound and decline to follow other district court decisions. This is not to say that one district never follows the decisions of another. Rather, the district courts have followed

28. *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980). The *Stanfill* court cited *Johns v. Wainwright*, 253 So. 2d 873, 874 (Fla. 1971), and *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958), which state that district courts were never intended to be intermediate courts and that district court decisions are, typically, final and absolute. The *Stanfill* phrase in the text was quoted in *Weiman v. McHaffie*, 470 So. 2d 682, 684 (Fla. 1985), and most recently in *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992).

29. Cases cited and discussed in Mattis, *Stare Decisis Florida*, *supra* note 23, at 150 n.38. More recent cases refusing to follow a conflicting decision of a coordinate district court include: *State v. Dorian*, 619 So. 2d 311, 313 (Fla. 3d Dist. Ct. App. 1993); *State v. Agee*, 588 So. 2d 600 (Fla. 1st Dist. Ct. App. 1991), *decision approved*, 622 So. 2d 473 (Fla. 1993); *State v. Bamber*, 592 So. 2d 1129, 1132 (Fla. 2d Dist. Ct. App. 1991), *jurisdiction accepted*, 602 So. 2d 942 (Fla. 1992), *disagreed with*, *State v. Thomas*, 604 So. 2d 1277 (Fla. 5th Dist. Ct. App. 1992); *State v. Pardo*, 582 So. 2d 1225, 1227 (Fla. 3d Dist. Ct. App. 1991), *approved in part and quashed in part*, 596 So. 2d 665 (Fla. 1992); *Pimm v. Pimm*, 568 So. 2d 1299, 1300 (Fla. 2d Dist. Ct. App. 1990) (“declin[ing] to follow” Third District decision, case certified as of great public importance), *decision approved*, 601 So. 2d 534 (Fla. 1992); *Durham v. Palm Court, Inc.*, 558 So. 2d 59 (Fla. 4th Dist. Ct. App.), *appeal dismissed sub nom.* *Forster v. Durham*, 566 So. 2d 256 (Fla. 1990); *Dealers Ins. Co. v. Jon Hall Chevrolet Co.*, 547 So. 2d 325, 326 (Fla. 5th Dist. Ct. App. 1989).

30. *Weiman*, 470 So. 2d at 684.

31. *E.g.*, *Spencer Ladd’s, Inc. v. Lehman*, 167 So. 2d 731, 735 (Fla. 1st Dist. Ct. App. 1964), *modified on other grounds*, 182 So. 2d 402 (Fla. 1965).

32. *E.g.*, *McDonald’s Corp. v. Department of Transp.*, 535 So. 2d 323, 325 (Fla. 2d Dist. Ct. App. 1988).

cases from other districts that they deemed persuasive and have rejected cases with which they disagreed without any suggestion that the later decision overrules the earlier.³³ The “law of the district” notion is as entrenched in Florida as is the “law of the circuit” in the federal system. The perceived safety net is the supreme court’s discretionary jurisdiction to resolve conflicts between districts, should an aggrieved party so choose and be financially able to seek such review. A wise man once cautioned that rules recognizing the existence of conflicts among intermediate courts as a ground for review by a top court “were designed to eliminate conflicts, not to stimulate them.”³⁴

The supreme court has said little about conflicts among districts, but in 1985 the court implied that a decision of one district does not bind another. The court said that a district court’s opinion has “a binding effect on all Florida trial courts [but] . . . a persuasive effect on sister district courts.”³⁵ More recently, the supreme court quoted with approval a district court’s statement that “a sister district’s opinion is merely persuasive.”³⁶

C. *Vertical Stare Decisis*

Fundamental to the operation of a common-law judicial system is the trial courts’ understanding of what precedent they must follow. For thirty-six years after Florida initiated a three-tiered judicial structure, no clear statewide authority existed on the issue of which trial courts were bound by which appellate decisions; however, in 1992, the supreme court spoke directly and laid the matter to rest, at least partially.³⁷ All Florida trial courts are bound by the decision of any district court that does not conflict with another district court decision.³⁸ If the court of appeal of the district in which the trial court sits has decided the issue, the trial court is bound to follow its rule, whether or not the rule conflicts with a decision of another district court.³⁹ Still unanswered is what course of action a trial court should take where other district courts are in conflict on an issue and the

33. See *supra* note 29.

34. Walter Schaefer, *Foreword: Stare Decisis and the “Law of the Circuit,”* 28 DE PAUL L. REV. 565, 566 (1979). Walter Schaefer is a former Justice of the Supreme Court of Illinois.

35. *Weiman*, 470 So. 2d at 684.

36. *Pardo*, 596 So. 2d at 667 (quoting *State v. Hayes*, 333 So. 2d 51, 53 (Fla. 4th Dist. Ct. App. 1976)).

37. *Id.* at 665.

38. *Id.* at 666.

39. *Id.* at 666-67.

trial court's own district is undecided.

In 1976, twenty years after the constitutional revision establishing the district courts of appeal,⁴⁰ the Fourth District Court of Appeal first addressed the issue of vertical stare decisis.⁴¹ In *State v. Hayes*,⁴² Chief Judge Walden “flatly stat[ed] that a Circuit Court wheresoever situate [sic] in Florida is equally bound by a decision of a District Court of Appeal regardless of its appellate district,” absent a conflicting decision from the trial court's own court of appeal.⁴³ Later that same year, the First District Court of Appeal reached the opposite result in *Smith v. Venus Condominium Ass'n*,⁴⁴ holding that trial courts are bound only by decisions of the court of appeal of the district in which the trial courts are located.⁴⁵ Chief Judge Boyer, in *Venus Condominium*, reasoned that requiring trial courts to follow decisions of sister courts of appeal “could lead to utter chaos were two of our sister courts to be in conflict on a point of law raised in a trial court in this district.”⁴⁶ He further pointed out that it would be “anomalous” for the First District Court of Appeal to reverse a trial court's decision not to follow a decision of a sister district court with which the First District Court disagreed.⁴⁷

The opinions in *Hayes* and *Venus Condominium* reveal jurisprudential differences about the appropriate function of trial judges. Chief Judge Walden in *Hayes* emphasized that in order to preserve harmony, stability, and predictability in the law, trial courts must follow the holdings of higher courts.⁴⁸ Chief Judge Boyer in *Venus Condominium* commented: “The fact is that trial courts, as appellate courts, have the duty and obligation to follow [determine] and apply the law.”⁴⁹

Interestingly, the two conflicting district courts attempted to facilitate

40. FLA. CONST. art. V, §§ 1, 4.

41. *Hayes*, 333 So. 2d at 51.

42. *Id.*

43. *Id.* at 52-53.

44. 343 So. 2d 1284 (Fla. 1st Dist. Ct. App. 1976), *quashed and remanded on other grounds*, 352 So. 2d 1169 (Fla. 1977) (stating nothing on the stare decisis point). *Venus Condominium* rejected the idea of a trial court's being bound by decisions of other district courts as “novel, though without merit.” *Id.* at 1285. *Hayes*, decided six months earlier, was not mentioned.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Hayes*, 333 So. 2d at 52.

49. *Venus Condominium*, 343 So. 2d at 1285.

supreme court review in each of the cases.⁵⁰ In the earlier opinion of *Hayes* the court said:

Since the state suggests that there is confusion and uncertainty abroad among the circuit courts as to whether they are bound to follow the decision of a foreign District Court of Appeal (a suggestion which surprises us), and since under that rationale Circuit Courts in the First, Second and Third Appellate Districts would not feel bound by this instant decision, we do hereby offer *upon appropriate application* to certify the question contained in Point I as being one of great public interest.⁵¹

In the later opinion of *Venus Condominium*, on petition for rehearing, the court certified that the decision passed upon a question of great public interest.⁵² There is no subsequent history of the *Hayes* decision; however, the supreme court did review the *Venus Condominium* decision without commenting upon the stare decisis conflict with *Hayes*.⁵³ It is folly to assume that a conflict once created between or among districts will soon be resolved by the supreme court. Some reasons for failure to resolve conflicts are that: (1) parties run out of money or energy to litigate further;⁵⁴ (2) they settle the dispute; or, (3) the supreme court refuses discretionary review or does not address the pertinent conflict.

During the next sixteen years, the conflict persisted about which trial courts were bound by which appellate decisions. The First District Court remained firm in its position that trial courts within the first appellate district were bound only by First District Court decisions and those of the supreme

50. *Id.*; *Hayes*, 333 So. 2d at 51.

51. *Hayes*, 333 So. 2d at 54.

52. *Venus Condominium*, 343 So. 2d at 1287 (referring to the substantive issue of the case).

53. *Smith v. Venus Condominium Ass'n*, 352 So. 2d 1169 (Fla. 1977). The supreme court accepted conflict jurisdiction under article V, section 3(b)(3) of the Florida Constitution based on interdistrict conflict on the substantive point. *Id.* at 1170.

54. In his concurring opinion, Justice Adknis stated:

The district courts of appeal are frequently expressly recognizing in opinions that a decision is in conflict with a sister district court. Unless one of the parties brings a petition for certiorari to . . . [the supreme court] the conflict remains in the reported case law and the trial judge is faced with the dilemma of selecting one of two conflicting district courts of appeal decisions as the proper case law.

The Florida Bar Re: Rules of Appellate Procedure, 463 So. 2d 1114, 1124 (Fla. 1984) (Adkins, J., concurring).

court.⁵⁵ The Second⁵⁶ and Fifth⁵⁷ Districts joined the Fourth District⁵⁸ in requiring trial courts to follow a decision of any district court where there was no conflicting district decision. In 1992, the Third District joined the First District in refusing to require trial courts to follow any but their “own” district decisions.⁵⁹ In *Pardo*, the trial court concluded that it was required to exclude a child victim’s hearsay statements under the authority of a Fifth District decision⁶⁰ with which the trial court disagreed.⁶¹ Judge Cope, writing for the Third District Court of Appeal, opined that the trial court was under no obligation to follow decisions of districts other than the Third.

55. *Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 480 So. 2d 1366, 1366 (Fla. 1st Dist. Ct. App. 1985), *aff’d*, 497 So. 2d 644 (Fla. 1986) (stating nothing on the stare decisis point). The trial court sitting in the First District, where there was no decision on point, was held to have acted correctly in rejecting recent, consistent Second and Third District cases. *Shands Teaching Hosp. & Clinics*, 497 So. 2d at 646.

56. *Chapman v. Pinellas County*, 423 So. 2d 578, 580 (Fla. 2d Dist. Ct. App. 1982); *In re E.B.L.*, 544 So. 2d 333, 336 (Fla. 2d Dist. Ct. App. 1989); *cf.* *State v. Kopulos*, 413 So. 2d 1195 (Fla. 2d Dist. Ct. App. 1982) (holding that trial courts must follow the decisions of the district court in their territorial district where those decisions conflict with other district decisions); *State v. Bamber*, 592 So. 2d 1129 (Fla. 2d Dist. Ct. App. 1991), *jurisdiction accepted*, 602 So. 2d 942 (Fla. 1992); *Pimm v. Pimm*, 568 So. 2d 1299, 1132 (Fla. 2d Dist. Ct. App. 1990), *decision approved*, 601 So. 2d 534 (Fla. 1992).

57. *Dillon v. Chapman*, 404 So. 2d 354, 359 (Fla. 5th Dist. Ct. App. 1981), *rev’d on other grounds*, 415 So. 2d 12 (Fla. 1982); *Dealers Ins. Co. v. Jon Hall Chevrolet Co.*, 547 So. 2d 325, 326 (Fla. 5th Dist. Ct. App. 1989) (noting that the trial judge acted correctly in following a decision of the Third District, but reversing the judgment because the Fifth District disagreed with that holding). In *Jon Hall Chevrolet*, the Fifth District expressly noted a direct conflict with the Third District on a question of statutory interpretation and constitutionality. *Id.* at 326-27. There is no subsequent history of the case.

58. Recent expressions of the position of the Fourth District are *Durham v. Palm Court, Inc.*, 558 So. 2d 59, 60 (Fla. 4th Dist. Ct. App.), *appeal dismissed sub nom. Forster v. Durham*, 566 So. 2d 256 (Fla. 1990), which explained “[t]he Fourth District Court had not spoken on this subject, and thus the trial court was bound by the First District’s *Gordon* case On the other hand, we are not bound by the *Gordon* decision and, in fact, we disagree with it” and *Dean v. Dean*, 607 So. 2d 494, 499 n.6 (Fla. 4th Dist. Ct. App. 1992), *review dismissed*, 618 So. 2d 208 (Fla. 1993), which explained “[i]n the absence of controlling precedent from its own district court, any trial court in Florida, irrespective of the district in which it sits, is required to follow the decision of any other district court of appeal in Florida.”

59. *State v. Pardo*, 582 So. 2d 1225 (Fla. 3d Dist. Ct. App. 1991), *approved in part, quashed in part*, 596 So. 2d 665 (Fla. 1992).

60. *Kopko v. State*, 577 So. 2d 956 (Fla. 5th Dist. Ct. App. 1991), *quashed by Pardo v. State*, 596 So. 2d 665 (Fla. 1992). *Kopko* excluded the child victim’s hearsay statements, even though they satisfied Florida Statutes section 90.803(23), because the child was able to testify fully at trial. *Id.* at 962.

61. *Pardo*, 582 So. 2d at 1226.

[D]ecisions of other district courts of appeal should be treated by trial courts in the same way that this court treats such decisions: as persuasive authority. Such decisions are deserving of careful consideration by trial courts in this district, but are not binding on them

The trial court's ultimate obligation is to ascertain and follow the law. The interests of justice are best served where trial judges have the opportunity and responsibility to reach a reasoned decision after consideration of all pertinent authority. In the present case there were sound reasons to disagree with the *Kopko* decision, and the trial court was entitled to do so.⁶²

The Second District Court was aware that the Third District had just freed its circuit courts to disregard precedent of other districts, when the Second District decided *Bamber*.⁶³ The Second District used *Bamber* to "reaffirm [its] . . . conviction that the circuit courts within the Second District must obey controlling precedent from the other districts."⁶⁴ A footnote following this quotation revealed how potentially divisive the issue of vertical stare decisis had become:

Ironically, we reaffirm this belief by requiring our circuit courts to follow a controlling precedent of the Third District, even though its circuit courts are now free to disregard the otherwise controlling precedent of this court. It has been suggested, perhaps facetiously, that we should limit . . . [the Second District rule] so that circuit courts in the Second District need only obey precedent from districts that recognize the precedential effect of our reported cases. We decline to create such a rule of inter-district *renvoi*. Hopefully, the formalized rules governing conflicts of law can be limited to conflicts between states.⁶⁵

Judge Altenbernd, writing for *Bamber*, supported the decision for broadcast vertical stare decisis on the bases of Florida's judicial structure and the appropriate functioning of the tri-level courts within that state structure.⁶⁶ The judge pointed out that Florida is one state, albeit with five districts.⁶⁷ The judge further noted that district courts do create precedent, and if they create conflicts in the process the supreme court can resolve

62. *Id.* at 1227.

63. 592 So. 2d at 1129.

64. *Id.* at 1132.

65. *Id.* at 1132 n.2.

66. *Id.* at 1132.

67. *Id.*

them.⁶⁸ However, the function of trial courts is not to create precedent.⁶⁹ A trial court's ruling is not

binding, even in the adjacent courtroom. . . . [N]o . . . [constitutional] mechanism exists to resolve conflicts among hundreds of circuit court judges. . . . [A] system in which trial courts were not bound by the only Florida precedent on a question of law would be a system promoting the rule of individual judges rather than the rule of law. At best, it would tend to create five balkanized districts confederated into a loose Floridian union.⁷⁰

The court further stated:

Floridians need to know, to the greatest extent possible, that trial courts will apply the same law in Pensacola, Tampa, and Miami. Trial judges are free to vigorously express their disagreement with controlling precedent from other districts, but a workable system of jurisprudence requires that they obey that precedent until their district creates conflicting precedent.⁷¹

Once again, *Pardo* and *Bamber* reveal jurisprudential differences about the appropriate function of trial judges. Judge Altenbernd in *Bamber*, like Chief Judge Walden in *Hayes*, emphasized that in order to preserve harmony, stability, and predictability in the law, trial courts must follow the holdings of higher courts. Judge Cope in *Pardo*, like Chief Judge Boyer in *Venus Condominium*, expressed that trial judges should reach their own reasoned decision, influenced by but without constraint from decisions of other districts. The approach in *Bamber* tends toward a communitarian model, emphasizing responsibility to the state judicial system as a whole, as central to the realization of equal justice, even where the intellectual proclivities of the individual judge may run contrary to a specific result. The approach in *Pardo* tends toward rugged individualism, positing that the ultimate good will result through decision-making according to the lights of

68. *Bamber*, 592 So. 2d at 1132. *But cf. supra* text accompanying note 54.

69. *Bamber*, 592 So. 2d at 1132.

70. *Id.*

71. *Id.* The Second District Court went on to affirm the trial court's disobeying precedent from another district because the Second District Court disagreed with the Third District on the point of law (the validity of a no-knock search). *Id.* at 1131.

each judge as a unit.⁷²

The vertical stare decisis issue finally attracted the attention of the supreme court when the Third District Court in *Pardo* certified an express and direct conflict with *Kopko* on the issue of the admissibility of the child victim's hearsay statements.⁷³ The *Pardo* court further certified that it had passed on a question of "great public importance."⁷⁴ The supreme court accepted jurisdiction.⁷⁵ Significantly, the supreme court found that in addition to the substantive conflict about the admissibility of evidence, the Third "[D]istrict [C]ourt's opinion conflicts with the Fourth District's decision in *State v. Hayes*, and our decision in *Weiman v. McHaffie*" on the stare decisis issue.⁷⁶ Holding that "in the absence of interdistrict conflict, district court decisions bind all Florida trial courts," Chief Justice Barkett cited *Weiman* and quoted from Judge Walden's Fourth District opinion in *Hayes*.⁷⁷

Thirty-six years after the establishment of the courts of appeal and sixteen years after a conflict developed concerning the precedential value to be accorded district court decisions by trial courts, the supreme court thus resolved the conflict in favor of broadcast vertical stare decisis.⁷⁸ The Third District bowed to the supreme court's *Pardo* pronouncements a few months later, when the Third District stated that the circuit "had no choice" but to follow a Second District decision.⁷⁹ The Third District hastened to add, however, that "*this* court is of course free to consider the issue as an original question."⁸⁰ The Third District happened to "completely agree with . . . [the Second District decision, on the merits] and therefore . . . [made] it a part of the law of . . . [the Third D]istrict."⁸¹ The balkanized "law of the district" lives on.

Unanswered by the supreme court in *Pardo*, or otherwise in Florida

72. Cf. Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENTARY 2259 (1992) (contrasting the traditional view of property and takings with the communitarian perspective, which emphasized the property owners' sense of responsibility to the community for the use of their property as central to their realization of individual freedom). The story one tells depends upon the normative theory that one applies.

73. *Pardo*, 582 So. 2d at 1228.

74. *Id.*

75. See FLA. CONST. art. V, § 3(b)(4).

76. *Pardo*, 596 So. 2d at 666 (citations omitted).

77. *Id.*

78. *Id.*

79. Allstate Ins. Co. v. Mazorra, 599 So. 2d 739, 739 (Fla. 3d Dist. Ct. App. 1992).

80. *Id.* at 740 (emphasis added).

81. *Id.*

jurisprudence, is the question of what a trial judge should do where decisions of two or more district courts other than her own conflict and the trial judge's district is undecided on the issue. The likelihood of this situation bothered the *Venus Condominium* court, which created the conflict on the issue of vertical stare decisis in 1976.⁸² Justice Adkins also spoke of the problem of placing a trial judge in "the dilemma of selecting one of two conflicting district courts of appeals decisions as the proper case law."⁸³

Three or four possible rules could be established for such situations:

(1) The trial court could follow the most recent appellate decision. In effect, the most recent district court decision would overrule the earlier district court decision in all undecided districts. In other words, assume that the First District is first-in-time to decide a particular point of law. It decides that the law is *X*. The law of *X* binds all trial courts in Florida. Now the Second District Court decides that the law on that particular point is *Y*. The law of *X* is overruled in the Second District, where *Y* now becomes the law of the Second District. To the extent that trial courts within the Third, Fourth, and Fifth Districts follow the last-in-time approach, the law of *X* is also overruled in those districts by the Second District decision for the law of *Y*.

(2) The trial court could follow the first-in-time decision.⁸⁴ A trial court faced with the dilemma described could follow the law of *X* because the first-in-time district court to decide the issue had so ruled. Thus, the law of *Y* would bind only the Second District.

(3) The trial court could follow the decision that it considered the best reasoned or that set the best policy, according to its own rights. Moreover, it could choose and apply a rule different from that of either of the

82. *Venus Condominium*, 343 So. 2d at 1285. The court said that requiring a trial court to follow other district courts "could lead to utter chaos were two of our sister courts to be in conflict on a point of law raised in a trial court in this district." *Id.*

83. The Florida Bar Re: Rules of Appellate Procedure, 463 So. 2d 1114, 1124 (Fla. 1984) (Adkins, J., concurring).

84. *Accord* Sowell v. Sowell, 92 S.E.2d 524, 526 (Ga. 1956). "Where there is conflict existing in the decisions of this court, the correct rule must be determined from the earliest decisions on the subject, and unless overruled, they are controlling." *Id.*; *Richmond County v. Sibert*, 125 S.E.2d 129, 131 (Ga. Ct. App. 1962). "The Court of Appeals is bound by the principles enunciated by the *oldest Supreme Court decision*, and not by the *latest* expression of the Supreme Court which does not overrule, modify, or distinguish its oldest case." *Id.*

conflicting districts.⁸⁵

(4) If there are an odd number of such decisions the trial judge could follow the majority.

Under any of the approaches “[t]he law is unsettled”⁸⁶ so long as both vertical and horizontal stare decisis do not apply. The irony of vertical without horizontal stare decisis is that a trial court may be reversed for doing the “right” thing (following another district) or affirmed for doing the “wrong” thing (rejecting precedent from another district). This anomaly is less serious jurisprudentially than the balkanization problem. It is nonetheless troubling, and it does emphasize the logical relationship that ought to exist between vertical and horizontal stare decisis.

It is true that Floridians and other persons need to know that the same law will be applied in Pensacola, Tampa, and Miami, not only by trial courts but also by courts of appeal. Most litigants will not get the opportunity to have the Supreme Court of Florida directly apply any law to their case.⁸⁷ It is also true that potential litigants within Pensacola, Tampa, and Miami need to know that the same law will be applied whichever panel of the district court reviews a trial court decision. Furthermore, potential litigants need to know that the same law of Florida will be applied regardless of whether they wind up in state or federal court. Before examining the latter proposition, we shall consider the avoidance and resolution of intradistrict conflicts among panels within each of the district courts.

D. *Intradistrict Stare Decisis*

Since the 1980 amendment of the Florida Constitution, the supreme

85. *Accord* State Farm Fire & Cas. Co. v. Yapejian, 605 N.E.2d 539, 542 (Ill. 1992). “This was not an instance in which the circuit court was faced with conflicting decisions from the various appellate districts and, in the absence of controlling authority from its home district, *would have been free to choose between the decisions of the other appellate districts.*” *Id.* (emphasis added). *But cf.* Garcia v. Hynes & Howes Real Estate, Inc., 331 N.E.2d 634, 636 (Ill. App. Ct. 1975). “To apply the principle of optional selectivity by a trial court in such situation could create an anomalous situation where the trial court one week would follow one principle and the following week, a contrary principle.” *Id.*

86. *The Florida Bar Re: Rules of Appellate Procedure*, 463 So. 2d at 1124 (Adkins, J., concurring).

87. *See supra* note 54.

court has no jurisdiction to review intradistrict conflicts.⁸⁸ An en banc process providing for the district courts to resolve conflicts within their respective districts is deemed an essential part of this appellate structural scheme.⁸⁹ Patterning after en banc rules of the United States Courts of Appeals for the Fifth and Eleventh Circuits,⁹⁰ the Supreme Court of Florida promulgated Florida Rule of Appellate Procedure 9.331, effective in 1980.⁹¹ The rule authorizes each district court of appeal to sit en banc to resolve intradistrict conflicts of decisions when “necessary to maintain uniformity in the court’s decisions.”⁹² In 1984, an additional provision for en banc review was made for cases “of exceptional importance.”⁹³

From its inception, the operation of the en banc rule has been troubled.⁹⁴ In 1990, a district judge referred to it as “an old problem.”⁹⁵ In 1982, the Florida Conference of District Court of Appeal Judges petitioned the supreme court to consider an emergency rule change to address practical

88. *In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc*, Florida Rules of Appellate Procedure, 416 So. 2d 1127, 1127 (Fla. 1982). Under article V, section 3(b)(3) of the Florida Constitution, the supreme court may review a district court decision that expressly and directly conflicts with a decision of *another* district court. Under section 3(b)(4), it may review a district court decision that is certified by it to be in direct conflict with a decision of *another* district court. FLA. CONST. art. V, § 3(b)(4).

89. *In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc*, Florida Rules of Appellate Procedure, 416 So. 2d at 1130 (Commentary).

90. *Id.*

91. FLA. R. APP. P. 9.331(a). This rule was originally promulgated in *In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc*, Florida Rules of Appellate Procedure, 374 So. 2d 992, 993 (Fla. 1979). Rule 9.331(a) has been amended several times, most recently by *In re Amendments to the Florida Rules of Appellate Procedure*, 609 So. 2d 516, 564-65 (Fla. 1992). Most of the amendments are stylistic. However, in 1984, provision for en banc review was made for cases “of exceptional importance” in addition to en banc review when necessary to maintain uniformity in the court’s decisions. *The Florida Bar Re: Rules of Appellate Procedure*, 463 So. 2d at 1115.

92. FLA. R. APP. P. 9.331(a).

93. *The Florida Bar Re: Rules of Appellate Procedure*, 463 So. 2d at 1119.

94. See generally Mattis, *Stare Decisis Florida*, *supra* note 23, at 163-72 (discussing the history of intradistrict conflicts through various changes in the Florida Constitution). In *State v. Bankowski*, the court “express[ed] [its] apologies” for “extreme delay in bringing [the] matter to final disposition.” 570 So. 2d 1152, 1153 (Fla. 4th Dist. Ct. App. 1990).

95. *State v. Georgoudiou*, 560 So. 2d 1241, 1248 (Fla. 5th Dist. Ct. App.) (Coward, J., dissenting), *review denied*, 574 So. 2d 141 (Fla. 1990). Judge Coward cited numerous opinions of district courts. *Id.* at 1248. He further referred to the “vague standard for selection of cases for en banc consideration coupled with no appellate review of the selection decision” which could “combine to deny the litigant equal protection of the law and deprive him of his constitutional right to have his case on appeal heard and decided by the three judge panel to which it was duly, and constitutionally, assigned for decision.” *Id.*

problems that had arisen in the en banc decisional process. The chief judges of the district courts asked whether one three-judge panel could overrule or recede from a prior decision of a three-judge panel of the same court. The supreme court responded that it would not by court rule prohibit overruling or receding by a three-judge panel, but it admonished the district judges to refrain from that action. Instead, when a three-judge panel is confronted with its district precedent with which it disagrees, it should suggest an en banc hearing.⁹⁶

Generally, the district courts seem to have refrained from panel overruling, expressing a commitment to the proposition that a prior panel decision of their particular district court is binding authority absent en banc review.⁹⁷ When a majority of district judges in a particular district think it is necessary or desirable to recede from or overrule a prior decision, en banc review is usually utilized.⁹⁸ Despite the supreme court's admonition, however, conflicting panel decisions do occur.⁹⁹ Inconsistent rulings by

96. *In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure*, 416 So. 2d at 1128.

97. *E.g.*, *State v. Delasierra*, 614 So. 2d 564, 566 (Fla. 3d Dist. Ct. App. 1993) (concurring opinion expressing "grave doubts about the constitutional validity" of the substantive rule (search and seizure) applied, but stating that "our recent decision . . . is binding authority on this panel" and that Rule 9.331 "compels this result"); *State v. Clark*, 538 So. 2d 500 (Fla. 3d Dist. Ct. App. 1989) (Schwartz, C.J., specially concurring) (expressing continuing disagreement with a prior panel decision of which the court as a whole denied en banc review, but stating that its holding represents "the law of this district," which every subsequent panel is bound to follow under Rule 9.331); *Holding Electric, Inc. v. Roberts*, 512 So. 2d 1112 (Fla. 3d Dist. Ct. App. 1987) (stating "[i]n the absence of a decision by the court en banc to overrule *Mardan*, the present panel is bound by that decision"), *rev'd*, 530 So. 2d 301 (Fla. 1988); *State v. Johnson*, 516 So. 2d 1015, 1016 (Fla. 5th Dist. Ct. App. 1987) (stating "[b]ecause we are bound by the prior decision of this court . . . we must affirm").

98. *E.g.*, *State v. McKenzie*, 574 So. 2d 1176 (Fla. 5th Dist. Ct. App. 1991) (stating "[b]ecause we find it necessary to recede from the holding [in a prior Fifth District decision], we have considered this case *en banc*"); *Brown v. Champeau*, 537 So. 2d 1120 (Fla. 5th Dist. Ct. App. 1989); *Inscho v. State*, 521 So. 2d 164 (Fla. 5th Dist. Ct. App. 1988); *cf.* *Fleischer v. Hi-Rise Homes, Inc.*, 536 So. 2d 1101 (Fla. 4th Dist. Ct. App. 1988) (noting case removed from en banc calendar since there was no conflict, no need to recede, and an absence of exceptional importance) (Glickstein, J., dissenting).

99. In *McBride v. State*, 604 So. 2d 1291, 1292 (Fla. 3d Dist. Ct. App. 1992), the Third District Court chose to follow a 1991 Fourth District decision (*Stayer*) and reject a 1992 Fourth District decision (*Scott*). The Third District commented: "There appears to be no authority for *Scott's* departure from the earlier panel decision in *Stayer* without the intervention of an en banc court." *Id.* at 1292 n.1.

In *Johnson v. State*, 568 So. 2d 519 (Fla. 1st Dist. Ct. App. 1990), a three judge panel

First District panels provided the supreme court with an opportunity to make it clear that later panel decisions overrule prior panel decisions.¹⁰⁰ In *State v. Walker*,¹⁰¹ the supreme court accepted for review a 1991 Fourth District decision on the basis that it conflicted with a 1986 First District decision.¹⁰² The supreme court then ascertained that a 1990 First District decision ruled opposite to a 1986 First District decision.¹⁰³ The court held that where there is an intradistrict conflict, a subsequent decision overrules a prior decision as the decisional law in the district.¹⁰⁴ The subsequent First District decision was consistent with the 1991 Fourth District decision.¹⁰⁵ Therefore, no direct conflict was presented to the supreme court as required by article V, section 3(b)(3), and the court dismissed the case since it was without jurisdiction.¹⁰⁶

Another problem that has arisen under the en banc rule is a disagreement among district judges as to what constitutes intradistrict conflict sufficient to authorize an en banc hearing or rehearing. The wording of Rule 9.331(a) is hardly precise: "En banc hearings and rehearings shall not be ordered unless the case is of exceptional importance or unless *necessary to maintain uniformity in the court's decisions*."¹⁰⁷ Tests applied for what is "necessary to maintain uniformity in the court's decisions" vary widely

of the First District ruled contrary to the earlier First District decision in *Watson v. State*, 504 So. 2d 1267, 1270 (Fla. 1st Dist. Ct. App. 1986), *review denied*, 506 So. 2d 1043 (Fla. 1987), on the issue of whether life felonies are subject to enhancement under the habitual offender statute. The later decision did not mention the former.

In *Ayares-Eisenberg Perrine Datsun, Inc. v. Sun Bank*, 455 So. 2d 525, 528 (Fla. 3d Dist. Ct. App. 1984), the Third District Court followed a 1980 Third District decision and did not follow a 1976 Third District decision, thus "find[ing] ourselves in conflict with another panel of this court . . . and with other district courts of appeal." The *Sun Bank* court did not purport to overrule the contrary 1976 decision. The United States Court of Appeals for the Eleventh Circuit then had to deal with the conflicts in attempting to apply the law of Florida in a diversity case. *Peoples Bank v. Roberts*, 779 F.2d 1544 (11th Cir. 1986).

100. See *Johnson*, 568 So. 2d at 519.

101. 593 So. 2d 1049 (Fla. 1992).

102. *Id.*

103. *Id.*

104. *Id.* at 1050. The court's citation of a 1968 supreme court case made it clear that the rule had survived, or had been reinstated by various constitutional changes. It cited *Little v. State*, 206 So. 2d 9, 10 (Fla. 1968), decided at a time when the supreme court had no jurisdiction to review intradistrict conflict, as is once again the case since 1980. See *Mattis, Stare Decisis Florida*, *supra* note 23, at 163, 166 n.144.

105. *Walker*, 593 So. 2d at 1049.

106. *Id.*

107. FLA. R. APP. P. 9.331(a) (emphasis added).

among districts, panels, and judges.¹⁰⁸ In 1985, the supreme court answered a question certified to it by the Third District Court: What is the proper scope of review for district courts of appeal in granting rehearings en banc?¹⁰⁹ The supreme court responded that district courts are free to develop their own concepts of decisional uniformity.¹¹⁰ They are not limited by the standards adopted by the supreme court in the exercise of its discretionary conflict jurisdiction.¹¹¹ “[T]he district court of appeal, in implementing the provisions of appellate procedure rule 9.331, has authority to adopt the standard of conflict it believes necessary or appropriate in order to harmonize the decisions of the court and avoid costly relitigation of similar issues within its appellate district.”¹¹² Thus, standards in one district may properly be different from standards in another, without creating a conflict between district court decisions to activate supreme court conflict jurisdiction.¹¹³

Not surprisingly, disagreement and uneven application of standards persist among the district judges.¹¹⁴ The district judges use a variety of tests, such as: (1) whether it would be difficult for the legal profession to harmonize the original panel decision under review with a prior decision of the same district;¹¹⁵ (2) whether the decisions are so inconsistent and disharmonious that they would not have been rendered by the same panel

108. See Harvey J. Sepler, *En Banc Review in Florida Appellate Courts*, 62 FLA. B.J. 37, 38-39 nn.11-13 (1988) (citing a dozen cases representing all districts utilizing what Sepler analyzes as three parallel tests for decisional uniformity in the en banc context). Moreover, there is no clear agreement on a test for “exceptional importance.” *State v. Georgoudiou*, 560 So. 2d 1241, 1247 (Fla. 5th Dist. Ct. App. 1990) (en banc) (Coward, J., dissenting).

109. *Chase Fed. Sav. & Loan Ass’n v. Schreiber*, 479 So. 2d 90, 91 (Fla. 1985), *cert. denied*, 476 U.S. 1160 (1986).

110. *Id.*

111. *Id.*

112. *Id.* at 94.

113. See *Schreiber*, 479 So. 2d at 104-05 (Ehrlich, J., concurring in part, dissenting in part).

114. See Mattis, *Stare Decisis Florida*, *supra* note 23, at 172; *Georgoudiou*, 560 So. 2d at 1241; *Fleischer v. Hi-Rise Homes, Inc.*, 536 So. 2d 1101, 1102 (Fla. 4th Dist. Ct. App. 1988) (referring to “protracted debate, for which we [the court] must confess judicial dismay” in deciding to reconsider and not to render an en banc decision); *State v. Navarro*, 464 So. 2d 137, 140 (Fla. 3d Dist. Ct. App. 1985) (granting rehearing en banc on basis of “misapplication of a rule of law,” citing the supreme court’s decision in *Schreiber*, opinion filed July 26, 1984) (Ferguson, J., dissenting to rehearing en banc); see also Sepler, *supra* note 108, at 37-39.

115. *Schreiber*, 479 So. 2d at 912-13, *quashed on other grounds*, 479 So. 2d 90 (Fla. 1985). Judge Schwartz’s “practical” test was approved by the supreme court in quashing *Schreiber*, 479 So. 2d at 94-95.

of the court;¹¹⁶ (3) whether there has been a misapplication of a well-established rule of law of the district;¹¹⁷ (4) whether the appellate court directly recedes from its own previously announced rule of law; and, (5) whether the court applied the same rule in two cases having indistinguishable facts, but nevertheless reached two different conclusions.¹¹⁸

We are left, then, with different rules among district judges within a district, among panels, and among the five district courts of appeal regarding when en banc review is necessary to achieve uniformity of law within a district. Even more troubling, each district is free to create conflicts with other districts on substantive points of law and each district has done so freely and without qualm. The question then becomes, as long as we do not recognize horizontal stare decisis, do we have “the law of Florida” on any particular point or do we indeed have the laws of five balkanized districts? The answer depends only partially on how dependably and how expeditiously the supreme court resolves conflicts among the districts. The answer has an impact on even-handedness of treatment among Florida state litigants, the equality of treatment between state court and federal court litigants, and the constitutional underpinnings of *Erie*.

III. THE *ERIE* OVERLAY: FEDERAL COURTS’ TREATMENT OF STATE LAW

Our system of jurisprudence comprises a dual court system containing both state and federal courts. Often, a state court is required to apply federal law. Similarly, a federal court is often called upon to apply state law to a specific issue in a particular case.¹¹⁹ However, if there is no statute or recent decision by the state’s highest court, the federal court faces the problem of determining the content of the rule of state law that is to be applied.

116. Also a “practical” test enunciated by Judge Schwartz in *Schreiber*, 422 So. 2d at 912 n.l.

117. *Navarro*, 464 So. 2d at 140. Judge Ferguson, in his dissenting opinion, labeled the standard freewheeling and elusive. *Id.* at 143.

118. Extensive case citation for all of these tests is provided in Sepler, *supra* note 108, at 37-39.

119. The problem arises in diversity cases as well as federal question cases whenever the federal law fails to supply a rule of decision, but refers to state law for an answer. *See, e.g., Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967); *see also supra* notes 3-8 and accompanying text.

A. *Early Erie*

In the 1938 case of *Erie Railroad Co. v. Tompkins*,¹²⁰ the Supreme Court of the United States handed down what has been characterized as one of the most important cases in American legal history.¹²¹ In that case, Justice Brandeis indicated that when state law supplied the rule of decision, the federal court was to apply state law whether “declared by its Legislature in a statute or by its highest court.”¹²² In 1940, the Supreme Court handed down a series of decisions dealing with the problem of how to determine the content of state law when state law supplied the rule of decision on an issue.¹²³ The Court held that a federal court must follow the decision of a lower state court in the absence of any persuasive data that the highest court of the state would decide otherwise.¹²⁴

The most troublesome of the 1940 cases was *Fidelity Union Trust Co. v. Field*,¹²⁵ which involved the decisions of a New Jersey trial court of statewide jurisdiction.¹²⁶ The New Jersey Legislature had passed a statute that clearly seemed to change prior law and permit a legal device known as a “totten trust.”¹²⁷ However, in two separate cases that came before the New Jersey Court of Chancery,¹²⁸ two vice-chancellors held that the statute had not changed the law and that “totten trusts” were not permitted in spite of the statute.¹²⁹

When a similar case came before a federal court in New Jersey, the Third Circuit recognized that under the command of *Erie*, it was required to apply state law with regard to the construction of state statutes.¹³⁰ The

120. 304 U.S. 64 (1938).

121. See CHARLES A. WRIGHT, FEDERAL COURTS 352-53 (4th ed. 1983). Professor Wright says: “It is impossible to overstate the importance of the Erie decision. It . . . goes to the heart of the relations between the federal government and the states, and returns to the states a power that had for nearly a century been exercised by the federal government.” *Id.* at 355.

122. *Erie*, 304 U.S. at 78 (1938).

123. WRIGHT, *supra* note 121, at 372.

124. *Id.* at 370-71.

125. 311 U.S. 169 (1940), *rev'g* 108 F.2d 521 (3d Cir. 1939).

126. *Id.*

127. WRIGHT, *supra* note 121, at 370. A “totten trust” allows parties to deposit funds in a bank and name themselves trustee for another, thereby creating a tentative trust revocable at any time before death. *Id.*

128. A *nisi prius* (or trial) court.

129. WRIGHT, *supra* note 121, at 371.

130. *Field v. Fidelity Union Trust Co.*, 108 F.2d 521, 526 (3d Cir. 1939), *rev'd on other grounds*, 311 U.S. 169 (1940).

question remained, however, whose interpretation of the statute the court should use. Reading the *Erie* reference to the “highest court” literally, two judges of the Third Circuit panel concluded that they were not bound to follow a New Jersey trial court’s interpretation of the statute.¹³¹ They stated that “[w]here that law has been determined by the courts of last resort their decisions are *stare decisis*, and must be followed As to the pronouncements of other state courts, however, we are not so bound, but may conclude that the decision does not truly express the state law.”¹³² The court refused to follow the decisions of the vice-chancellors, and awarded the proceeds of the trust to the beneficiary.¹³³

The Supreme Court reversed and held that where the state law supplies the rule of decision, it is the duty of the federal courts “to ascertain and apply that law even though it has not been expounded by the highest court of the State.”¹³⁴ Subsequently, when the “totten trust” issue came before a New Jersey state court, the decision of the Third Circuit was followed, with the notation that it had been “reversed on other grounds” by the Supreme Court.¹³⁵ Thus, on the question of the content of New Jersey law, it turned out that the Third Circuit had been correct.

This was grist for the mill of legal scholarship, and leading scholars of the day criticized the Supreme Court’s *Field* doctrine from the academy¹³⁶ and the bench. In a brief but biting criticism, Judge Jerome N. Frank likened federal judges, faced with questions of state law, as being forced by the Supreme Court “to play the rule [sic, role] of ventriloquist’s dummy to the courts of some particular state.”¹³⁷ Years later, the late Judge Henry Friendly, one of the leading legal scholars of our century, referred to the Supreme Court’s 1940 series of decisions as “the excesses of 311 U.S. [of the United States Reports].”¹³⁸

131. *Id.* at 527

132. *Id.* at 526.

133. *Id.*

134. *Field*, 311 U.S. at 177.

135. *Hickey v. Kahl*, 19 A.2d 33 (1941).

136. See Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 290-95 (1946). Charles Clark, a former Dean of the Yale Law School, was United States Circuit Judge, Second Circuit Court of Appeals, when he wrote this article. *Id.*; see also Arthur L. Corbin, *The Laws of the Several States*, 50 YALE L.J. 762 (1941); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 510 (1954).

137. *Richardson v. Commissioner*, 126 F.2d 562, 567 (2d Cir. 1942).

138. Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 400 (1964).

The zenith of the *Field* doctrine probably came in a Sixth Circuit case. The Sixth Circuit felt bound to follow an unreported decision of an intermediate Ohio court in the face of an Ohio statute providing that "only such cases as are hereafter reported in accordance with the provisions of this section shall be recognized by and receive the official sanction of any court within the state."¹³⁹

B. Reformed Erie

It seemed inevitable that the Supreme Court would have to back down from the furthest extremes of the *Field* doctrine. As Professor Wright has pointed out, to do otherwise would be to simply substitute one kind of forum shopping for another. He writes:

The lawyer whose case was dependent on an old or shaky state court decision that might no longer be followed within the state would have a strong incentive to maneuver the case into federal court, where, on the mechanical jurisprudence that the Erie doctrine was once thought to require [under *Field*], the state decision could not have been impeached.¹⁴⁰

By 1967, the Second Circuit decided that it was no longer bound by the *Field* holding.¹⁴¹ Despite the fact that *Field* had not been expressly overruled, subsequent Supreme Court decisions indicated that it had been modified.¹⁴² In its strictest sense, *Field* was no longer the law.¹⁴³ Presently, the position expressed by the Second Circuit is well accepted among the federal appellate courts.¹⁴⁴

However, since the *Field* case, the Supreme Court has given very few instructions to the bench and bar on solving the problem of how a federal court is to determine state law when the question has not been addressed by the highest state court. Moreover, except for expressing a general approval of the certification process, whereby federal courts can certify questions of

139. *Gustin v. Sun Life Assur. Co.*, 154 F.2d 961 (6th Cir.), *cert. denied*, 328 U.S. 866 (1946).

140. WRIGHT, *supra* note 121, at 374.

141. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967). In *Roginsky*, the court stated: "[w]e do not consider ourselves as bound by the rulings of a state *nisi prius* judge although we treat these with respect." *Id.* at 851.

142. WRIGHT, *supra* note 121, at 372.

143. *Id.*

144. 19 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4507 at 88-91 (1988) [hereinafter PRACTICE AND PROCEDURE].

state law to the highest state court,¹⁴⁵ the Court has never touched on the problem of conflicting decisions among state appellate courts.

The first retreat from the furthest extensions of the *Field* doctrine came in 1948.¹⁴⁶ In *King v. Order of United Commercial Travelers*,¹⁴⁷ the Court was faced with the contention that a federal court was bound by an unreported decision of a South Carolina Court of Common Pleas that would not have had precedential value in any other South Carolina court.¹⁴⁸ The Court indicated that such a case was entitled to "some weight."¹⁴⁹ However, the Court decided it was not controlling on the federal court.¹⁵⁰

Less than a decade later, the Court gave further instructions on this issue. Where the highest state court had spoken, time or other events might cast doubt on whether the previous decision would still be followed. The issue in *Bernhardt v. Polygraphic Co. of America*¹⁵¹ was whether a 1910 Vermont decision was binding on a federal court in 1956.¹⁵² The Court held that it was, but at the same time instructed lower courts, in a round-about way, on how they should handle such a problem.¹⁵³ The Court stated: "[T]here appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of the Vermont judges on the question, no legislative development that promises to undermine the judicial rule."¹⁵⁴ The Court seemed to be asking the lower courts to draw the inference that if there had been any doubts, a federal court might have been free to disregard a holding by a state trial court, or even the 1910 decision by the state's highest court.

Further instruction on how to handle the problems of state law content was present in the 1967 federal tax case of *Commissioner v. Estate of Bosch*,¹⁵⁵ involving a situation where the federal court was required to

145. *E.g.*, *Lehman Bros. v. Schein*, 416 U.S. 386 (1974); *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960). Certification is discussed *infra* notes 241-42, 255-58 and accompanying text.

146. WRIGHT, *supra* note 121, at 372.

147. 333 U.S. 153 (1948).

148. WRIGHT, *supra* note 121, at 372.

149. *King*, 333 U.S. at 160.

150. *Id.* at 161.

151. 350 U.S. 198 (1956).

152. *Id.* at 202.

153. *Id.* at 204-05.

154. *Id.* at 205. The implications of *Bernhardt* are discussed in 19 PRACTICE AND PROCEDURE, *supra* note 144, at 87-91.

155. 387 U.S. 456 (1967).

apply state law in solving a federal tax question.¹⁵⁶ In *Bosch*, the Court cited *Erie* cases and said that “under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling.”¹⁵⁷

The *Bosch* Court held:

[W]hen the application of a federal statute is involved, the decision of a state trial court . . . should *a fortiori* not be controlling This is not a diversity case but the same principle may be applied for the same reasons, *viz.*, the underlying substantive rule involved is based on state law and the State’s highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving “proper regard” to relevant rulings of other courts of the State. *In this respect, it may be said to be, in effect, sitting as a state court.*¹⁵⁸

The court’s holding was a far cry from the implications of the 1940 *Field* decision. In fact, for the last several decades, federal courts have indicated that they are no longer absolutely bound by decisions of lower state courts.¹⁵⁹ Some federal courts have even felt free, under the updated version of *Erie*, to refuse to follow outdated decisions of the highest court of the state when applying the law of that state.¹⁶⁰

Two of the dissenters in *Bosch* developed the formula now being applied “to determine state law in diversity cases—essentially, that, absent a recent judgment of the State’s highest court, state cases are only data from which the law must be derived—is necessarily applicable without modification in all situations in which federal courts must ascertain state law.”¹⁶¹ Having stated what they thought to be the majority’s rule, Justices Harlan and Fortas, disagreed with it.¹⁶² According to them, “[t]he relationship between the state and federal judicial systems is simply too delicate and important to be reduced to any single standard.”¹⁶³

Perhaps the standard announced by Justices Harlan and Fortas, with

156. *Id.* at 465.

157. *Id.*

158. *Id.* (emphasis added).

159. See 19 PRACTICE AND PROCEDURE, *supra* note 144, at 88-98.

160. *Mason v. American Emery Wheel Works*, 241 F.2d 906 (1st Cir. 1957) (refusing to be bound by an outdated holding of the Mississippi Supreme Court in light of recent statements by that court indicating that it might no longer follow the old rule).

161. *Estate of Bosch*, 387 U.S. at 477 (Harlan, J., and Fortas, J., dissenting).

162. *Id.*

163. *Id.*

regard to their understanding of how the formula should be applied, is itself a bit too simplistic. According to Professors Wright, Miller and Cooper, a “solid statement”¹⁶⁴ of the method to be applied by federal judges, faced with problems of interpreting state law, was the one announced by the Third Circuit Court of Appeals in *McKenna v. Ortho Pharmaceutical Corp.*¹⁶⁵ As stated by the court in *McKenna*:

An accurate forecast of [state] law, as it would be expressed by its highest court, requires an examination of all relevant sources of that state’s law in order to isolate those factors that would inform its decision. The primary source that must be analyzed of course, is the decisional law of the [state supreme court]. In the absence of authority directly on point, decisions by that court in analogous cases provide useful indications of the court’s probable disposition of a particular question of law. It is important to note, however, that our prediction “cannot be the product of a mere recitation of previously decided cases.” In determining state law, a federal tribunal should be careful to avoid the “danger” of giving “a state court decision a more binding effect than would a court of that state under similar circumstances.” Rather, relevant state precedents must be scrutinized with an eye toward the broad policies that informed those adjudications, and to the doctrinal trends which they evince.

Considered dicta by the state’s highest court may also provide a federal court with reliable indicia of how the state tribunal might rule on a particular question. Because the highest state court “enjoys some latitude of decision in ascertaining the law applicable to a particular dispute even where there may be dicta in point,” however, a federal court should be circumspect in surrendering its own judgment concerning what the state law is on account of dicta. As Professor Charles Alan Wright has written, “much depends on the character of the dictum.” Of somewhat less importance to a prognostication of what the highest state court will do are decisions of lower state courts and other federal courts. Such decisions should be accorded “proper regard” of course, but not conclusive effect. Thus, the Supreme Court has held that although the decision of a lower state court “should be ‘attributed some weight . . . the decision (is) not controlling . . . ’ where the highest court of the State has not spoken on the point Thus, under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling.” Additionally, federal courts may consider scholarly treatises, the Restatement of Law, and germane law review

164. 19 PRACTICE AND PROCEDURE, *supra* note 144, at 89 n.30.

165. 622 F.2d 657 (3d Cir. 1980).

articles—particularly, it seems, of schools within the state whose law is to be predicted.¹⁶⁶

Note, however, that even with this elaborate statement, nothing is said about the problem of conflicting state intermediate appellate court decisions.

C. *Erie Instructions—Few and Far Between*

There have only been three instances since 1940 where the Supreme Court of the United States has addressed the problem of how a federal court is to determine the content of state law when state law provides the rule of decision.¹⁶⁷ *King*, *Bernhardt*, and *Bosch* are the only guidelines handed down by the Court since *Field*. The most recent of those three cases is now more than a quarter century old.

At the time *Erie* was decided, only twelve of the then forty-eight states had intermediate appellate courts.¹⁶⁸ Moreover, the entire *corpus juris* of the country was far less complex than it is today. Presently, there has yet to be a Supreme Court decision instructing the lower federal courts on how to handle the problems of conflicting state intermediate appellate court decisions.

Although it is true that there have been Supreme Court cases emphasizing the “twin aims of the *Erie* doctrine—‘discouragement of forum-shopping and avoidance of inequitable administration of the [laws],’”¹⁶⁹ these cases, had nothing to do with the problem of ascertainment of state law. It seems obvious that if the twin aims of the *Erie* doctrine are discouragement of forum shopping and avoidance of inequitable administration of the law,¹⁷⁰ then the problem of conflicting state appellate court decisions is a problem that should be addressed. As long as the law administered in the federal courthouse is different from the law administered in the state courthouse down the street, there will be forum shopping, and it will therefore be

166. *Id.* at 662-63 (footnotes omitted).

167. *King v. Order of United Commercial Travelers of Am.*, 333 U.S. 153 (1948); *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198 (1956); *Estate of Bosch*, 387 U.S. at 456.

168. This number came from a count of the courts listed in the front of the West National Reporter system in 1938. Of these 12, some had only limited jurisdiction, such as the Oklahoma Criminal Court of Appeals.

169. *Salve Regina College v. Russell*, 499 U.S. 225, 234 (1991) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965), on the twin aims of *Erie*).

170. Aren't these “twin aims” really one and the same?

impossible to avoid inequitable administration of the law.¹⁷¹

If the highest court of the state whose substantive law is applicable has addressed the issue in a fairly recent case, the problem of what law federal courts should apply is almost nonexistent. The federal court simply applies the law as enunciated by the highest state court.¹⁷² If the highest court has spoken to the issue, but time or developments in other jurisdictions have created a doubt as to whether the previous decision would be followed today, the Supreme Court has given instructions on how a federal court is to handle the problem.¹⁷³

A more serious problem of applying state law occurs when there is no decision by the highest court of the state, but there are decisions by lower courts at either the trial or appellate level. This issue is complicated by the Supreme Court's modification of its original position without expressly overruling *Field*. However, as discussed above, it now seems clear that a federal court is no longer absolutely bound by a decision of a lower state court at either the trial or appellate level.¹⁷⁴ The only requirement is that federal courts give them "proper regard."¹⁷⁵ Beyond this rather meager guidance, however, very little is clear.

Perhaps the thorniest problem for the federal trial judge in this area is the situation that exists when there are conflicting decisions among state intermediate appellate courts. Most federal courts will handle this problem by deciding the issue the way they think the highest court in the state would decide it. Those who follow this policy seem to perceive it as the policy of the Supreme Court as well. However, this method may well encourage forum shopping.

Since several states that have distinct and different systems of appellate courts, it seems improbable that the twin aims of *Erie* can be met if all state court systems are treated the same way by federal courts deciding issues of state law. Recall the statement of Justices Harlan and Fortas, dissenting in *Bosch*: "The relationship between the state and federal judicial system is simply too delicate and important to be reduced to any single standard."¹⁷⁶

171. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). "The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Id.*

172. *Estate of Bosch*, 387 U.S. at 465.

173. *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 205 (1956).

174. *Estate of Bosch*, 387 U.S. at 457.

175. *Id.* at 465.

176. *Id.* at 477.

D. *The Klaxon Overlay*

After Harry Tompkins was struck by an object protruding from a train while walking in Pennsylvania on a right-of-way belonging to the Erie Railroad, he brought suit against the railroad in New York.¹⁷⁷ The Supreme Court held that the standard of duty owed by the railroad to Tompkins was determined by state law rather than general federal common law.¹⁷⁸ It was unclear which state's law the court should use in making its decision: New York's, where the trial was held, or Pennsylvania's, where the accident occurred. Everyone who read the opinion must have known that the Court was referring to the law of Pennsylvania, but the Court was not explicit about the method of choosing the rule of state law in a conflict of laws situation. The oversight was corrected three years later, in *Klaxon Co. v. Stentor Electric Manufacturing Co.*,¹⁷⁹ when the Court set down the rule that:

The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. . . . And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be.¹⁸⁰

In other words, a federal court, sitting in a particular state, should give the same deference to that state's choice of law (or conflict of law) rules as it would be required to give to the state's substantive law rules.¹⁸¹ Thus, a New York federal judge, faced with a conflicts problem from an accident that occurred in California, is to apply the same law that the New York Court of Appeals would apply in solving the problem. If it is more likely that the New York Court of Appeals would apply California substantive law, then so must the federal judge sitting in New York. This situation led Judge Friendly to posit:

Our principal task, in this diversity of citizenship case, is to deter-

177. For a fascinating account of the story of the litigation in *Erie*, see Irving Younger, *What Happened in Erie*, 56 TEX. L. REV. 1011 (1978).

178. *Erie*, 304 U.S. at 78.

179. 313 U.S. 487 (1941).

180. *Id.* at 496. This rule was reaffirmed by the Court in *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975).

181. *Klaxon*, 313 U.S. at 496.

mine what the New York courts would think the California courts would think on an issue about which neither has thought. They have had no occasion to do so. But life, here coupled with death, casts up new problems, and the court seised of the case is obliged, as best it can, itself to blaze the trail of the foreign law that it has been directed to follow.¹⁸²

Facetious as this statement was, there is little doubt that it is as accurate today as when it was first written.

Given that federal courts are under the command of *Erie*—with its twin goals, preventing forum shopping and inequitable administration of the law—and given the *Klaxon* overlay, should federal courts faced with a state law problem simply decide the case the way they think the state’s highest court would decide it; or should they try to foster the twin goals of *Erie* and decide the issue according to the decisions that would be binding on a state trial judge?

E. *A Changed Situation With State Intermediate Courts*

As mentioned above, when *Erie* was decided only twelve states had intermediate appellate courts.¹⁸³ Today, there are thirty-seven states with intermediate appellate courts.¹⁸⁴ Many of these have been created in the past twenty years.¹⁸⁵ It seems safe to say that today, most of the new “law” that binds state trial courts is handed down by state intermediate appellate courts, rather than by the highest courts of the several states. And yet, judges and legal scholars have paid little attention to the problems raised by the question of which courts are “bound” by intermediate appellate court decisions. This is true at both the state and the federal level.

Even in those states where it is agreed that an intermediate appellate court decision is binding on *all* state trial courts, there has yet to be much discussion about the problems raised by conflicting decisions among the intermediate appellate courts. There can be conflicting decisions between districts (interdistrict conflict); as well as conflicting decisions within the same appellate district (intradistrict conflict).

182. Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960).

183. ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 6 (2d ed. 1988).

184. *Id.*

185. *Id.* At the time Mr. Stern wrote this book, there were 38 states with intermediate appellate courts because North Dakota had created a “temporary court of appeals” for the period from July 1, 1987, through January 1, 1990. *Id.* at 7 n.14.

As discussed above,¹⁸⁶ until the Supreme Court of Florida rejected the rule, some appellate districts in Florida were holding that the courts below them were not bound by a decision of Florida appellate courts in other districts. In many states with intermediate appellate courts, the highest court has never spoken on the question. One appellate court may say that any appellate decision is binding on all trial courts in the state, but if another appellate court in the same state lays down a different rule, who is to say what the law of the state is on that point? When there is a conflict between the First and Fifth Districts, what are the trial judges in the Second, Third, and Fourth Districts supposed to do?¹⁸⁷ Few authoritative answers exist.

As we have seen in the Florida cases, courts even disagree on the question of whether there is a conflict between appellate decisions.¹⁸⁸ Just as one person's freedom fighter may be another person's terrorist, one judge's conflict may seem like perfect harmony to another judge.

In his classic book, Professor Levi described legal reasoning, or *stare decisis*, as

a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between the cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case

. . . .
. . . . *The determination of similarity or difference is the function of each judge.* Where case law is considered, and there is no statute, he is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important.¹⁸⁹

186. See *supra* notes 37-81 and accompanying text.

187. Some of the possibilities are discussed *supra* notes 83-86 and accompanying text.

188. See *supra* notes 108-18 and accompanying text.

189. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1949) (emphasis added). Professor Levi later became Dean of the University of Chicago Law School and Attorney General of the United States.

Of course not everyone will agree with Professor Levi. He cites Professor Goodhart as presenting a different view. See Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L. J. 161 (1930); see also BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); JEROME FRANK, COURTS ON TRIAL (1969); KARL LLEWELYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); E. PATTERSON, JURISPRUDENCE (1953).

Under such a system, it is only natural that there may be disagreement among lawyers and judges as to *when* a conflict between appellate decisions exists. Certainly, most would agree that there will indeed be conflicts. That being the case, it would seem that there should be rules, binding on all courts within a system, instructing them on what to do in case a conflict between decisions of appellate courts on the same level arises.

Several states have rules of precedent where it is agreed that an intermediate appellate court is not bound by the decision of a sister court.¹⁹⁰ Other jurisdictions, however, have rules that require an intermediate appellate court either to adhere to previous decisions by a court or panel on the same level, or to follow a special procedure for overruling the case.¹⁹¹ It seems probable that in several states the problem has never been addressed by either the appellate courts or the highest state court.

With all of these different court systems and rules of appellate precedent existing among the states, federal courts have had very little guidance from the Supreme Court on how the problem of lower court precedent should be handled. What has been created in many states is a forum shopper's supermarket. Because of the prevailing rules of precedent binding on federal trial courts in Florida,¹⁹² there will be frequent situations where a litigant, by filing in or removing to a federal court, will get a different result on an issue of state law from that which would have resulted had he filed in the state court down the street.

F. *Judicial Debate in Chicago*

The question of how a federal court should handle the problem of ascertaining the content of state law, when there are conflicting decisions among panels of the state's intermediate appellate courts, sparked a remarkable debate by judicial opinion between two judges of the United

190. See, e.g., Taylor Mattis & Kenneth Yalowitz, *Stare Decisis Among [sic] the Appellate Court of Illinois*, 28 DEPAUL L. REV. 571, 583-592 (1979) (discussing the Illinois rule); *McGlothlen v. Department of Motor Vehicles*, 140 Cal. Rptr. 168 (1977).

191. See Taylor Mattis, *Stare Decisis Within Michigan's Court of Appeals: Precedential Effect of Its Decisions on the Court Itself and on Michigan Trial Courts*, 37 WAYNE L. REV. 265 (1991) [hereinafter Mattis, *Stare Decisis Michigan*] (discussing the Michigan Administrative Order 1990-6). Among the federal courts of appeal, the Fifth and Eleventh Circuits have rules under which a prior decision of the circuit (panel or en banc) cannot be overruled by a panel, but only by the court sitting en banc. See *Atlantis Dev. Corp., Ltd. v. United States*, 379 F.2d 818, 828 (5th Cir. 1967); *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

192. See *infra* notes 232-51 and accompanying text.

States District Court for the Northern District of Illinois.¹⁹³ This debate merits extensive consideration in light of participants' intuitive insights into the general problem of *Erie* and state intermediate court decisions. It also merits detailed examination for its application to Florida as well as Illinois. The debate stage was set by a question of substantive state law: whether an insured may, under Illinois common law, maintain a claim against an insurer for its bad faith conduct in handling a first party claim under an insurance policy, and if so, whether punitive damages are available.

Like the five district courts of appeal in Florida, Illinois also has five district courts of appeal, although the latter system is unitary.¹⁹⁴ A panel

193. The *Erie* doctrine presents such complex legal problems that when we see judges examining it, we cannot help but think of the tale of the five blind men and the elephant. Each blind man was asked to feel part of the elephant, and was then asked to describe it. Each of the blind men touched the elephant and described it variously as a tree trunk, a serpent, a hose, a fan, and a wall.

If a judge sees the *Erie* case as a constitutional command, then the judge may act differently from the judge who sees it as merely a prudential judicial policy. Professor Wright points out that the early commentators had a great deal to say about the constitutional discussion in *Erie*, most of it critical. However, in recent years there has been substantial scholarly support for the constitutional aspect of the case. WRIGHT, *supra* note 121, at 363. Articles, pro and con, by many very distinguished scholars are listed. *Id.* nn. 14-16; *see also* John H. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) [hereinafter Ely, *Myth of Erie*].

We like to tempt our federal court students into further understanding by reading to them Professor Abram Chayes' comment about Professor Ely's article:

Professor Ely's full dress encounter with *Erie* is in every way the work of an adept. With his overall analytic framework I have no quarrel. On the contrary, I think his approach clarifies much that has mystified several decades of civil procedure students—which probably means that their professors have been mystified as well.

Abram Chayes, *The Bead Game*, 87 HARV. L. REV. 741, 741 (1974); *see also* John H. Ely, *The Necklace*, 87 HARV. L. REV. 753 (1974); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974).

Professor Ely suggests that *Erie* is not “a monolithic doctrine,” but rather “three distinct and rather ordinary problems of statutory and constitutional interpretation.” Ely, *Myth of Erie*, *supra* at 698. He contends that the Supreme Court practice of allowing federal courts to substitute general federal common law for state common law, as was done for almost a century under *Swift v. Tyson*, 41 U.S. 1 (1842), “was unconstitutional because nothing in the Constitution provided the central government with a general lawmaking authority of the sort the Court had been exercising under *Swift*.” *Id.* at 703.

194. *See infra* note 289. The population of Illinois is roughly the same as that of Florida but is distributed much less evenly than Florida's. The Chicago/Cook County area has by far the heaviest concentration of people. Of the five appellate districts, the one encompassing Cook County has the most judges, and consequently the best chance for an

of the Fifth District Appellate Court of Illinois had held that there was a common law cause of action in tort for an insurer's bad faith refusal to make payments under a first party policy, adding that punitive damages were available under proper circumstances.¹⁹⁵ The First and Third Districts had held that a common law claim would not be allowed because it had been preempted by a statute.¹⁹⁶ The Fourth District has held that an earlier version of the statute had not preempted the field, and declined to express an opinion as to the newer version of the statute.¹⁹⁷ The Second District has held that the statute bars a common law claim for punitive damages, but leaves open the possibility of a common law recovery in tort for compensatory damages.¹⁹⁸ Thus, within a fairly short time span, Illinois district courts of appeal have taken several distinct approaches regarding the interpretation of the same state statute. Review had been sought and denied by the Supreme Court of Illinois in most of these cases.

This same substantive law problem was brought before Milton I. Shadur and Prentice H. Marshall, judges for the United States District Court for the Northern District of Illinois.¹⁹⁹ These two judges followed different approaches in determining the process to be used by a federal judge in determining the content of state substantive law to be applied.

Judge Shadur had held, in previous cases involving other points of law, that *Erie* requires a federal court to decide issues of substantive law in the

intradistrict conflict.

195. *Ledingham v. Blue Cross Plan for Hosp. Care of Hosp. Serv. Corp.*, 330 N.E.2d 540 (Ill. App. Ct. 1975), *rev'd on other grounds*, 356 N.E.2d 75 (Ill. 1976). There was no indication that the court considered the effect of the statute on the plaintiff's right to assert a common law claim. Subsequent to this decision, the statute was amended.

196. *See* ILL. REV. STAT. ch. 73, § 767 (1983); *see also* *Tobolt v. Allstate Ins. Co.*, 393 N.E.2d 1171, 1180 (Ill. App. Ct. 1979); *Debolt v. Mutual of Omaha*, 371 N.E.2d 373, 376-77 (Ill. App. Ct. 1978). *Tobolt* appears to have been based on the pre-1977 version of the statute, but the court indicated that the present version of the statute supported its conclusion as well. *Tobolt*, 393 N.E.2d at 1180.

197. *Lynch v. Mid-America Fire & Marine Ins. Co.*, 418 N.E.2d 421, 425 (Ill. App. Ct. 1981). The Fourth District has held that the statute was not applicable when the insurer is a nonprofit health care service corporation. *McCall v. Health Care Serv. Corp.*, 452 N.E.2d 893, 896 (Ill. App. Ct. 1983).

198. *Hoffman v. Allstate Ins. Co.*, 407 N.E.2d 156, 158-59 (Ill. App. Ct. 1980).

199. The substantive issue was brought before several of the judges of the United States District Courts in Illinois. For the most part, we will confine our discussion to the way the problem was handled by two of them.

same way as a state trial judge would sitting in the same location.²⁰⁰ Because he was sitting in Cook County, Illinois, Judge Shadur believed he should decide substantive law questions as if he were sitting as the Circuit Court of Cook County (the state trial court). As such, he would be required by Illinois law to follow the decisions of the First District of the Illinois Appellate Court.

Judge Marshall took the position that he was required to decide any issue of Illinois law the way he believed it would be decided by the Illinois Supreme Court.²⁰¹ On the issue before him, he did not think the Illinois Supreme Court would follow the decision of the First District.²⁰²

1. The Marshall Position—Supreme Court Swami²⁰³

Judge Marshall, when faced with the complex problem of conflicting intermediate appellate court decisions, resorts to what he labels the "Supreme Court predictive approach."²⁰⁴ He admits that this approach does not have the advantage of being a bright line rule, and that judges will inevitably be "gazing into a crystal ball"²⁰⁵ on some occasions. He states:

The proposition that we must act as state trial judges stems from a misapprehension of the commands of *Erie* and its progeny. *Erie* requires a federal court to apply the substantive law of the forum state;

200. See, e.g., *Slate Printing Co. v. Metro Envelope Co.*, 532 F. Supp. 431, 434 (N.D. Ill. 1982) (Shadur, J.); *National Can Corp. v. Whittaker Corp.*, 505 F. Supp. 147, 148-9 n.2 (N.D. Ill. 1981) (Shadur, J.).

201. *Roberts v. Western-Southern Life Ins. Co.*, 568 F. Supp. 536, 539-40 (N.D. Ill. 1983); *Kelly v. Stratton*, 552 F. Supp. 641, 645 (N.D. Ill. 1982).

202. *Roberts*, 568 F. Supp. at 554-55. We need not be concerned here as to the reasons why Judge Marshall believed that the First District was wrong on the issue. Suffice it to say that he believed he had sufficient grounds to believe that the Illinois Supreme Court would use a different method in solving the problem of statutory interpretation that was before the court.

Ironically, another judge in the same district agreed with Judge Marshall on the method to be followed, (deciding the way he thought the Illinois Supreme Court would decide). However, that judge agreed with Judge Shadur on the merits of the issue, *i.e.* reached the same result as the First District.

203. Judge Marshall's opinions are long and quite detailed. He cites many primary and secondary authorities to support his position. It is impractical to reproduce those opinions in full here. At the same time there is a danger that the authors, by paraphrasing, may have missed important points made by the judge. For those who are interested in further detail, we suggest an examination of the original opinions discussed here.

204. *Roberts*, 568 F. Supp. at 543.

205. *Id.* at 545.

we take this to mean that we must apply the law that *ultimately* would be applied were the case to be litigated in the state courts. While intermediate appellate decisions exert upon us a high degree of persuasive force, and while they may be binding upon state trial courts, the law we must apply is that which the state supreme court would apply. In a given case we may choose to follow an intermediate appellate ruling, but we may not end our analysis of state law with mere citation to such rulings where we are persuaded that the state supreme court would rule otherwise.²⁰⁶

Judge Marshall believes that it is necessary to apply the law that the state supreme court would apply to avoid creating an incentive for forum shopping. The “state trial court” approach, he believes, invites forum shopping because it requires the federal courts to give *more* weight to state intermediate appellate decisions than would be given in the state system. Three examples are offered.²⁰⁷

In a case in which no supreme court decision exists and the appellate district [court] of proper state venue has not yet taken a position on an issue . . . , [Judge Shadur] would require a federal court to follow the law as declared by the other appellate districts However, the very fact that the various Illinois appellate districts sometimes conflict on an issue of law indicates the problem inherent in the state trial court approach. The appellate districts, it appears, do not consider each others’ decisions binding; rather, they regard them as persuasive authority only. Thus, if a litigant filed suit in a state court in the First District and the only intermediate appellate decision on a pertinent issue was from the Fourth District, while the trial court presumably would follow the Fourth District ruling, on appeal the First District would not necessarily do so, if it found persuasive reasons to do otherwise. In such a case, if diversity of citizenship existed, the litigant favored by the Fourth District rule could file the case in federal court (or remove it, if there was diversity of citizenship, in the case of a non-Illinois defendant) and thereby obtain ‘insurance’ that the favorable rule of law would be applied and upheld on appeal, were . . . [Judge Shadur’s holding] to apply.²⁰⁸

As a second example, Judge Marshall points out that even where “First District law” exists, the First District has five divisions which do not

206. *Id.* at 539-40 (citations omitted) (emphasis added).

207. *Id.* at 540.

208. *Id.* at 540-41 (citations omitted).

consider themselves bound by the holdings of other divisions. Thus, Judge Shadur's rule "permits a diversity litigant in whose favor the non-unanimous but not as yet uncontradicted rule runs to obtain 'insurance' by bringing the case in federal court or removing it there."²⁰⁹

The third type of forum shopping Judge Shadur's rule was said to permit is somewhat more subtle. His rule requires federal courts to give more weight to state appellate decisions than the rendering courts themselves would give them. According to Judge Marshall, the "state law" that *Erie* requires him to follow includes the power to re-examine earlier holdings based upon "data" not considered in the earlier decision. *Erie*, he believes, permits a federal court to exercise the same authority.²¹⁰

Judge Marshall then quotes Wright, Miller, and Cooper for the proposition that Judge Shadur's rule would result in merely substituting one kind of forum shopping for another. The lawyer depending on old or shaky precedent would bring his case into federal court secure in the knowledge that the federal court would follow the old state rule.²¹¹ According to Judge Marshall, Judge Shadur's rule permits forum shopping because a federal court is required to give state intermediate precedent more weight that it would carry in other state appellate courts and "even in the rendering panel itself."²¹²

Besides encouraging forum shopping, Judge Shadur's rule was said to be wasteful of both the litigants' and the courts' resources. Where a state appellate court has ignored a critically important "datum" of state law (as Marshall thought the state intermediate appellate courts had done in some of the precedents being urged on him when he heard *Kelly v. Stratton*²¹³), it has caused the state court to reach a result that was incorrect as a matter of state law. The Shadur rule, according to Marshall, would require him to follow the appellate court ruling and reach a similarly erroneous result, despite the existence of persuasive reasons for believing that the state supreme court would not so hold. The result would require the district court to commit error and leave it to the court of appeals (which would then act

209. *Roberts*, 568 F. Supp. at 541.

210. *Id.* Ironically, for similar reasons Judge Shadur did not feel bound by his own court of appeals or "even one or two bits of language in United States Supreme Court opinions supporting that predictive approach," because the United States Supreme Court had not considered certain data in making those early decisions. See *Rizzo v. Means Serv., Inc.*, 632 F. Supp. 1115, 1131 (N.D. Ill. 1986); see *infra* notes 226-27 and accompanying text.

211. *Roberts*, 568 F. Supp. at 541-42 (citing 19 PRACTICE AND PROCEDURE, *supra* note 144, at 89-91).

212. *Id.* at 542.

213. 552 F. Supp. 641, 646-48 (N.D. Ill. 1982).

as the state appellate court) to correct the error. So read, Judge Shadur's rule was said to elevate form over substance and promote the needless expenditure of courts' and litigants' resources.²¹⁴

[T]he central principle is that we must give appellate court holdings their due where the supreme court has not spoken, but we must not give them more than their due. This will require resort to the 'Supreme Court predictive approach,' but to do otherwise would be to ignore the policy of *Erie* and its progeny. That policy is the avoidance of forum shopping. When we apply the law that ultimately would be applied were the case litigated in state court, we are fully faithful to *Erie*. By contrast, to act as a state trial court, following intermediate appellate decisions that are erroneous as a matter of state law, not only would violate the policy of *Erie*, but would also elevate form over substance, as the court of appeals, assuming the role of its state counterpart, would apply the correct rule of state law. *Erie* requires us, in all cases, to apply the rule of law that the state supreme court would follow.²¹⁵

2. The Shadur Rule—Just Another State Trial Court²¹⁶

Judge Shadur's view is that a federal judge faced with a problem of state law should decide the case the same way as his state court counterpart would in the courthouse down the street. Since the state judge would be bound by an opinion of an appellate court whose geographical territory included the city where the state and federal courts sat, so should the federal judge.

Why is this the duty of the federal trial judge under the *Erie* doctrine? According to Judge Shadur, the answer is found in the *Erie* opinion, buttressed by the opinions in *Guaranty Trust Co. v. York*²¹⁷ and *Klaxon v. Stentor Electric Manufacturing Co.*²¹⁸ Judge Shadur writes:

Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by non-citi-

214. *Roberts*, 568 F. Supp. at 542-43.

215. *Id.* at 543 (footnote omitted).

216. Judge Shadur's views are set forth in a series of opinions. One can get the essence of his views from his opinions in *Rizzo v. Means Servs., Inc.*, 632 F. Supp. 1115 (N.D. Ill. 1986); *Abbott Laboratories v. Granite State Ins. Co.*, 573 F. Supp. 193 (N.D. Ill. 1983); and *Commercial Discount Corp. v. King*, 552 F. Supp. 841 (N.D. Ill. 1982).

217. 326 U.S. 99 (1945).

218. 313 U.S. 487 (1941).

zens against citizens. It 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.²¹⁹

Shadur cites *Guaranty Trust* as being in accord:

The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.²²⁰

Judge Shadur also points out that the *Klaxon* case treated state "choice-of-law rule as substantive, not procedural, for *Erie* purposes."²²¹ *Klaxon*, he said, required this because "[o]therwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side."²²² Thus, Judge Shadur reads *Klaxon* as commanding him to treat "internal" state choice of law rules the same as *Klaxon's* treatment of external state choice of law rules. This leads Judge Shadur to a position fundamentally different from Judge Marshall.²²³

219. *Abbott*, 573 F. Supp. at 197 (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938)).

220. *Id.* (quoting *Guaranty Trust*, 326 U.S. at 109).

221. *Id.* at 197 (quoting *Klaxon*, 313 U.S. at 496).

222. *Id.* (quoting *Klaxon*, 313 U.S. at 496).

223. Professor Geri Yonover disagrees and contends that "not even the broadest reading of *Klaxon* suggests that it embraces the stare decisis effect of [internal choice of law decisions] on federal—as opposed to state—courts." She says that the Illinois internal choice of law cases addressed their comments to state, not federal courts, and points out that in 1941, when *Klaxon* was decided, the prevailing choice of law rules used by state courts reflected those found in the now discredited first RESTATEMENT OF CONFLICT OF LAWS. Geri J. Yonover, *Ascertaining State Law: The Continuing Erie Dilemma*, 38 DEPAUL L. REV. 1, 34-35 (1989).

While it is true that the Illinois internal choice of law cases were addressed to state courts, so are state external choice of law cases addressed by superior state courts to inferior state courts. Moreover, although *Klaxon* was decided in the era of the first RESTATEMENT, its principles were forcefully reaffirmed well into the era of the RESTATEMENT (SECOND), when the Fifth Circuit was reversed after being tempted to make some modern innovations

As in Florida, the Illinois internal choice of law rule of *stare decisis* requires that all trial courts in the state be bound by the decision of the appellate court of any district and by their own district court if there is a conflict.²²⁴ Also, as in Florida, the Illinois district courts do not consider themselves bound by the decisions of other districts.²²⁵

Judge Marshall feels bound by the rule of *Bosch* and the Seventh Circuit to apply the state supreme court predictive approach when confronted with a litigant's claim that he is bound by an intermediate appellate court decision.²²⁶ On the other hand, Judge Shadur considers himself free of some of the binding effects of those cases because the courts that rendered them did not take into consideration the internal choice of law rules that are binding on Illinois state courts.

Judge Shadur answered the criticism of his method, in part, as follows:

This Court is of course aware of the opinions of some of its colleagues who prefer the greater flexibility of trying to predict what the Illinois Supreme Court would do if and when faced with the same kind of conflict among Appellate Districts. And there are of course some statements in opinions by our Court of Appeals (and even one or two bits of language in United States Supreme Court opinions) supporting that predictive approach. But *not one* of those statements has dealt in terms with the situation (which may or may not be unique to Illinois) where an integral part of Illinois substantive law—which we federal judges are duty-bound to adhere to and follow under *Erie*—is a rule that mandates every Illinois trial court to follow current opinions in its own Appellate District, even if it might prefer the differing views of another Appellate District (or even if it believed the Illinois Supreme Court,

on Texas' choice of law rules. See *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975).

It is hard to see how Judge Shadur can be faulted, therefore, for extrapolating from *Klaxon* the general principle that federal courts, applying state law, are required to follow state choice of law rules, whether internal or external.

224. *State Farm Fire & Casualty Co. v. Yapejian*, 605 N.E.2d 539, 542 (Ill. 1992). At the time Judge Shadur wrote his opinions, this rule had been adopted by some of the state districts, but had not been approved by the Illinois Supreme Court. Since then, the Illinois Supreme Court has cited those intermediate appellate opinions with apparent approval. *Id.* (citing *People v. Thorpe*, 367 N.E.2d 960 (Ill. App. Ct. 1977); *Garcia v. Hynes & Howes Real Estate, Inc.*, 331 N.E.2d 634 (Ill. App. Ct. 1975)). These were the very same cases relied upon by Judge Shadur in formulating his rule of intrastate choice of law rules.

225. See Mattis & Yalowitz, *supra* note 190, at 588-95, and cases cited therein.

226. *Roberts*, 568 F. Supp. at 540 (citing *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967); *In re Air Crash Disaster*, 701 F.2d 1189, 1196-98 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 866 (1983)).

given the opportunity, might opt for the other District's view)

Ordinarily the job of a state trial court, in the absence of controlling state supreme court precedent, is to make its best effort to decide what its supreme court would do if faced with the same problem. That task really accounts for the opinions that express a federal court's responsibilities in the same terms where state law is to provide the rule of decision. And that is so because of *Erie* itself and the very reason *why* it mandated federal courts' adherence to state substantive law But the same principle that informs *Erie* and its progeny compels a wholly different approach where the duty of the state trial court is not Supreme-Court-prediction but Appellate-Court-adherence. After all, . . . [internal choice of law cases] express at least as binding a substantive law principle in *Erie* terms as the substantive doctrines of contract or tort law we federal judges may be asked to choose between where the intermediate state courts differ. And, not so incidentally, the . . . [internal choice of law] rule is one as to which there is *no* split of Illinois authority and there is *no* reason to believe that the Illinois Supreme Court disagrees with the rule—indeed at least as recently as 1981 that court deliberately passed up the opportunity to announce a different rule

[S]o long as *Erie* binds us, we are not free to pick and choose which established state law doctrines we want to follow and which we do not — to ignore the unequivocal [state] choice-of-law mandate in favor of giving ourselves greater latitude in essaying to predict future Illinois Supreme Court decisions where Illinois Appellate Districts differ on rules of law. That latter approach fosters forum shopping in precisely the way *Erie* sought to eliminate: by creating the prospect of differing results for the diversity plaintiff who has a choice between filing suit in one of two Clerk of Court's Offices four blocks apart on Chicago's Dearborn Street, or for the diversity defendant who must decide whether or not to remove a case from the northernmost of those courts to the southernmost.²²⁷

3. Another Thrust by Marshall

In one opinion Judge Marshall had criticized Judge Shadur's position for, among other things, failing to take into account the lack of coincidence of the geographical territory of the federal districts in Illinois and the geographic territory of the state appellate districts. Judge Marshall pointed out that the Eastern Division of the Northern District of Illinois comprises not only Cook County but also several other counties, all of which lie in

227. *Rizzo*, 632 F. Supp. at 1131-32. This last "prediction" of Judge Shadur turned out to be true. See *Yapejian*, 605 N.E.2d at 539.

districts other than the First District. Moreover, in cases where all defendants are non-residents, Illinois law permits the plaintiff to bring suit in any county. Marshall writes:

Thus, . . . [Judge Shadur's] approach is inconsistent with *Erie* in that it might require a federal court to apply a rule of decision that would not be used if plaintiff filed in state court. In fact, . . . [Judge Shadur's rule] would enable a defendant to forum-shop by removing [actions] to federal court . . . [which are] brought in non-Cook County areas of the Northern District of Illinois, in which . . . [the defendant] wants to avail itself of the law of the First District of the Illinois Appellate Court.²²⁸

[At this point the authors intrude into the debate to illustrate how the lack of geographical coincidence applies also to Florida. See Appendix A].

4. The Shadur Sidestep

Judge Shadur subsequently modified his position to sidestep this criticism of his approach. He indicated that his adherence to Illinois' internal choice of law rules, regarding the binding effect on intermediate appellate decisions on state trial courts,

should not be misread as automatically looking to the Illinois Appellate Court for the First District just because this Court sits (in the literal physical sense) within that District. Such an approach could of course lead to exactly the same kind of forum shopping [which] *Erie* and this Court seek to avoid. What proper analysis calls for is a two-step inquiry: First, the federal court must determine which is the proper Appellate District to look to (in a case originally filed in this District Court, that is a function of the Illinois venue provisions that would have controlled the plaintiff's choice had the suit been filed in state court; in a removed case, the location of the state court where suit *was* filed provides the precise and obvious answer). Second, only then does the federal court ascertain the applicable state law as in force in that Appellate District (including, if relevant, the use of the . . . [state internal choice-of-law] rule).²²⁹

5. Agreement on Intradistrict Conflicts

When there is a conflict between decisions of the same Illinois state

228. *Kelly v. Stratton*, 552 F. Supp. 641, 644-45 (N.D. Ill. 1982).

229. *Rizzo*, 632 F. Supp. at 1132-33.

district appellate court, Judge Shadur takes the position that he should then rule as he thinks the state supreme court would rule.²³⁰

G. Florida Federal Courts

Most federal courts agree with Judge Marshall's view that federal courts should decide issues of state law based on the way they think those issues would be decided by the highest court in the state—while at the same time giving proper deference to state intermediate appellate court decisions.²³¹ One commentator who recently reviewed the problem says that, “[e]xtensive research has disclosed only two cases in which other federal judges perceive their *Erie* role as somewhat akin to Judge Shadur's view.”²³² However, to the extent that those two cases can be considered “holdings,” they are binding on federal courts in Florida.²³³

In *Farmer v. Travelers Indemnity Co.*,²³⁴ the Fifth Circuit panel said:

Although not all Florida District Courts of Appeal have decided the question and the matter may be finally resolved as a matter of Florida law by the Florida Supreme Court, the Second District Court of Appeal has decided the matter. A state action by this Lee County plaintiff would have been reviewed by the Second District. Undoubtedly the trial court and the Second District would have followed the recent Second District opinion. Thus, the same law has been applied in federal court as would have been applied *in the specific courts available to plaintiff in the state system.*²³⁵

The *Farmer* court would not certify the question to the Florida Supreme Court, warning that: “It is not the proper office of the certification procedure to permit a party, by choosing a federal over a state forum, to get the

230. *Bonanno v. Potthoff*, 527 F. Supp. 561, 563 (N.D. Ill. 1981); *Commercial Discount Corp. v. King*, 552 F. Supp. 841, 845 (N.D. Ill. 1982).

231. See generally 19 PRACTICE AND PROCEDURE, *supra* note 144, at 88-103.

232. *Yonover*, *supra* note 223, at 28 n.184.

233. *Farmer v. Travelers Indem. Co.*, 539 F.2d 562 (5th Cir. 1976), and *Peoples Bank v. Roberts*, 779 F.2d 1544 (11th Cir. 1986), both involved federal courts applying Florida state law. The Eleventh Circuit has ruled that Fifth Circuit cases decided before September 30, 1981, are binding on judges within the Eleventh Circuit. See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc). The *Bonner* case also adopted the Fifth Circuit rule that “a prior decision of the circuit (panel or en banc) could not be overruled by a panel but only by the court sitting en banc.” *Id.* at 1209.

234. *Farmer*, 539 F.2d at 562.

235. *Id.* at 563 (citations omitted) (emphasis added).

Florida Supreme Court's attention through this Court to issues which that Court [the Florida Supreme Court] has refused to accept from state litigants."²³⁶

Farmer was easy; there were two intermediate appellate cases that had both decided the same way. The only two United States Supreme Court cases cited by the court were *Erie* and *Hanna v. Plumer*.²³⁷ *Hanna* had little to do with determining the content of state law, but it did mention the "twin aims" of *Erie*.²³⁸

The Eleventh Circuit case of *Peoples Bank v. Roberts*²³⁹ presented a slightly more complex problem, while at the same time predicting that more complex problems were to come. The question of state law had been decided the same way by all five state appellate courts of appeal. Only one case had deviated from the majority, a 1984 decision by the Third District. An earlier Third District case, decided in 1976, had gone along with what was then a unanimous majority. The case before the Eleventh Circuit would have been reviewed by the Second District had it been brought in state court, and that district went along with the majority. The Eleventh Circuit panel said:

Although the intermediate court decisions are not unanimous, we accept the overwhelming majority rule as controlling state law for two reasons: First, there is no indication the Florida Supreme Court would decide the issue otherwise, and second, it is the law that would have been applied "in the specific courts available to plaintiff in the state system."²⁴⁰

Peoples Bank was also a relatively easy case, but it began to sow the seeds of a real dilemma. The first (Judge Marshall's view) and second (Judge Shadur's view) reasons given in the paragraph above just happen to be in harmony. However, the federal trial judge is faced with a dilemma when he thinks the Florida Supreme Court would decide the case as the majority had decided, but also believes that a different rule would be applied in the specific courts available to plaintiff in the state system. In addition, the Florida Supreme Court may have refused to review the issue for state litigants.

Under the Florida certification procedure, the federal trial court cannot

236. *Id.*

237. *Id.*

238. *Hanna*, 380 U.S. at 460; see also *supra* note 169 and accompanying text.

239. 779 F.2d 1544 (11th Cir. 1986).

240. *Id.* at 1546 (quoting *Farmer*, 539 F.2d at 563).

certify.²⁴¹ The Eleventh Circuit has said that its panels are bound by Fifth Circuit decisions, and the Fifth Circuit said, in *Farmer*, that it is not proper to certify questions on issues which the Florida Supreme Court has refused to accept from state litigants.²⁴²

To the extent that what the Fifth Circuit said in *Farmer* and what the Eleventh Circuit said in *Peoples Bank* can be considered holdings, the Eleventh Circuit may have just tied itself into a Gordian knot; a knot which could only be cut by an en banc proceeding or by a United States Supreme Court holding. True, there is language in both *Farmer* and *Peoples Bank* which leaves it open for a court to follow the state supreme court predictive approach. However, the opinions taken together are at best ambiguous.

A federal trial judge hearing a case with the same legal issue as the one in *Peoples Bank* would be without guidance if the state court venue had been the Third District.²⁴³ Which part of the *Peoples Bank* holding should the judge follow when there is no reason to believe that the Florida Supreme Court would decide one way or the other? Should the judge follow the rule of the majority, or the rule that would bind a state judge in the Third District?²⁴⁴ Although the matter is far from certain, it appears that Judge Shadur's viewpoint²⁴⁵ has at least some vitality in the Eleventh Circuit.

In many instances Florida provides for statewide venue.²⁴⁶ Of the

241. Of course, the trial judge could always certify the question to the Eleventh Circuit under 28 U.S.C. § 1292(b) (1992), and that court could then certify under article V, section 3(b)(6) of the Florida Constitution, Florida Statutes section 25.031 (1993), and Florida Rule of Appellate Procedure 9.150.

242. *Farmer*, 539 F.2d at 563.

243. The problem raised in the substantive issue in *Peoples Bank* must have been fairly common, otherwise it would not have been litigated so many times. Thus, it is not difficult to believe that the problem arises often in Florida's most populous county, which is included within the Third District.

244. The situation in *Peoples Bank* involved two Third District opinions: a 1976 case that was in the majority, and a 1984 case that was the sole minority position among the appellate courts. Does this provide the solution, or does it merely raise more questions? Should the federal judge follow the later case on the theory that, as presently constituted, the Third District today would be more likely to follow it, or should the judge follow the earlier case, either because it was first, or because it is in the majority, or both? Although the Supreme Court of Florida has said that the later panel overrules the former panel, *State v. Walker*, 593 So. 2d 1049 (Fla. 1992), this does not necessarily mean that the supreme court itself would follow the holding of the second panel.

245. See *supra* notes 216-30 and accompanying text.

246. The general venue statute, Florida Statutes section 47.011 (1991), does not apply to non-residents. Thus, transitory state court actions may be brought against non-residents in any county. Corporations, domestic and foreign, who do business on a statewide basis are particularly vulnerable to suit in almost any of the five appellate districts under Florida

three federal districts in Florida, only the northern is located entirely within one state appellate district.²⁴⁷ What is supposed to happen, under the *Farmer* and *Peoples Bank* holdings, when venue is properly laid in United States District Court for the Middle District of Florida, and the same suit could have been filed properly in a state court in either the First, Second, or Fifth Districts of the state appellate system? If there are conflicting decisions among those state districts, which should be applied? Should it matter whether the case was brought originally to the federal court, or whether it was removed there? For example, in *Farmer*, the Fifth Circuit was reviewing a case from the federal district court of the Middle District of Florida. The federal Middle District includes counties within the venue of the state's First, Second, and Fifth District Courts of Appeal.²⁴⁸ The *Farmer* court said that a state action by "this Lee County plaintiff would have been reviewed by the Second District,"²⁴⁹ which would have followed the recent Second District opinion that the Fifth Circuit applied. The assumption is that the Lee County plaintiff would have filed any state action in Lee County within the second district. The plaintiff might well have found state venue proper for a suit against the corporate defendant in Osceola County, which is within the Fifth District, and brought his hypothetical state action there. If the Fifth District substantive rule conflicted with the Second District rule, how would the federal Middle District judge know which to apply, since, in fact, the Lee County plaintiff did not actually file in any state court?

One more possibility exists, which if not a Gordian knot is at least a jurisprudentially awkward situation. Under Judge Shadur's view the same judge may apply the law of Florida differently to similar cases. The federal Southern District includes counties within the venue of the state's Second, Third, and Fourth District Courts of Appeal.²⁵⁰ Federal District Judge Wisely, of the Southern District of Florida, has two cases on her diversity docket on a given day. They raise identical questions of law. The "proper venue" of the one, if it had been brought in state court, would be Dade County in the state's Third District. The proper venue of the other would have been in Broward County in the Fourth District. Decisions of the courts of appeal for the Third District conflict with those of the Fourth District. Judge Wisely rules in favor of one plaintiff and the next hour in the same

Statutes section 47.051 (1991).

247. See Appendix A.

248. See *id.*

249. *Farmer*, 539 F.2d at 563.

250. See Appendix A.

courtroom rules against the other plaintiff. These results might be difficult to explain to laypersons, seeking equality under “the law of Florida.”²⁵¹

Neither the United States Supreme Court nor the Eleventh Circuit Court of Appeals has considered these issues of applying state law where there are intrastate conflicts.

H. *Can the Dilemma be Avoided—Abstention and Certification*²⁵²

There are some instances where federal courts can avoid deciding issues of state law, and thus avoid the problem of conflicting state appellate court decisions. In certain cases it is appropriate for a federal court to abstain from deciding the case. However, cases where abstention is proper are relatively rare.²⁵³ The Supreme Court has held that “the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.”²⁵⁴

In some instances the dilemma can be avoided through the process of certification of questions of state law to the Florida Supreme Court.²⁵⁵

251. Where interstate conflicts exist, similar results could occur. For example, where multiple parties are involved in one occurrence, different state laws may apply to different parties. However, that situation strikes the objective observer less heavily because different substantive rules among states are inherent in the federal system.

252. Only 12 states and the District of Columbia lack some certification procedure. Of those that have adopted it, eight (including Florida) make certification of questions of state law to the highest state court available only to federal circuit courts and the United States Supreme Court. The other states and Puerto Rico allow certification by federal district courts. Thirteen states and Puerto Rico allow certification from courts of other states. See Yonover, *supra* note 223, at 16-17 (citing the various state statutes, rules, and constitutional provisions dealing with certification).

253. For a discussion of the various abstention doctrines, see 17A PRACTICE AND PROCEDURE, *supra* note 144, §§ 4241-47.

254. *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943).

255. FLA. CONST. art. V, § 3(b)(6); FLA. STAT. § 25.031 (1993); FLA. APP. R. 9.150. On the process of certification, see generally Larry M. Roth, *Certified Questions from the Federal Courts: Review and Re-proposal*, 34 U. MIAMI L. REV. 1 (1979); Robert B. Lillich & Raymond T. Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 UCLA L. REV. 888 (1971); Vincent L. McKusick, *Certification: A Procedure for Cooperation Between State and Federal Courts*, 16 ME. L. REV. 33 (1964); 17A Practice and Procedure, *supra* note 144, § 4248. One problem with certification is that it has the potential for creating long delays in adjudication of private disputes. See Brian Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U.

However, Florida's federal trial courts are not permitted to certify questions of state law to the Florida Supreme Court. Only federal appellate courts and the United States Supreme Court have that privilege. Given the limited jurisdiction of the Florida Supreme Court available to state litigants, it may be that federal court certification is the best strategy for a litigant to get a question answered by the Florida Supreme Court.²⁵⁶ This strategy may give federal litigants an advantage over state litigants. It may further disadvantage all state litigants by tying up the supreme court's docket with federally certified questions.²⁵⁷

Though some problems can be avoided by use of abstention and certification, those devices are of only limited utility given the myriad of problems surrounding conflicting state appellate decisions. Abstention is usually inappropriate or forbidden, and certification is often impractical—if not for the litigants,²⁵⁸ then for the courts that are involved.

I. *When Abstention is Unavailable and Certification Impractical—What Then?*

What should a federal judge do when faced with conflicting decisions by state intermediate appellate courts? Is Judge Marshall correct in saying that he is bound by *Bosch* and the decisions of his circuit court to follow the state supreme court predictive approach; or, is Judge Shadur right when he says that he is not bound by those same holdings because those courts did

MIAMI L. REV. 717 (1969).

256. *But see supra* text accompanying note 236.

257. In *Thiry v. Atlantic Monthly Co.*, 445 P.2d 1012 (Wash. 1968), a question of state law had been certified by a United States District Court to the Supreme Court of Washington. An obviously disgruntled Judge Hale dissented, and stated: "The question of speed, of course, gives rise to another question of policy. At the time the instant case was argued in this court . . . , this court had pending a backlog of approximately 700 cases, some of which were of high precedential value and of exigent importance to the parties." *Id.* at 1014-15 (Hale, J., dissenting).

258. *See Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 228 (1960) (Douglas, J., dissenting), *rev'd on other grounds*, 377 U.S. 179 (1964).

Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled—absent unique and rare situations—to adjudication of their rights in the tribunals which Congress has empowered to act.

Id.

not consider the problem in the context of states' internal choice of law rules?

Since the United States Supreme Court has never addressed the problem, it seems that the only way to solve it is to use a United States Supreme Court predictive approach. Would the United States Supreme Court hold that in deciding issues of state law, consideration should be given to a state's internal choice of law rules? Should it matter whether a state has a viable certification process whereby federal courts can certify questions of state law to the highest state court? These and similar questions can only be answered by the United States Supreme Court. If the past is any guide, it may take years for the answers to come.

Meanwhile, state and federal judges (and no doubt many lawyers) deplore the problem of conflicting intermediate appellate court decisions. Judge Marshall has mentioned "the confusion engendered by the failure of the various districts and divisions of the appellate court to follow each others' rulings"²⁵⁹ While this is perhaps lamentable, it nevertheless reflects 'state law' within the meaning of *Erie* and we are therefore required to take account of it."²⁶⁰

Similar concern was expressed by Florida Supreme Court Justice James C. Adkins concurring in the adoption of the Florida Rules of Appellate Procedure. While concurring in their adoption, Justice Adkins pointed out that

the present rules of appellate procedure fail to solve a problem which is causing confusion in the case law of Florida. The district courts of appeal are frequently expressly recognizing in opinions that a decision is in conflict with a sister district court. Unless one of the parties brings a petition for certiorari to this Court the conflict remains in the reported case law and the trial judge is faced with the dilemma of selecting one of two conflicting district courts of appeals decisions as the proper case law. *The law is unsettled.*²⁶¹

IV. RECOMMENDATIONS

The Florida legal system has a long history of cooperation with the

259. *Roberts v. Western-Southern Life Ins. Co.*, 568 F. Supp. 536, 541 n.8 (N.D. Ill. 1983) (citing *Mattis & Yalowitz*, *supra* note 190, at 571).

260. *Id.*

261. *The Florida Bar Re: Rules of Appellate Procedure*, 463 So. 2d at 1123-25 (Adkins, J., concurring) (emphasis added).

federal judiciary. Florida was the first state to have a process whereby federal courts could certify questions of Florida law to the state supreme court. Florida was the first state to have that process approved by the United States Supreme Court. The Florida Legislature adopted its certification statute in 1945.²⁶² In *Clay v. Sun Insurance Office, Ltd.*,²⁶³ Justice Frankfurter credited the Florida Legislature with “rare foresight” in dealing with “the problem of authoritatively determining unresolved state law involved in federal litigation by [enacting] a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision.”²⁶⁴ The statute lay dormant until the United States Supreme Court suggested, in the *Clay* opinion, that Florida adopt a procedure for its use. A procedure was adopted,²⁶⁵ and the state law question in *Clay* was certified to the Supreme Court of Florida.²⁶⁶ Subsequently, the procedure was made part of the state constitution.²⁶⁷

Florida is a cosmopolitan state and much of the work of the relevant federal courts is the business of Florida. Nonetheless, the burden of this article is not to suggest changes in Florida’s stare decisis approach merely to facilitate the work of federal judges who must apply “the law of Florida.” All Florida citizens, those who litigate in state courts as well as federal courts and those who plan transactions to which Florida law might apply, will benefit by a greater respect for the effect of the doctrine of stare decisis on court decisions. We recommend that horizontal precedential effect be accorded to decisions of Florida’s courts of appeal. We begin by examining the experience of a state where that solution has been tried.

A. *A Model for Statewide Stare Decisis*

Until about three years ago, the problem of unresolved conflicts among decisions of Michigan’s intermediate appellate court had become scandalous.²⁶⁸ Although that state has only one such court, the Michigan Court of Appeals,²⁶⁹ the twenty-four judges²⁷⁰ are elected from three judicial

262. FLA. STAT. § 25.031 (1946).

263. 363 U.S. at 207.

264. *Id.* at 212 (citing FLA. STAT. § 25.031 (Supp. 1957)).

265. FLA. R. APP. P. 4.61 (current version at FLA. R. APP. P. 9.150).

266. *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 737 (Fla. 1961).

267. FLA. CONST. art. V, § 3(b)(6).

268. Edward M. Wise, *The Legal Culture of Troglodytes: Conflicts between Panels of the Court of Appeals*, 37 WAYNE L. REV. 313 (1991); see also Mattis, *Stare Decisis Michigan*, *supra* note 191, at 265.

269. MICH. CONST. art. VI, § 1.

270. MICH. COMP. LAWS ANN. § 600.301 (Supp. 1993).

districts²⁷¹ and sit, rotating in several locations around the state, in panels of three.²⁷² Before November 1, 1990, the stare decisis rules in Michigan were: 1) all trial courts were bound by the decision of a panel of the court of appeals (vertical stare decisis obtained), but 2) one panel of the court of appeals was not bound by the decision of any other panel (horizontal stare decisis was not honored).²⁷³ The similarity between Michigan's pre-1990 approach and Florida's present approach, despite the difference in judicial structure, is manifested in a quotation often repeated in Michigan cases that sounds like Chief Justice Barkett's recent statement about Florida stare decisis. The Michigan Court of Appeals stated:

While decisions of this Court [of appeals] are not precedent setting in the sense that subsequent panels of this Court are bound to follow earlier opinions, "a decision of any division of this Court is controlling statewide until a contrary decision is reached by another division on the identical question or until such decision is reversed by the Supreme Court."²⁷⁴

Not surprisingly, a chaos of conflicting decisions reigned in Michigan.²⁷⁵ Later decisions did not purport to overrule prior inconsistent decisions, but one panel would merely shrug off authority that it did not

271. *Id.* § 600.302.

272. MICH. CT. R. 7.201(D), 7.201(F).

273. Mattis, *Stare Decisis Michigan*, *supra* note 191, at 272-85.

274. *City of Detroit v. Recorder's Court Traffic & Ordinance Judge*, 304 N.W.2d 829, 835 (Mich. Ct. App. 1981) (quoting *Hackett v. Kress*, 133 N.W.2d 221, 223 (Mich. Ct. App. 1965)).

Compare the Michigan quotation with Chief Justice Barkett's statement that the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by the supreme court, that in the absence of interdistrict conflict, district court decisions bind all Florida trial courts, and that "[c]ontrarily, as between District Courts of Appeal, a sister district's opinion is merely persuasive." *Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992).

275. See *Wise*, *supra* note 268, at 318; see also Mattis, *Stare Decisis Michigan*, *supra* note 191, at 274-301. For example, on the issue of whether a third party could testify about an out-of-court identification of a criminal defendant made by another witness, the court of appeals held such testimony inadmissible 12 times, admissible nine times, and one time it declined to decide because of the harmless error rule. *People v. Malone*, 483 N.W.2d 470, 474 (Mich. Ct. App. 1992) (Connor, J., concurring) (citing *People v. Newcomb*, 476 N.W.2d 749, 752 (Mich. Ct. App. 1991), *appeal denied*, 483 N.W.2d 904 (Mich. 1992)). The conflict was ultimately resolved by the court of appeals pursuant to Administrative Order No. 1990-6. See *Newcomb*, 476 N.W.2d at 752.

choose to follow.²⁷⁶ Then in late 1990 the Supreme Court of Michigan²⁷⁷ promulgated Administrative Order 1990-6 designed to end the crisis.²⁷⁸ It has succeeded very well.

The most dramatic part of Administrative Order 1990-6 is its first sentence: "A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990."²⁷⁹ The published decision remains controlling authority unless reversed, modified, or overruled by the supreme court or a special panel of the court of appeals. Provision is made for convening a special panel where a panel indicates in the text of its opinion that it follows a prior published decision only because it is required to do so by Administrative Order 1990-6. In other words, the disgruntled panel may trigger the conditions necessary for convening the special panel, but it must follow the prior decision. The new order neatly avoids a conflict in the appellate court. If a majority of the appellate judges believe that the issue merits further attention, then twelve judges are selected who together with the chief judge form the special panel. The panel decision is vacated and the special panel resolves the matter by a decision that is binding statewide upon the court of appeals as well as upon all lower courts, unless reversed or modified by the Michigan Supreme Court.²⁸⁰

The horizontal stare decisis rule has worked well in Michigan. Without the convening of a special panel, conflicts existing before November 1, 1990, have been resolved in numerous cases²⁸¹ by a published panel

276. Mattis, *Stare Decisis Michigan*, *supra* note 191, at 274-99. Dean Wise's observation that refusing to follow a prior decision is in fact no different from overruling it, is highly persuasive. Wise, *supra* note 268, at 321.

277. The supreme court shall prescribe the rules for the practice and procedure of the court of appeals. MICH. CONST. art. 6, § 10.

278. Administrative Order No. 1990-6, 436 Mich. lxxxiv (1990), was effective November 1, 1990, and was to remain in effect until December 31, 1991. It was continued in effect by Administrative Order No. 1991-11, 439 Mich. cxliv (1991), until December 31, 1992, and by Administrative Order No. 1992-8, 441 Mich. lii (1992), until December 31, 1993. See *Jennings v. Southwood*, 499 N.W.2d 460, 464 (Mich. Ct. App. 1993) (Neff, J., concurring).

279. Administrative Order No. 1990-6, 436 Mich. xxxiv (1990).

280. *Id.* A petition to convene a special panel is not a prerequisite to filing an application for leave to appeal to the Michigan Supreme Court from the panel decision. *Id.*

281. *Gonyea v. Motor Parts Fed. Credit Union*, 480 N.W.2d 297 (Mich. Ct. App. 1991) (cited in *Rouch v. Enquirer & News of Battle Creek Michigan*, 487 N.W.2d 205, 221 (Mich. 1992) (Riley, J., concurring) as "controlling authority" and "binding precedent") (followed in *Prysak v. R.L. Polk Co.*, 483 N.W.2d 629, 636 (Mich. Ct. App. 1992)); *People v. Lannom*, 480 N.W.2d 321 (Mich. Ct. App.), *aff'd*, 490 N.W.2d 396, 398 (Mich. 1992) (per curiam).

decision issued after November 1, 1990, that pursuant to Administrative Order 1990-6 binds all panels.²⁸² Conflicts that would have been created were it not for Administrative Order 1990-6 have been avoided in cases where the deciding panel expressly indicated that but for Administrative Order 1990-6 it would rule contrary to a prior decision.²⁸³ In many other

One justice would have denied leave to appeal to the supreme court because the split of authority in the court of appeals was resolved by a "first out" opinion under the Administrative Order. *Id.* at 399 (Levin, J., separate opinion). Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., 496 N.W.2d 373 (Mich. Ct. App. 1992), *appeal granted*, 506 N.W.2d 877 (1993); People v. Gardner, 487 N.W.2d 515 (Mich. Ct. App. 1992) (noting case discussed and followed in People v. Parr, 494 N.W.2d 768, 771 (Mich. Ct. App. 1992) (Corrigan, J., concurring) (questioning the majority analysis of Gardner), *appeal denied*, 505 N.W.2d 585 (Mich. 1993)); Rouse v. Wesley, 494 N.W.2d 7 (Mich. Ct. App. 1992), *appeal denied*, 503 N.W.2d 440 (Mich. 1993); Auto Club Ins. Ass'n v. Frederick & Herrud, Inc., 479 N.W.2d 18 (Mich. Ct. App. 1991) (resolving on remand a complex ERISA issue, according to Wolverine Mut. Ins. Co. v. Rospach Corp. Employee Benefit Plan, 489 N.W.2d 204, 207 n.3 (Mich. Ct. App. 1992)), *appeal granted*, 491 N.W.2d 571 (Mich. 1992); Brown v. Brown, 480 N.W.2d 292 (1991) (seeking grandparents' visitation rights); People v. Landt, 469 N.W.2d 37 (Mich. Ct. App.), *rev'd*, 475 N.W.2d 825 (Mich. 1991) (noting discussion in People v. Schollaert, 486 N.W.2d 312, 317 n.5 (Mich. Ct. App.), *appeal denied*, 494 N.W.2d 750 (Mich. 1992)); People v. Punga, 465 N.W.2d 53 (Mich. Ct. App. 1991); Postema v. Postema, 471 N.W.2d 912 (Mich. Ct. App. 1991) (resolving long-standing conflict regarding postgraduate degree as a divisible marital asset); Smith v. Michigan Bell Tel. Co., 472 N.W.2d 32 (Mich. Ct. App. 1991).

282. The rule that a post November 1, 1990, decision of a panel binds all panels of the court of appeals is now well accepted. In addition to the results and language of the cases cited in notes 239-40 *supra*, the court of appeals sometimes notes that its decision creates a new rule of law that will bind in the future. *E.g.*, Borman v. State Farm Fire & Cas. Co., 499 N.W.2d 419, 422 (Mich. Ct. App. 1993) (following a pre-Administrative Order decision); Brown v. Yousif, 499 N.W.2d 446, 450 (Mich. Ct. App. 1993); Rowell v. Security Steel Processing Co., 491 N.W.2d 265, 266 (Mich. Ct. App. 1992), *appeal granted in part*, 500 N.W.2d 469 (Mich. 1993).

283. The court in Fetz Eng'g Co. v. Ecco Sys., Inc., 471 N.W.2d 85, 87 (Mich. Ct. App. 1991), *vacated*, 483 N.W.2d 619 (Mich. 1992), said that the precedent case was wrongly decided and that it followed that case only because it was required to do so by Administrative Order No. 1990-6. A petition to submit *Fetz* to a special panel pursuant to Administrative Order No. 1990-6 was denied. The supreme court granted leave to appeal, (as explained in Dane Constr., Inc. v. Royal's Wine & Deli, Inc., 480 N.W.2d 343, 344 n.1 (Mich. Ct. App. 1991), *appeal denied*, 486 N.W.2d 747 (Mich. 1992)), *vacated* the court of appeals opinion, and remanded to the trial court. *Fetz*, 483 N.W.2d at 619.

Other cases where a conflict would have been created but for Administrative Order No. 1990-6 are: People v. Hadley, 501 N.W.2d 219 (Mich. Ct. App. 1993) (dissenting judge believed prior decisions were distinguishable); Generou v. Kalamazoo Regional Psychiatric Hosp., 480 N.W.2d 638, 639 (Mich. Ct. App. 1991), *appeal denied*, 486 N.W.2d 733 (Mich. 1992); People v. Martinez, 485 N.W.2d 124 (Mich. Ct. App. 1992); Askwith v. City of Sault

cases the reluctant compliance of a panel in following a prior published panel decision under Administrative Order 1990-6 indicates that a conflict might well have been created but for the order.²⁸⁴ A jurisprudentially sound deference for stare decisis is manifested in those cases that merely follow the horizontal precedent as required by the Administrative Order, without further significant comment.²⁸⁵

Ste. Marie, 477 N.W.2d 448 (Mich. Ct. App. 1991) (concurring judge believed that precedent case was correctly decided); Makky v. General Dynamics Land Sys., Inc., 486 N.W.2d 309 (Mich. Ct. App. 1992), *appeal denied*, 508 N.W.2d 507 (Mich. 1993); Benson v. Callahan Mining Corp., 479 N.W.2d 12 (Mich. Ct. App. 1991), *appeal denied*, 485 N.W.2d 501 (Mich. 1992).

284. *E.g.*, Jenerou v. Jenerou, 503 N.W.2d 744 (Mich. Ct. App. 1993); People v. Stein, Nos. 142771, 88-502, 1993 WL 195679 (Mich. Ct. App. June 8, 1993); Warden v. Fenton Lanes, Inc., 495 N.W.2d 849, 854 (Mich. Ct. App. 1992), *appeal granted in part*, 506 N.W.2d 877 (Mich. 1993); People v. Landis, 494 N.W.2d 865 (Mich. Ct. App. 1992), *appeal denied*, 505 N.W.2d 584 (Mich. 1993); State Farm Fire & Cas. Co. v. Fisher, 481 N.W.2d 743, 746 (Mich. Ct. App. 1991), *appeal denied*, 496 N.W.2d 294 (Mich. 1993).

285. *E.g.*, Jennings v. Southwood, 499 N.W.2d 460 (Mich. Ct. App. 1993); Lombardi v. William Beaumont Hosp., 502 N.W.2d 736, 741 (Mich. Ct. App. 1993) (noting that to the extent the "suggesting" in a later 1991 decision conflicted with an earlier 1991 decision, the earlier 1991 decision "is controlling authority under Administrative Order Nos. 1990-6 and 1992-8, since the *Sobh* [earlier] preceded the *Bachula* [later] by several months"); People v. Cutchall, 504 N.W.2d 666, 672 (Mich. Ct. App. 1993) (following People v. Buck, 496 N.W.2d 321 (Mich. Ct. App. 1992), without further comment; concurring opinion would rule otherwise were it not for the prior decision); People v. Gallego, 502 N.W.2d 358 (Mich. Ct. App. 1993); Holland v. Liedel, 494 N.W.2d 772, 775 n.1 (Mich. Ct. App. 1992), *appeal denied*, 503 N.W.2d 910 (Mich. 1993); Keen v. Keen, 486 N.W.2d 105, 106 (Mich. Ct. App. 1992); Pavlov v. Community Emergency Medical Serv., Inc., 491 N.W.2d 874, 879 (Mich. Ct. App. 1992), *appeal denied*, 500 N.W.2d 478 (Mich. 1993); People v. Buck, 496 N.W.2d 321, 334 (Mich. Ct. App. 1992), *appeal denied*, 498 N.W.2d 742 (Mich. 1993) (following post-Administrative Order decisions of panels of the court of appeals on three issues, one of which was then pending before the supreme court: "until such time as our Supreme Court decides the issue, we are bound by *Deans*"); People v. Malone, 483 N.W.2d 470, 472 (Mich. Ct. App. 1992), *appeal granted in part*, 500 N.W.2d 470 (Mich. 1993); People v. Spearman, 491 N.W.2d 606, 611 (Mich. Ct. App. 1992), *appeal denied*, 497 N.W.2d 188 (Mich.), *rev'd in part sub nom.* People v. Rush 504 N.W.2d 185 (Mich. 1993); Prysak v. R.L. Polk Co., 483 N.W.2d 629, 636 (Mich. Ct. App. 1992); Reese v. County of Wayne, 483 N.W.2d 671, 672 (Mich. Ct. App.) (seeing "no reason to disagree"), *appeal denied*, 495 N.W.2d 382 (Mich. 1992); Richardson v. Warren Consol. School Dist., 496 N.W.2d 380, 382 (Mich. Ct. App. 1992); Thompson v. Fitzpatrick, 501 N.W.2d 172 (Mich. Ct. App. 1992), *appeal denied*, 503 N.W.2d 911 (Mich. 1993); People v. Milton, 478 N.W.2d 740 (Mich. Ct. App. 1991), *appeal denied*, 494 N.W.2d 745 (Mich. 1992); People v. Williams, 477 N.W.2d 877 (Mich. Ct. App. 1991), *appeal denied*, 479 N.W.2d 697 (Mich. 1992); People v. Williams, 473 N.W.2d 727 (Mich. Ct. App. 1991) (following a post-Administrative Order published panel decision that was later overruled by special panel in People v. Hill, 480 N.W.2d 913 (Mich. Ct. App.

In the almost three years of the operation of Administrative Order 1990-6 special panels have convened only three times.²⁸⁶ Were it not for Administrative Order 1990-6, the Supreme Court of Michigan would have had the duty to resolve conflicts not only in these three cases but in the many others that the court of appeals resolved and avoided without special panel treatment.²⁸⁷

Even though Administrative Order 1990-6 has proved generally

1991), *appeal denied*, 480 N.W.2d 909 (Mich. 1992) in a seven to six decision), *appeal denied*, 478 N.W.2d 473 (Mich. 1991); Yarrick v. Village of Kent City, 473 N.W.2d 774, 775 (Mich. Ct. App. 1991), *vacated*, 489 N.W.2d 82 (Mich. 1992).

Occasionally a panel follows horizontal precedent noting that it agrees with the prior decision. *E.g.*, Wolverine Mut. Ins. Co. v. Rospatch Corp. Employee Benefit Plan, 489 N.W.2d 204, 207 (Mich. Ct. App. 1992); People v. Watts, 464 N.W.2d 715, 716 (Mich. Ct. App. 1991), *appeal denied*, 478 N.W.2d 90 (Mich. 1991); National Indem. Co. v. Budget Rent-A-Car Sys[s], Inc., 489 N.W.2d 175, 177 n.1 (Mich. Ct. App. 1992) (agreeing with and following what was arguably dicta).

It would be difficult to ascertain the exact number of cases that have followed prior panel precedent because many decisions are unpublished. Of course, a panel is bound by post-November 1, 1990, published decisions, even though the deciding panel's decision is not to be published. Administrative Order No. 1990-6, 436 Mich. lxxxiv (1990); Keen v. Keen, 486 N.W.2d 105, 106 n.2 (Mich. Ct. App. 1992). Only published decisions, however, have precedential effect under the rule of stare decisis. MICH. CT. R. 7.215(C)(1); *see* Makowski v. Towles, 489 N.W.2d 133, 134 n.1 (Mich. Ct. App. 1992); People v. Polus, 495 N.W.2d 402, 405 (Mich. Ct. App. 1992).

286. Maner v. Ford Motor Co., 493 N.W.2d 909 (Mich. Ct. App. 1992) (resolving four year old conflict regarding deduction of other benefits from worker's compensation weekly wage loss payments), *aff'd*, 502 N.W.2d 197 (Mich. 1993); People v. Brashier, 496 N.W.2d 385 (Mich. Ct. App. 1992) (resolving sixteen year old conflict regarding the definition of "gross indecency"), *appeal granted*, 508 N.W.2d 490 (Mich. 1993); People v. Hill, 480 N.W.2d 913 (Mich. Ct. App. 1991) (noting justifications for sentencing judge's departure from mandatory minimum sentences), *appeal denied*, 480 N.W.2d 909 (Mich. 1992).

287. Sometimes the supreme court must resolve a conflict among court of appeals judges. One example is Bowie v. Arder, 490 N.W.2d 568 (Mich. Ct. App. 1992). Panels of the court of appeals were having difficulty interpreting whether a supreme court decision related to the trial court's lack of subject matter jurisdiction or the parties' lack of standing. The later of two post-Administrative Order panel decisions distinguished the earlier one and said that the earlier interpretation of the supreme court decision was dicta. The supreme court then had to decide whether its prior decision rested on a lack of standing or subject matter jurisdiction. *Id.*

Following two post-Administrative Order panel decisions taking different viewpoints on whether a minor's estate as well as the minor's family could recover under the dramshop act (the latter labeling the former's interpretation dicta), the supreme court reversed both decisions and held that neither the estate nor the family could recover. *See* LaGuire v. Kain, 487 N.W.2d 389 (Mich. 1992); Estate of Kuikstra v. Cheers Good Time Saloons, Inc., 489 N.W.2d 468 (Mich. 1992).

successful, it was originally issued over the dissent of Justice Boyle. She objected that “[s]uch a momentous change in the legal culture of this state should be preceded by full research and study of such matters as the experience with the conflict question in the intermediate courts of appeals of our sister states”²⁸⁸ Florida has an opportunity for such research and study during the years before the convening of the constitution revision commission.²⁸⁹ The horizontal, or statewide stare decisis model may prove useful.

The similarity between Michigan’s pre-1990 approach and Florida’s present approach, despite the difference in judicial structure, has been noted.²⁹⁰ We may now ask whether, in view of the difference in judicial structure, the conflict avoidance technique of a state with a unitary appellate court could be utilized in a state with multiple appellate courts. If a horizontal stare decisis model is desirable and practicable, we must then

288. Administrative Order No. 1990-6, 436 Mich. lxxxiv, lxxxvi (1990).

289. FLA. CONST. art. XI, § 2. Under article XI, section 2, of the Florida Constitution, the constitution revision commission will convene in 1998.

Other states where studies have been done include Illinois and New Mexico. Illinois is a unitary appellate court state, but unlike Michigan, it has not adopted horizontal stare decisis. ILL. CONST. art. VI, § 1. The judges of the Appellate Court of Illinois are elected from five judicial districts and each district must have at least one division to which at least three judges are assigned. *Id.* §§ 2, 5. No action has been taken to change the judge-made rules that a decision of the appellate court is not binding on the appellate court in “other appellate districts,” and is binding on the trial courts throughout the state. *State Farm Fire & Casualty Co. v. Yapejian*, 605 N.E.2d 539, 542 (Ill. 1992). The appellants in a more recent case contended that conflicts within the appellate court constituted grounds for reversal. *See* Brief for Appellant at 2, 12-15, *Roach v. Springfield Clinic*, 623 N.E.2d 246 (Ill. 1993). The supreme court, however, did not mention equal protection arguments in its opinion. *See* *Roach v. Springfield Clinic*, 623 N.E.2d 246 (Ill. 1993). Interestingly enough, however, the Illinois Supreme Court had previously talked in clear equal protection language a few years before when it said that “by granting these [Third District] defendants a new trial, we would be *unfairly discriminating* against other similarly situated defendants . . . who happened to be tried outside the third district.” *People v. Harris*, 526 N.E.2d 335, 341 (Ill. 1988), *cert. denied sub nom. Wilson v. Illinois*, 488 U.S. 902 (1988) (emphasis added). On the Illinois experience, see generally Mattis & Yalowitz, *supra* note 190, at 571 (advocating conflict avoidance); J. Timothy Eaton, et al., *Resolving Conflicts in the Illinois Appellate Court*, 78 ILL. B.J. 182 (1990) (recommending conflict resolution by a special panel of judges from the appellate court); *see also* Taylor Mattis, *Precedential Value of Decisions of the Court of Appeals of the State of New Mexico*, 22 N.M. L. REV. 535, 538 (1992) (discussing instructive dialogue between two New Mexico intermediate appellate court judges, found in *State v. Bothné*, No. 13,425 (N.M. Ct. App. Dec. 4), *cert. denied*, 822 P.2d 671 (N.M. 1991)).

290. *See supra* note 274 and accompanying text.

inquire whether the change should be by supreme court rule or precedent or by constitutional amendment.

B. *Achieving Statewide Horizontal Stare Decisis in Florida*

1. The Principle

We might begin with formulating a principle and regime. For the time being, we shall call the former the Principle. The issue to be examined in the following subsection is whether any change should be made by supreme court rule or precedent or by constitutional amendment. The Principle might be stated:

Any panel of a district court of appeal must follow the holding of [or, the rule of law established by] a prior published decision of any district court of appeal issued on or after [the effective date of this enactment].

A choice of wording allows for consideration of which meaning is clearer: a “rule of law established by” a prior decision, or “the holding of” a prior decision. Either phrase would be more specific than “maintain[ing] uniformity in the court’s decisions,” under Florida Rule of Appellate Procedure 9.331, about which courts have a history of disagreement.²⁹¹ Probably, the “holding of” a prior case is the preferable terminology, even though legal scholars from law students to supreme court justices will disagree about what was the holding of a particular case. That inherent defect, if it is one, of the common-law system cannot be addressed here.

Consistent with *Department of Legal Affairs v. District Court of Appeal, 5th District*, only prior *published* decisions of district courts would be precedent.²⁹² Adoption of the Principle would mean that a panel of any district would be bound by the district court decision of its own or any other district. The “law of the district” would be replaced by “the law of Florida.” The need for resolution of intradistrict conflicts would exist no more, with the institution of statewide horizontal stare decisis.

Vertical stare decisis would continue, so that all trial courts would be bound by any district decision. No longer would it be said that “absent a conflicting district court decision,” a trial court is bound. The dilemmas now facing state and federal trial judges, federal appellate judges, as well as

291. See *supra* notes 108-18 and accompanying text.

292. 434 So. 2d 310 (Fla. 1983).

litigants and legal counselors, would be eased.

Providing that published decisions have statewide precedential effect only after a certain date would prevent the confusion that would otherwise arise where conflicts presently exist. The district decision “first out” after enactment of the Principle would resolve the old conflict and stand as precedent for the future.

Let those who fear that uniformity of law within a particular jurisdiction means stagnation in the law²⁹³ be comforted. That has not been the case in the jurisdictions that require horizontal stare decisis.²⁹⁴ The foremost argument against that fear is that there is the Supreme Court of Florida, which this recommendation does not suggest abolishing. A decision made by the force of the Principle could be certified as a question of great importance, under article V, section 3(b)(4), of the Florida Constitution, as decisions in direct conflict with other district court decisions now are certified. At least since 1956, a primary motivation of constitutional amendments has been to free the supreme court to use its discretionary jurisdiction to decide matters of important public policy.²⁹⁵ This proposal would foster that goal. Under the present system, if the supreme court chooses not to review, the conflict persists. Under the Principle, if the supreme court chose not to review, no conflict would have been created in the first place.

Moreover, even absent supreme court review, a decision of a district court of appeal would not be carved in stone. Procedures would be provided for a special en banc panel of district appellate judges to review rules of law to which the supreme court had not spoken.

2. Some Details

Provision should be made to implement a procedure whereby a limited number of district appellate judges could convene in a special en banc panel and review certain district court decisions. To trigger eligibility for such review, the panel opinion would have to state that the court is following a

293. See, e.g., Administrative Order No. 1990-6, 436 Mich. lxxxiv, lxxxvi-vii (1990) (Boyle, J., dissenting) (stating “[c]onflict itself is neither bad or good; it may be an agent for change or the source of chaos”). The authors could not disagree more with the first clause. As for conflict’s being an agent for change, a “bad” law uniformly applied within a jurisdiction may well bring change more quickly than one applied willy-nilly to some parties while other parties get the benefit of the “good” law.

294. Compare the experiences of the United States Courts of Appeals that require horizontal stare decisis, as well as the experience of Michigan.

295. See Mattis, *Stare Decisis Florida*, *supra* note 23, at 144-45.

prior published decision only because it is required by the Principle to do so.²⁹⁶ Upon the vote of a majority of the judges of the district courts,²⁹⁷ the special en banc panel would convene. Perhaps too detailed for this article is the question of how many district judges should be on the en banc panel, or where it should meet. However, a judge or judges from each of the five districts should be included. Florida has already had experience with large en banc panels. In the present system for resolving intradistrict conflicts all the judges of each district—the thirteen judges of the First District, the twelve of the Second, the eleven of the Third, the twelve of the Fourth, and the nine of the Fifth—²⁹⁸ are included in their respective intradistrict en banc panels.²⁹⁹ Certainly the special en banc panel should not include all the appellate judges. Perhaps the five chief judges might be appropriate decision makers³⁰⁰ and Tallahassee an appropriate meeting place. To the extent that convening a special en banc panel is burdensome, serious consideration will be given to triggering the mechanism.³⁰¹ Under the present system it is all too easy for a panel in one district, because of a slight preference for a different rule of law, to create a conflict by disagreeing and choosing not to follow the decision of another district. The administrative burden is a small price to pay if it will ameliorate the problems previously discussed.

The statement that the court is following a prior published decision only because it is required by the Principle should not automatically trigger a vote by all appellate judges on whether en banc treatment is desirable. Procedure could require that only an appellate judge could request the vote, or it might allow the parties to petition for special en banc treatment. Again, Florida could draw on its experience with intradistrict en banc procedure to inform this decision. Under the present rule an intradistrict hearing en banc may be ordered only by a district court on its motion, but a rehearing en banc may be ordered by the court on its own motion or on

296. This might be called the “chopped hay” statement: The prior published decision that we must swallow goes down like chopped hay.

297. This would mean a majority of the appellate judges who participate in the vote. Cf. *In re* Rule 9.331, Determination of Causes by a Dist. Court of Appeal En Banc, Florida Rules of Appellate Procedure, 416 So. 2d 1127, 1129 (Fla. 1982) (interpreting Rule 9.331 to mean a majority of the appellate judges who participate in the vote).

298. FLA. STAT. § 35.06 (1990).

299. See FLA. R. APP. P. 9.331.

300. The chief judge of each of the district courts of appeal is selected by the members of the court of that district. FLA. STAT. § 35.12 (1991).

301. The special en banc panel of Michigan’s Court of Appeal has convened only three times in three years. See *supra* note 286 and accompanying text.

motion of a party.³⁰²

The authors apprehend no reason why the Principle of horizontal stare decisis should not be obtainable merely because Florida's appellate courts are multiple rather than unitary. Division of the state into districts should be retained for purposes of selection and retention of judges³⁰³ and for the convenience of litigants. Despite retention of appellate districts, with statewide horizontal stare decisis, the notion of "five balkanized districts confederated into a loose Floridian union"³⁰⁴ would tend to dissipate.

C. *Constitutional Amendment, Supreme Court Rule, or Precedent?*

There are several choices as to how the Principle could be put into effect on a statewide basis. It could be done by legislation, constitutional amendment, supreme court rule, or precedent.

The powers of our state government are constitutionally allocated among the three branches in such a way that, although it does not enjoy an exclusive power to make substantive law, the legislative branch exercises lawmaking power that takes precedence over the lawmaking powers respectively exercised by the executive and judicial branches. Nevertheless, the executive and judicial branches have a certain amount of lawmaking power that is reserved to them under the principle of separation of governmental power, particularly in managing the details of the business that they are charged with managing under the constitution.

It seems to us that putting the Principle into effect by legislative act would leave the statute open to attack on the ground that it intrudes on the judiciary's power to manage its own affairs. We believe that the principle should be put into effect either by constitutional amendment, supreme court rule, or by precedent—preferably by constitutional amendment as to the basic Principle, and by supreme court rule as to the details.

1. The Eleventh Circuit's Method of Adopting Stare Decisis

When the Fifth Circuit Court of Appeals was split into two circuits, the Fifth Circuit and the Eleventh Circuit, one of the first tasks undertaken by the new Eleventh Circuit was the adoption of a rule of stare decisis. The judges had concluded that they wanted to adopt the Fifth Circuit rule that

302. Fla. R. App. P. 9.331.

303. See FLA. STAT. §§ 35.08, 35.10 (1991).

304. *State v. Bamber*, 592 So. 2d 1129, 1132 (Fla. 2d Dist. Ct. App. 1991), *jurisdiction accepted*, 602 So. 2d 942 (Fla. 1992).

a prior decision of the circuit (panel or en banc) could not be overruled by a panel, but only by the court sitting en banc.³⁰⁵ One problem facing the court was the question of whether the rule should be adopted by court rule, or by precedent (i.e., stare decisis).³⁰⁶ There had been a great deal of discussion about this problem,³⁰⁷ and the court finally decided to adopt the Fifth Circuit rule by precedent in *Bonner v. City of Prichard*,³⁰⁸ the court's first case.

The court rejected the idea of adopting the rule by an informal and unrevealed consensus among the individual judges as being inconsistent with orderly administration of justice.³⁰⁹ It would not give fair notice to litigants, courts, and government agencies of what to expect.³¹⁰ Moreover, without the "imprimatur" of judicial decision, such a rule could be upset by changes in the composition of the court.³¹¹

Also rejected was the idea of adopting the Fifth Circuit rule of stare decisis under the rule-making power of the court.³¹² According to the court, neither the authorizing statute nor the Federal Rules of Appellate Procedure addresses the establishment of substantive law by the court.³¹³

The judges of this court, when judges of the former Fifth Circuit, maintained a distinct separation between their administrative and their judicial functions. The substantive law of the circuit was established by the exercise of judicial authority and procedural rules by administrative action. We consider it inappropriate to decide what this circuit's substantive law will be by any means other than judicial decision.³¹⁴

Of course the options open to the Eleventh Circuit were not as broad

305. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

306. *Id.*

307. See generally Thomas E. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 Sw. L.J. 687 (1981) (citing most of the discussion prior to the Eleventh Circuit's adoption of the rule).

308. *Bonner*, 661 F.2d at 1207.

309. *Id.* at 1210.

310. *Id.*

311. *Id.*

312. *Id.* In section 2071 of title 28 of the United States Code, Congress authorizes courts to prescribe rules for the conduct of their business. *Bonner*, 661 F.2d at 1211; see 28 U.S.C. § 2071 (1988). Rule 47 of the Federal Rules of Appellate Procedure adopted under authority of the statute, authorizes judges of the circuit to make rules of practice not inconsistent with the rules. *Bonner*, 661 F. 2d at 1211.

313. *Bonner*, 661 F.2d at 1211.

314. *Id.*

as the options under state law. As a practical matter, that court did not have the choice of legislation or constitutional amendment.

2. The Problem of Adoption by Supreme Court Rule

The Florida Constitution, article V, section 2 (a), provides:

The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.³¹⁵

It is arguable that by negative implication, this section forbids the Supreme Court of Florida to use its rule-making power for the purpose of creating substantive law. The provision speaks only of "rules for the practice and procedure in all courts."³¹⁶ The Principle under discussion would quite obviously be the creation of an entire body of substantive law, and is itself a rule of substantive law.

In promulgating Florida Rule of Appellate Procedure 9.331, providing for intradistrict en banc decisions, the Supreme Court of Florida carefully considered its constitutionality.³¹⁷ Nonetheless, questions have persisted. The argument is this: because article V, section 4(a), of the Florida Constitution specifically provides that three judges shall consider each case heard by the district courts, a different procedure cannot be authorized by the promulgation of a court rule.³¹⁸ Similarly, and perhaps a fortiori, a supreme court rule establishing a special en banc panel crossing district lines might be questioned.

Most instructive is the position of the Florida Supreme Court. In 1982 the Florida Conference of District Court of Appeal Judges petitioned the

315. FLA. CONST. art. V, § 2(a).

316. *Id.*

317. See *In re* Rule 9.331, Determination of Causes by a Dist. Court of Appeal En Banc, Florida Rules of Appellate Procedure, 374 So. 2d 992, 993 (Fla. 1979), *modified*, 377 So. 2d 700 (Fla. 1979).

318. See *id.* at 995 (Boyd, J., dissenting); *State v. Georgoudiou*, 560 So. 2d 1241, 1247-48 (Fla. 5th Dist. Ct. App. 1990) (Coward, J., dissenting), *review denied*, 574 So. 2d 141 (Fla. 1990); *Carroll v. State*, 497 So. 2d 253 (Fla. 3d Dist. Ct. App. 1985) (Hubbart, J., dissenting), *review denied*, 511 So. 2d 297 (Fla. 1987).

supreme court to consider an emergency rule change to address practical problems that had arisen in the en banc decisional process.³¹⁹ The chief judges of the district courts asked whether one three judge panel could overrule or recede from a prior decision of a three judge panel of the same district court.³²⁰ The supreme court responded, “[w]ithout addressing possible constitutional problems,” that *it would not by court rule* prohibit overruling or receding by a three judge panel, but it admonished the district judges to refrain from that action.³²¹

Justice Ehrlich believed that “taking it upon ourselves [the supreme court] to define intra-district conflict for the districts themselves would be overreaching and presumptuous.”³²² If that is so, then the supreme court’s taking it upon itself to forbid interdistrict conflicts might also be overreaching. The authors suggest that adoption of the Principle of horizontal stare decisis by supreme court rule would raise issues of constitutionality that need not be faced. Supreme court rules for implementing the procedural aspects, once the Principle is adopted, would be the proper use of article V, section 2(a) of the constitution.

3. The Problem of Implementation by Decision

The Supreme Court of Florida could do what the Eleventh Circuit did by taking an appropriate case and putting the rule into effect in the process of deciding that case. The problem with that method is that, although it would have “the imprimatur of judicial decision,”³²³ it would not carry the same precedential weight as the Eleventh Circuit’s decision did. There the court was adopting a well established rule that had been in effect in Florida, Georgia, and Alabama for decades (while these states were within the Fifth Circuit). The Florida rule would be brand new, and could be more easily upset by changes in the composition of the court simply because of its newness.

4. The Preferred Method—Constitutional Amendment

Putting the Principle into effect and establishing the special en banc panel by constitutional amendment would avoid many of the problems

319. *In re* Rule 9.331 Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure, 416 So. 2d at 1127.

320. *Id.*

321. *Id.* at 1128.

322. *Chase Fed. Sav. & Loan Ass’n v. Schreiber*, 479 So. 2d 90, 105 (Fla. 1985) (Ehrlich, J., concurring in part, dissenting in part), *cert. denied*, 476 U.S. 1160 (1986).

323. *See Bonner*, 661 F.2d at 1210.

suggested above, and would remove any questions as to the power of any particular branch of government to establish the rule. Just as a constitutional amendment removed any question of the power of the supreme court to "review a question of law certified" to it by a federal court,³²⁴ so would a constitutional amendment remove any question of the power to require the district courts to follow prior published decisions of any district court. The Principle under discussion should be made a part of article V, section 4, of the Florida Constitution. The statement of the Principle should be followed by the provision for special en banc treatment by judges from each district. The section or subsection might read:

Any panel of a district court of appeal must follow the holding of [or, the rule of law established by] a prior published decision of any district court of appeal issued on or after [the effective date of this amendment]. When a panel of a district court of appeal states in its opinion that it is following a prior published decision only because it is required to do so, a special en banc panel of the district courts of appeal may convene to rehear the case for the purpose of resolving the conflict which would have been created but for this provision.

The amendment could also specifically allow for supreme court rule to fix the number of district judges to sit on the special en banc panel and to provide for the manner of their selection from among the district judges. As for implementing the rest of the practice and procedures, the present article V, section 2(a) should suffice.

Since the en banc procedure suggested here would amount to the creation of a new court, article V, section 1, should be amended to include such a court among those named in the first sentence. The first sentence would then read: "The judicial power shall be vested in a supreme court, *a special en banc panel of the district courts of appeal*, district courts of

324. FLA. CONST. art. V, § 3(b)(6). In some early cases involving the certification procedure and abstention, it was questioned whether a state's highest court had the power to give what might arguably be an "advisory opinion." When the Fifth Circuit abstained from deciding a case in order to get an answer to a state law question from the state courts, the Supreme Court of Texas held that it was without power, under the state constitution, to render such an advisory opinion. *United Servs. Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 863 (Tex. 1965). The Supreme Court of Maine has refused to answer a certified question which would not have disposed of the action. *See In re Richards*, 223 A.2d 827, 833 (Me. 1966). The Supreme Court of Washington approved the use of certification over the objections of three of its justices who argued that it was unlawful under the state constitution. *In re Elliot*, 446 P.2d 347, 354 (Wash. 1968).

appeal, circuit courts and county courts.³²⁵

V. CONCLUSION

To paraphrase the Eleventh Circuit's opinion in *Bonner v. City of Prichard*:³²⁶

The state and federal trial courts, the federal appellate courts, the bar and the public are entitled to a better result than to be cast adrift among the differing precedents of other districts, required to examine afresh every legal principle that eventually arises in the state. This approach is inconsistent with the virtually wholesale adoption in this country of English common law. A multi-district court sitting en banc would be an available forum for pursuit of a better rule and for rejection of any precedents that should be no longer followed.³²⁷

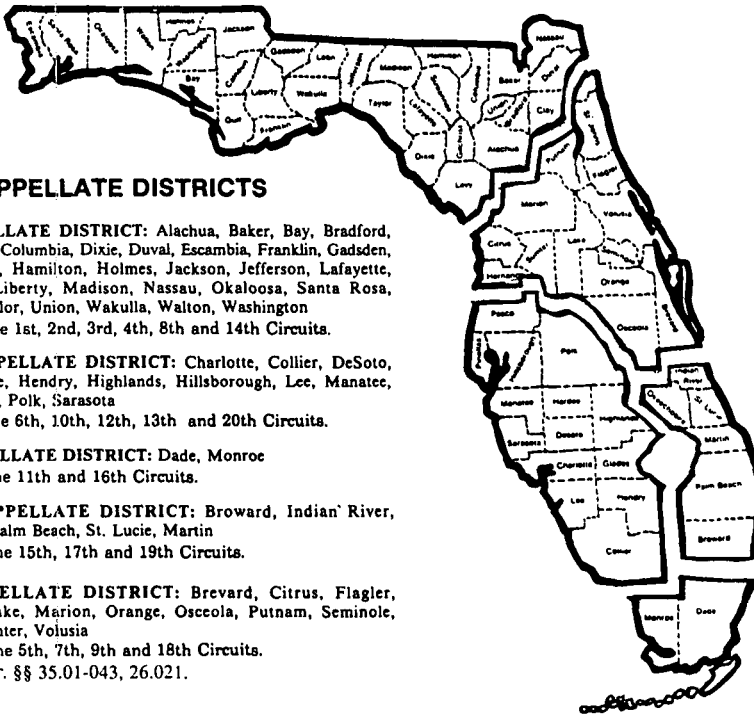
Moreover, the Supreme Court of Florida would be available, as it is today, to supervise the administration of justice in Florida.

325. At the same time, any question about the constitutionality of intradistrict en banc decisions, as has been raised by some judges, could be settled by amending article V, section 4(a) (the third sentence) to read: "Three *or more* judges shall consider each case and the concurrence of *a majority* shall be necessary to a decision." Intradistrict en banc consideration might still be desirable, for example, for cases of "exceptional importance."

326. 661 F.2d at 1211.

327. The Eleventh Circuit's version can be found *id.* at 1211.

APPENDIX "A"

**STATE APPELLATE DISTRICTS**

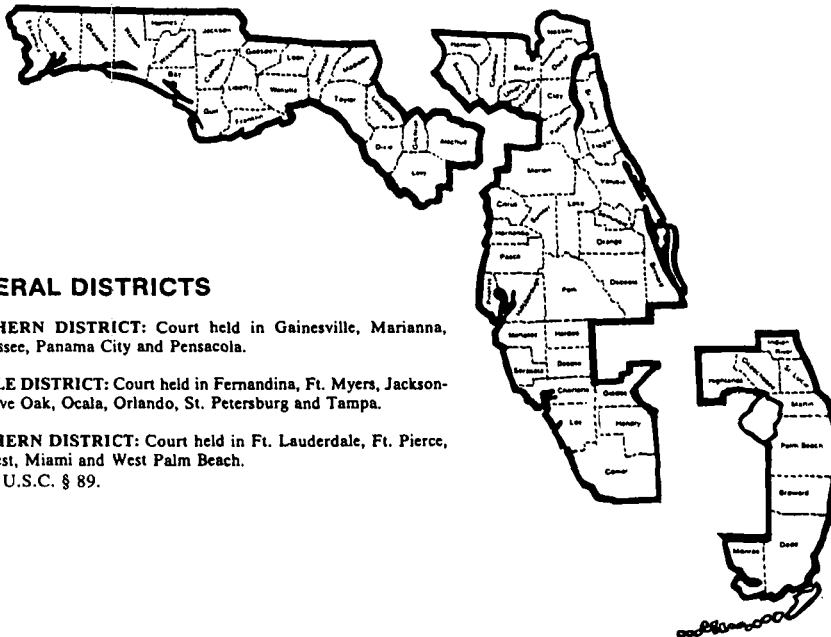
FIRST APPELLATE DISTRICT: Alachua, Baker, Bay, Bradford, Calhoun, Clay, Columbia, Dixie, Duval, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Hamilton, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Nassau, Okaloosa, Santa Rosa, Suwannee, Taylor, Union, Wakulla, Walton, Washington
Comprising the 1st, 2nd, 3rd, 4th, 8th and 14th Circuits.

SECOND APPELLATE DISTRICT: Charlotte, Collier, DeSoto, Glades, Hardee, Hendry, Highlands, Hillsborough, Lee, Manatee, Pasco, Pinellas, Polk, Sarasota
Comprising the 6th, 10th, 12th, 13th and 20th Circuits.

THIRD APPELLATE DISTRICT: Dade, Monroe
Comprising the 11th and 16th Circuits.

FOURTH APPELLATE DISTRICT: Broward, Indian River, Okeechobee, Palm Beach, St. Lucie, Martin
Comprising the 15th, 17th and 19th Circuits.

FIFTH APPELLATE DISTRICT: Brevard, Citrus, Flagler, Hernando, Lake, Marion, Orange, Osceola, Putnam, Seminole, St. Johns, Sumter, Volusia
Comprising the 5th, 7th, 9th and 18th Circuits.
See FLA. STAT. §§ 35.01-043, 26.021.

**FEDERAL DISTRICTS**

NORTHERN DISTRICT: Court held in Gainesville, Marianna, Tallahassee, Panama City and Pensacola.

MIDDLE DISTRICT: Court held in Fernandina, Ft. Myers, Jacksonville, Live Oak, Ocala, Orlando, St. Petersburg and Tampa.

SOUTHERN DISTRICT: Court held in Ft. Lauderdale, Ft. Pierce, Key West, Miami and West Palm Beach.
See 28 U.S.C. § 89.