Good Intentions Gone Bad: The Special NoDeference Erie Rule for Louisiana State Court Decisions

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Until 1938, federal courts routinely created their own interpretations of substantive state law in the guise of creating a “federal common law.” They had been empowered to do so in 1842 by the United States Supreme Court’s decision in *Swift v. Tyson.* This lack of deference to state courts created two major interjudicial problems.

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First, federal courts deciding diversity cases generally ended up interpreting state law, allowing independent federal court judgments over what state law required. All too often, this created two conflicting systems of rights. Citizens of a state could only have their rights decided by their own state courts. A non-citizen, however, could and often did exploit diversity jurisdiction to move a case to federal court and seek there an entirely different and much more favorable reading of state law from a federal judge. This dual system of law denied state citizens the same rights and protections as non-citizens; the latter had a unique chance to thwart state law by securing a different rule in federal court. Thus, non-citizen litigants, often powerful and distant corporations, had available a special procedure allowing them to attempt to evade state rules that would have held them liable under settled state precedent.

Second, permitting federal judges to essentially tell their state counterparts that the latter did not know how to interpret their own law betrayed a strong institutional disregard for the capabilities of state courts. The *Swift v. Tyson* system, where state law decisions were made by federal judges, men nominated by the President and confirmed by the United States Senate yet often having no link at all to the state whose law was in question, ran contrary to the federalist structure in the Constitution and injected constitutionally suspect friction into the relationship between the state and federal judiciaries.

The Supreme Court reversed *Swift v. Tyson* and required federal courts to follow substantive state law in 1938 in *Erie Railroad Company v. Tompkins*.

This decision announced a new rule of deference to state judicial opinions. In an eloquent opinion by Justice Louis D. Brandeis, *Erie* held that federal judges in diversity cases who refused to follow state court decisions denied state citizens protection of the law equal to that given non-citizens.

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2. 304 U.S. 64, 58 S. Ct. 817 (1938).
and, in an independent constitutional affront, thwarted the Constitution’s federalist structure.3

Since Erie, it has become well settled that federal courts are bound to follow a state supreme court's interpretation of its own law, and that federal deference to the state system extends to intermediate state courts as well “in the absence of other persuasive data.”4 “Other persuasive data” cannot just mean that a federal judge thinks a state judge got it wrong, or even very, very wrong. That would be a rule of no real deference. “Other persuasive data” means that there must be a specific, demonstrable reason within state law or some new fact unavailable at the time of the prior state decision that provides an objective foundation for the belief that state courts would change their position if they revisited the issue in dispute. An example would be a new statute right on-point, or a subsequent state supreme court decision in a closely related area that adopts a new approach and indicates that existing on-point precedent would be reversed.

Down on the bayou in Louisiana, however, something funny has happened to Erie in its application to decisions made by Louisiana’s intermediate courts. Erie has been submerged beneath a flood tide of federal courts exulting over Louisiana’s civilian law tradition, yet refusing to accept Louisiana precedent. Forty years ago, Judge John Minor Wisdom, one of the Fifth Circuit’s most respected members and a lawyer from an old New Orleans family, used Louisiana’s civil law method of interpretation in his 1964 opinion, Shelp v. National Surety Company,5 as a rationale for reaching his own decision on Louisiana state law de novo. Judge Wisdom followed the procedures of a Louisiana state court in going right to primary sources of Louisiana law in the civilian manner.6 He asserted the right of a federal judge deciding Louisiana law to also look directly at the sources of substantive state law, even if to do so meant largely ignoring state court

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3. Erie was more than just an occasion for Justice Brandeis to provide a stirring example of opinion writing and a substantive decision of great importance. It also furnished the fodder for one of the most entertaining law review dissections of any case. See Irving Younger, What Happened in Erie?, 56 Tex. L. Rev. 1011 (1978).
5. 333 F.2d 431 (5th Cir. 1964).
6. Id. at 435.
decisions, at least (and this is a somewhat illogical qualification) those below the state supreme court level. Judge Wisdom viewed his approach as compelled by Louisiana's civilian tradition.

This special, Louisiana-only discounted *Erie* rule against deference to state court precedent was powerfully bolstered a few decades later by another of the Fifth Circuit's most respected members, Judge Alvin Rubin. In an influential law review article, Judge Rubin urged federal courts to adopt civilian methods when reviewing Louisiana law and, in essence, to ignore, or at least downplay, the decisions of Louisiana's state courts in the same area.

The no-deference rule was hatched from a surfeit of fidelity to civilian interpretive procedures. Yet this dismissive rule, which applies only to the lower courts of one state, Louisiana, has had the opposite effect. *Erie* declares a rule of institutional deference. *Shelp* is a rule of institutional disregard. *Erie* demands that state courts, not federal courts, interpret state law and that citizens and non-citizens alike have the same rights under state law, whether their case is decided in state or federal court. But under *Shelp*'s no-deference rule, federal courts enjoy license to indulge their private readings of Louisiana law, and the supposedly abandoned pre-*Erie* discriminatory dual system of law symbolized by *Swift v. Tyson* has been revived. The rule encourages federal courts to disagree with Louisiana state judges and to substitute their own reasoning whenever they think their reading of Louisiana law is superior. A rule founded on respect for Louisiana's unique processes has ended up having the opposite effect.

I. *ERIE* WAS DESIGNED TO END DUAL SYSTEMS OF LAW AND TO UPHOLD STATE JUDGES' RIGHT TO DETERMINE THEIR OWN LAW

The facts that gave rise to *Erie* seemed likely to be of more interest to the plaintiff, Harry J. Tompkins, than to anyone else. "[S]omething which looked like a door projecting from one of the moving cars" on an Erie Railroad Company train hit Tompkins

7. *Id.* at 438–39.
9. *See infra* part I.B.
while he was walking along a footpath that bordered the train tracks in Hughestown, Pennsylvania. When Tompkins sued the railroad for his injuries, he recovered thirty thousand dollars under what the trial court and court of appeals treated as a "general" law of recovery. The railroad argued that it did not owe Tompkins anything because he was a trespasser, that it had no duty under Pennsylvania common law and, because Tompkins had been injured in Pennsylvania, that Pennsylvania's law applied and created a shield from liability.

Although the Supreme Court began its opinion by citing new, "more recent research" on the applicable federal statute, section 34 of the Federal Judiciary Act of 1789, the most forceful portions of Erie discuss the "defects, policy and social," that flowed from Swift v. Tyson's fractious rule. In the Court's view, Swift v. Tyson created two problems. First, independent federal readings of state law had given federal judges free rein to re-read state law and create a discriminatory dual system of law. Second, this federal intrusion deprecated the abilities of state courts. The Supreme Court therefore reversed and sent the case back for decision under Pennsylvania precedent.

A. Erie Sought to Avoid a "Discriminatory" Dual System of Law

The graphic problem created by the older system of federal common law was that non-citizens were petitioning federal courts to reject unfavorable state rules. Non-citizens thus might receive extra rights in federal court that they could not expect to get in state court. In such cases, non-citizens did not necessarily fear the subjective bias of state courts, the traditional rationale for diversity jurisdiction. They sought instead to evade the substantive rules

10. Erie, 304 U.S. at 69, 58 S. Ct. at 818.
11. Id. at 70, 58 S. Ct. at 818.
12. Id. at 71, 58 S. Ct. at 818-19. Not surprisingly, plaintiff Tompkins disputed Erie's interpretation of Pennsylvania law. See id. at 70, 58 S. Ct. at 818.
13. Id. at 70-72, 58 S. Ct. at 819.
14. Id. at 74, 58 S. Ct. at 820.
15. Id. at 74-76, 58 S. Ct. at 820-21.
16. Id. at 78-80, 58 S. Ct. at 822-23.
17. For thoughts on the traditional argument that the risk of state-court bias against non-citizens justifies diversity jurisdiction, doubts about the actual
of law that a state court could be expected to apply evenhandedly to citizens and non-citizens alike. The problem the non-citizen sought to avoid was not bias, but the rule of state law itself.

Giving federal courts the power to declare state law rules "made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court." With non-citizens having every incentive to seek a more favorable opinion in federal court whenever they feared existing state court decisions, the dual options open to them "rendered impossible equal protection of the law." Although the idea of a federal common law might suggest a striving for national uniformity, in practice the dual system "prevented uniformity in the administration of the law of the state."

The Supreme Court surveyed the way that Swift v. Tyson had spawned improper, differential systems of state law in everything from commercial law, contracts, and torts to the law of punitive damages, mineral law, and real estate law. The Court might have been tempted to uphold Swift v. Tyson on stare decisis grounds because it had been on the books for so long, but Swift v. Tyson's historic luster paled when constitutional values were at issue.

motive and factual support for this view, and the long-running controversy over this basis for federal court jurisdiction, see Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3601 (2d ed. 1984).

18. Erie, 304 U.S. at 74–75, 58 S. Ct. at 820. The full citation is even more emphatic:

Swift v. Tyson introduced grave discrimination by non-citizens 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.

Id., 58 S. Ct. at 820–21. The Court listed a number of prominent critics of Swift v. Tyson. Id. at 77 n.20, 58 S. Ct. at 822 n.20. However, the Court admitted that the old rule had its supporters, too. Id. at 78 n.22, 58 S. Ct. at 822 n.22.

19. Id. at 75, 58 S. Ct. at 820–21.
20. Id. at 78–80, 58 S. Ct. at 822–23.
21. Id. at 75–76, 58 S. Ct. at 821.
22. Id. at 77–78, 58 S. Ct. at 822. "But the unconstitutionality of the course pursued has now been made clear, and compels us to do so [to find it unconstitutional]." Id., 58 S. Ct. at 822.
B. Erie is a Constitutionally Mandated Rule of Institutional Deference

The Erie Court found a second, independent problem with federal judges independently deciding issues of state law. The Constitution reserves this power to the states. The Constitution's federalist structure imposes a rule of institutional deference. Nothing in the Constitution gives federal courts power to decide substantive state law.

Justice Brandeis cited two influential decisions to support his federalist point about the integrity of state court authority over state law. He cited Justice Stephen J. Field's dissent in *Baltimore & Ohio Railroad Co. v. Baugh* for the proposition that "the Constitution of the United States ... recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments." The

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23. *Id.* at 78–80, 58 S. Ct. at 822–23. "[E]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. There is no general federal common law." *Id.*, 58 S. Ct. at 822.

24. *Id.*, 58 S. Ct. at 821.


26. *Erie*, 304 U.S. at 78–79, 58 S. Ct. at 822 (citation omitted). The *Baltimore & Ohio* case stemmed from an even more serious train wreck than in *Erie*, a collision of two trains in Ohio in which an Ohio locomotive fireman lost an arm and the use of his leg. 149 U.S. at 369, 13 S. Ct. at 914. The Maryland "citizen" Baltimore & Ohio Railroad Company had been found liable by a jury properly instructed under Ohio law, but that determination was reversed on appeal under a supposed federal common law. *Id.* at 370, 13 S. Ct. at 914–15. The Supreme Court majority accepted the company view that, applying a general common law that clearly was not the law in Ohio, an engineer and fireman were "fellow servants" and that this status precluded the fireman from recovering against their joint employer, the railroad, for injuries caused by the engineer's negligence. *Id.* at 370–90, 13 S. Ct. at 914–23. As a result, the fireman, John Baugh, had to live with his injuries without compensation.

Justice Field wrote an impassioned dissent based on the independence of the states and the absence of a separate federal or general law in areas of state regulation. *See id.* at 391, 13 S. Ct. at 923 (Field, J., dissenting). He criticized the "habit" of some "learned judges" in the federal system of relying on a general "law of the country" and appealed to "the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments." *Id.* at 401, 13 S. Ct. at 927. Field pinpointed the basic problem as he decried a system under which "there could be one law when a suitor went into the state courts and another law when the suitor went into the federal courts,
Baltimore & Ohio opinion had arisen as one of many cases displaying the mischief of an independent federal reading of state law. The Court reversed a jury verdict awarding a severely injured Ohio locomotive fireman nearly seven thousand dollars in money damages after a devastating accident in which he lost his arm.\(^{27}\) The Court’s ground for reversal was its choice to apply a federal common law that was much more protective of corporations than the Ohio law on which the state court jury had been instructed.\(^{28}\)

In *Erie*, Justice Brandeis also cited Justice Holmes’s dissent in *Black & White Taxicab v. Brown & Yellow Taxicab*:\(^{29}\) "The authority and the only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."\(^{30}\) *Black and White Taxicab* ably illustrated the opportunity for egregious abuse opened up by *Swift v. Tyson*. The plaintiff, a Tennessee corporation established to operate a taxicab business in Kentucky for a Kentucky railroad, had incorporated in Tennessee for the purely strategic reason that Kentucky courts would not enforce an anticompetitive exclusivity agreement with the railroad.\(^{31}\) Believing that federal courts might enforce such an agreement, the plaintiff needed diversity jurisdiction to have a

in relation to a cause of action arising within the state . . . ." *Id.* at 404, 13 S. Ct. at 928.

Separately from the dual system’s affront to individual rights that was such a part of *Erie*, Justice Field listed the threat to federalism:

Nothing can be more disturbing and irritating to the States than an attempted enforcement upon its people of a supposed unwritten law of the United States, under the designation of the general law of the country, to which they have never assented and which has no existence except in the brain of the Federal judges in their conceptions of what the law of the States should be on the subjects considered. *Id.* at 403, 13 S. Ct. at 927–28. Justice Field urged that federal judges had no choice but to follow state law, at least when state law "is neither unsettled nor doubtful, but is established and certain." *Id.* at 397, 13 S. Ct. at 925.

27. *Id.* at 369, 13 S. Ct. at 914.

28. In a common pattern for pre-*Erie* diversity cases, an out-of-state corporation thus secured immunity from damage for injuring an in-state citizen. The decision was "in favor of the largest exemptions of corporations from liability." *Id.* at 411, 13 S. Ct. at 930.


chance of hiding from Kentucky law behind a federal shield. The plaintiff fabricated the basis for diversity jurisdiction via its out-of-state incorporation, in an effort to evade the reach of Kentucky state courts and improve its chances of preserving an agreement to restrain railroad cab service in Kentucky. The plaintiff's plan, if permitted, would effectively allow an anticompetitive scheme to operate in Kentucky that was forbidden by Kentucky law, as defined by Kentucky courts.

The United States Supreme Court approved the plaintiff's unsavory wish, but Justice Holmes wrote in dissent with the voice of history as he insisted that the proper source of law within a state was the declaration of its own legislature or courts. "The common law so far as it is enforced in a State . . . is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else." A decision of the state's highest court should be just as binding as a state statute.

Although Black and White Taxicab did not pertain to Louisiana, Justice Holmes did note Louisiana's unique legal characteristics in an aside full of significance for the later special Louisiana rule. He hinted that even under Swift v. Tyson, the singularity of Louisiana's civilian tradition might require federal courts to give more deference to Louisiana's courts, not less, a conclusion opposite to that of the federal appellate judges who subsequently have looked at Louisiana state appellate court decisions as less worthy of respect. In Holmes's compelling logic, the existence of special interpretive rules for a particular state would be a reason for giving even wider sway to that state's judges. In a contemplative parenthetical to the Taxicab case, Holmes wrote that even under the non-deferential Swift v. Tyson rule, "I do not know whether . . . we should regard ourselves as

32. Id.
33. Id. at 532, 48 S. Ct. at 408 (Holmes, J., dissenting).
34. Id. at 533–34, 48 S. Ct. at 409.
35. See id. at 534, 48 S. Ct. at 409. As in Erie itself, so in Holmes' dissent the issue was deference to the highest state court. The problem of intermediate-court authority had to wait until the United States Supreme Court had decided the main point, the supremacy of state supreme courts on state law issues.
36. Id. at 533–34, 48 S. Ct. at 409.
37. Id. at 534, 48 S. Ct. at 409.
authorities upon the general law of Louisiana superior to those trained in the system.”

Because the Constitution imposes federalism as a constitutional requirement, Erie’s institutional deference rises far above the suggestions of judicial etiquette that can underlie comity. In rejecting Swift v. Tyson, the Erie opinion noted that assumptions by federal courts of the power to decide state rules of law “have invaded rights which in our opinion are reserved by the Constitution to the several states.”39 Charles Alan Wright and Mary Kay Kane accurately summed up the significance of Erie’s justification based on this federalist logic:

It is impossible to overstate the importance of the Erie decision. It announces no technical doctrine of procedure or jurisdiction, but 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.40

C. Naturally, This Rule of Institutional Deference Requires Fidelity to Intermediate State Courts, as Well

Erie did not address the proper orbit of intermediate state courts in the federalist universe. Its resounding language remained in the context of the deference federal judges must accord to a state supreme court.41 Yet, logically, the twin policies behind Erie, its desire to avoid an unfair, discriminatory dual system of law and the institutional respect commanded to the competence of state judges to decide their own law, should apply to intermediate courts just as much as to a state’s highest court. And, indeed, this is what the Supreme Court decided soon after Erie.

38. Id.
41. See Erie, 304 U.S. at 78, 58 S. Ct. at 822. “[T]he law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.” Id., 58 S. Ct. at 822 (emphasis added).
The issue of the deference due lower state courts quickly bubbled up to the Court. In *West v. AT&T*,42 a case begun well before the Supreme Court decided *Erie*,43 the Sixth Circuit had refused to follow an Ohio intermediate court’s holding on whether a formal demand was a prerequisite to accruing a cause of action for failure to transfer certain stock.44 The Sixth Circuit instead asserted a general right to “apply what it considered to be the better rule that demand is unnecessary . . . .”45

Noting that *Erie* had dealt only with the respect owed to a state’s highest court, the Supreme Court nonetheless held that the “obvious purpose of section 34 of the Judiciary Act,” to avoid the conflicting dual system of law, would be defeated if federal courts did not have to obey lower-court indicia of state law as well.46 With this predicate, the Supreme Court predictably concluded in *West* that federal courts are not free to disregard “rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state,” and that a federal court could not disregard those rules “even though it thinks the rule is unsound in principle or that another is preferable.”47 The Court then announced what has become the general rule for intermediate decisions:

Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is

42. 311 U.S. 223, 61 S. Ct. 179 (1940).
43. The case on appeal in *West* first appeared in federal court on July 14, 1937, *id.* at 234, 61 S. Ct. at 182, over nine months before the Supreme Court decided *Erie*. State court litigation between the parties had begun in June 1934, *id.* at 232–33, 61 S. Ct. at 181, almost four years before the *Erie* decision.
44. *Id.* at 231–35, 61 S. Ct. at 181–82.
45. *Id.* at 234–35, 61 S. Ct. at 182–83. The accrual issue determined when the statute of limitations began to run, a dispositive issue in *West*.
46. *Id.* at 236, 61 S. Ct. at 183. The Court described section 34’s purpose as to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken.

*Id.*
47. *Id.* at 237, 61 S. Ct. at 183.
convinced by other persuasive data that the highest court of the state would decide otherwise.\textsuperscript{48}

Even though the Ohio Supreme Court might someday override the Ohio appellate court’s decision, nonetheless, “whether that will ever happen remains a matter of conjecture.”\textsuperscript{49} In the same month as it decided \textit{West}, the Court reversed three other decisions where a federal court had disregarded precedent set by an intermediate state court decision.\textsuperscript{50}

\textsuperscript{48} Id.
\textsuperscript{49} Id. at 237–38, 61 S. Ct. at 183–84. Though the \textit{West} Court noted in addition that the Ohio Supreme Court had refused to review an appeal from one phase of the same litigation, this denial of review could not have been dispositive, as indicated by the Court’s notation that the Ohio Supreme Court could always someday change its mind. \textit{Id.} at 237, 61 S. Ct. at 183. Writ denials are relevant evidence of high-court thinking, but not conclusive, because state supreme courts, like the United States Supreme Court, can always reverse themselves.

\textsuperscript{50} In \textit{Fidelity Union Trust Co. v. Field}, 311 U.S. 169, 61 S. Ct. 176 (1940), a same-day decision as \textit{West}, the federal court refused to follow two decisions by New Jersey’s chancery court on New Jersey trust law. The Third Circuit Court of Appeals had declined to follow the New Jersey decisions because it concluded that they “[did] not truly express the state law.” \textit{Id.} at 177, 61 S. Ct. at 178. In reversing, the Supreme Court cited \textit{West}, and reiterated that even intermediate decisions need to be respected. \textit{Id.} at 178–79, 61 S. Ct. at 178–79. The Court went on to hold that the federal court was “not at liberty to undertake the determination of that question on its own reasoning independent of the construction and effect which the State itself accorded to its statute.” \textit{Id.}

In \textit{Six Companies of California v. Joint Highway District Number 13}, 311 U.S. 180, 61 S. Ct. 186 (1940), a decision also handed down on the same day as \textit{West}, the district court and Ninth Circuit distinguished a prior, intermediate state court decision on an issue of liquidated damages under California law that the Supreme Court found squarely on point. Reversing, the Supreme Court noted that as there was no other California decision, “[w]e thus have an announcement of the state law by an intermediate appellate court in California in a ruling which apparently has not been disapproved, and there is no convincing evidence that the law of the State is otherwise.” \textit{Id.} at 188, 61 S. Ct. at 188.

In \textit{Stoner v. New York Life Insurance Company}, 311 U.S. 464, 61 S. Ct. 336 (1940), decided two weeks after \textit{West} and its siblings, the Supreme Court again reversed a lower federal court’s refusal to follow state law. In \textit{Stoner} the same issue, the scope of evidence needed to prove total disability under Missouri law, had been twice decided by the Kansas City Court of Appeals, with the Missouri Supreme Court once denying a writ. \textit{Id.} at 466, 61 S. Ct. at 338. New York Life then tried to circumvent the state process by filing a federal declaratory judgment action that the petitioner was not totally disabled. Although the federal district judge held a trial and found for the petitioner, thus agreeing with the two prior state decisions, New York Life finally got lucky with the Eighth Circuit, which reversed. \textit{Id.} at 467, 61 S. Ct. at 337. The Eighth Circuit decided
In both *West* and the same-day *Fidelity Union Trust Co. v. Field*,\(^51\) the Court rooted its continued deference to state court decisions on state law questions, including decisions by intermediate state courts, in its interpretation that section 34 of the Judiciary Act sought a single rule of decision, and in the principle that justice should not vary depending upon whether a non-citizen ended up in state or federal court. In *West*, the Court explained this rationale of *Erie* as seeking:

... to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken.\(^52\)

In *Fidelity Union*, the Court spoke in similarly strong terms, holding it "inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship."\(^53\)

The extension of *Erie* to lower courts does have some limits. Even in early cases like *West*, there were hints that the state court determination must have some indicia that it is a valid reading of state law. For instance, a lower court had to have at least minimal stature within the state judicial system before federal judges would

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\(^{51}\) 311 U.S. 169, 61 S. Ct. 176 (1940).

\(^{52}\) *West*, 311 U.S. at 236, 61 S. Ct. at 183.

\(^{53}\) *Fidelity Union*, 311 U.S. at 180, 61 S. Ct. at 179.
be bound to follow it. A decade after Erie, in King v. Order of United Commercial Travelers, the Court approved a federal judge's direct reading of an insurance policy under South Carolina law even though a South Carolina court of common pleas had issued a contrary but unreported decision on the same policy for the same plaintiff, albeit against a different insurer.

The Supreme Court admitted in King that it had required fidelity to a trial decision of a New Jersey chancery court in Fidelity Union, but distinguished that case because the New Jersey court "had state-wide jurisdiction," received some deference from New Jersey's Supreme Court, and bound later chancery cases through its decisions. In contrast, the South Carolina trial court did not command similar respect because, as a court of common pleas, its opinions were not published or digested, "seem to be accorded little weight as precedents in South Carolina's own courts," and therefore did not "have such importance and competence within South Carolina's own judicial system that its decisions should be taken as authoritative expositions of that State's laws." Because the South Carolina trial court decision could "apparently be ignored" by all other South Carolina courts,

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54. In West, the Supreme Court discussed lower court decisions "which are nevertheless laws of the state," and law "authoritatively declared." 311 U.S. at 236, 238, 61 S. Ct. 183–84. In Fidelity Union, the Court mentioned that the decisions by the Court of Chancery whose opinions it held must be followed "if they have not been disapproved, are treated as binding in later cases in chancery." 311 U.S. at 179, 61 S. Ct. at 179 (citation omitted). The Court suggested that "a uniform ruling either by the Court of Chancery or by the Supreme Court over a course of years will not be set aside by the highest court 'except for cogent and important reasons.'" Id., 61 S. Ct. at 179 (quoting Ramsey v. Hutchinson, 187 A. 650, 651 (N.J. 1936)). This is a somewhat careless and implicit reservation of an unidentified federal power to gauge whether even a state supreme court decision was still in place as good law.


56. See id. at 155–56, 68 S. Ct. at 489–90 for the procedural context.

57. Id. at 159, 68 S. Ct. at 491–92. The Supreme Court carefully limited King to its facts, and equally carefully went out of its way to make clear that it was not saying federal courts never have to "abide" by state trial-court decisions. Id. at 162, 68 S. Ct. at 493.

58. Id. at 160–61, 68 S. Ct. at 492–93. One reason the Supreme Court found deference implausible was that it was hard to even locate decisions by South Carolina's courts of common pleas, which were only filed in the county where a case was tried. Id. at 161–62, 68 S. Ct. at 492–93. "Litigants could find all the decisions on any given subject only by laboriously searching the judgment rolls in all of South Carolina's forty-six counties." Id. at 161, 68 S. Ct. at 493.
it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court."  

The suggestion that federal courts should gauge the weight of state court decisions, at least beyond a minimal scrutiny (weeding out courts that no one within the system takes seriously and that no one thinks establish the law, which may be what the Supreme Court thought about these South Carolina trial courts), will always recreate the *Erie* problem. Non-citizens will have a new shot at differential treatment by seeking out federal judges, and state systems will be exposed anew to institutional rejection by their federal counterparts.

In *Bernhardt v. Polygraphic Company of America, Inc.*, the Supreme Court made additional suggestions on the type of subterranean change in state law that, short of direct action by a state's highest court, might "undermine" intermediate state decisions. Noting that a Vermont law made arbitration agreements revocable until an award was made, and finding that the federal arbitration statute did not apply, the Court included as reasons why it would follow existing Vermont law that "there is no later authority from the Vermont courts, that no fracture in the rules announced in those cases has appeared in subsequent rulings or dicta, and that no legislative movement is under way in Vermont to change the result of those cases." This casual language itself
shows the danger of dicta—dicta are not enough to overturn a rule of law and should not vary the level of deference, and a “legislative movement” could not be cited as law in any state unless it converts its efforts into actual, passed legislation.

Despite these potential limitations, the general rule of deference to even intermediate state courts nonetheless remains, and can apply with great stringency. For instance, in McMahon v. Toto, a 2002 opinion, the Eleventh Circuit reversed one of its own very recent decisions, on whether Florida would apply its offer-of-judgment statute in a case tried in Florida but applying another state’s law, because a Florida intermediate state court issued a contrary ruling soon after the prior Eleventh Circuit decision. The Eleventh Circuit initially had concluded, in the absence of any dispositive Florida decision, that Florida would not apply its offer-of-judgment statute to disputes in its own courts that turned on other states’ laws. But an intermediate Florida state court judges on the question, no legislative development that promises to undermine the judicial rule.” Id. at 205, 76 S. Ct. at 277. The Court took particular comfort from the fact that the federal judge deferring to the State was a Vermont judge, so “we give special weight to his statement of what the Vermont law is.” Id. at 204, 76 S. Ct. at 277 (citations omitted).

In actuality, if Erie let any federal judge be less deferential to state court decisions—and Erie does not allow such selective obedience, except, unfortunately, in Louisiana where federal judges have presumed the right to disregard state courts under the special Erie exception—the less-deferential federal judges should be those who sit in the state whose law is at issue. These judges tend to have practiced in their state, are more likely to have been on a state court or to interact frequently with the state’s judges, and thus are likely to be closer to the state’s law than other federal judges. They would be more distant on average than state judges themselves, but closer than other federal judges sitting in outside states. If they did reject a state rule, there would be at least some chance that they would ruffle fewer feathers than an unknown judge living in a distant state.

63. 311 F.3d 1077 (11th Cir. 2002), cert. denied, 539 U.S. 914, 123 S. Ct. 2273 (2003).

64. Id. at 1079–80. Under Florida law, defendants in civil actions who file an offer of judgment are entitled to recover “reasonable costs and attorneys fees” under certain circumstances. Fla. Stat. Ann. § 768.79 (1997). The McMahon defendant offered judgment for one hundred dollars, an amount the Eleventh Circuit later determined included attorneys fees and punitive damages. 311 F.3d at 1081–83. The defendant won, and the trial court awarded $260,034.29 in costs and fees because the plaintiff, who received nothing, did worse than the one-hundred-dollar offer. Id. at 1084. When the plaintiff tried to come under one of the offer-of-judgment statute’s exclusions by arguing that the offer was not made in good faith, and claiming that the defendant “lacked any reasonable
promptly rejected this Eleventh Circuit rule. Faced with a new, contrary intermediate state decision, fidelity to *Erie* led the Eleventh Circuit to abandon its own just-decided principle in *McMahon*. As it noted, had the Florida intermediate opinion been available earlier, “we would have followed it.”65 Indeed, absent *West*-like “other persuasive data” suggesting the Florida Supreme Court would disagree, the Eleventh Circuit would have been “compelled” to follow the state rule.66 In sum, then, the Eleventh Circuit properly (in an *Erie* sense) overturned its recent decision because, no matter how well-reasoned its own analysis had been, Florida appellate judges “presumably know more about Florida law than we do.”67

Under *Erie*, state courts indeed are taken to know their own law better. The issue is not a subjective one of actual knowledge or sophistication, but one rather of institutional competence and entitlement. State courts are designated to make decisions about their own state law. The goal is to avoid a separate federal system of state law. As Wright, Miller, and Cooper wrote years ago, the federal court’s “function when divining the content of forum state law is not to choose the rule of law that it believes is ‘better.’”68 Unfortunately, many Fifth Circuit panels addressing Louisiana law have had a different, much less respectful approach to Louisiana’s intermediate state courts.

II. *Erie’s* Erosion by the No-Deference Rule for Louisiana

The erosion of *Erie* in relation to intermediate Louisiana state court decisions began in a grim case. In *Shelp v. National Surety Company*,69 a New Orleans lessee and her guest, both assaulted...
and one raped after an intruder broke through their defective front door in a French Quarter apartment, sued the building owner’s insurance company. Recovery from the insurer turned on whether a Louisiana statute, Civil Code article 2716, which excluded from a landlord’s general liability the parts of premises that were the tenant’s responsibility to repair or within the tenant’s sphere of control, included doors. The article clearly made lessees, not landlords, responsible for windows, locks, and hinges, but it did not mention doors, even though a much earlier French version of the Louisiana Civil Code had done so.

The plaintiffs had a very simple and compelling plain-meaning argument. The French version of the relevant article in the Louisiana Code of 1825 expressly allocated responsibility for doors to the lessee, but the same article in the English Code of 1825, later incorporated into the controlling Revised Civil Code of 1870, dropped the term “doors.” Understandably, the plaintiffs argued that “a court is bound by the plain wording of the law: where there is no ambiguity in the language of an article courts cannot change its meaning by resorting to the French text of the Code of 1825.” It is hard to think of how one could pay better homage to statutory language than to honor a change that dropped “doors” from the lessee’s areas of responsibility.

Even better, from the plaintiffs’ perspective, they had in their favor what Judge Wisdom viewed as the one extant “all-fours case . . . the only Louisiana decision squarely on-point.” In Bradley v. Yancy, a case from 1939, Louisiana’s Second Circuit Court of

70. Id. at 432.
71. Id. at 432–33.
72. Id.
73. Id.
74. Id. at 433, 438–39.
75. 195 So. 110, 112–14 (La. App. 2d Cir. 1939). In Bradley, the Louisiana Second Circuit Court of Appeal squarely addressed the omission of “doors” from the Louisiana Code. It was aware that “portes” was in the French version of the Code of 1825, but not in the English version, and not in the succeeding Revised Civil Code of 1870. See id. at 112. The court noted that the Code of 1870 was printed only in English; that this later code was an amendment as well as a re-enactment; that the court had to apply unambiguous law as written; and that the Civil Code of 1870 contained “many articles” not in the Code of 1825 and “fails to include many articles which were in the Code of 1825.” Id. at 113. Thus the Second Circuit considered and rejected the idea that a Louisiana court could ignore the plain meaning of the absence of “doors” in the governing
Appeals found that a lessee is not responsible for doors because doors are not listed in revised article 2716. Thus an intermediate state court already had decided the Shelp issue for the tenants. Under the ordinary reading of Erie, that should have been the end of the inquiry.

Without squarely addressing what it meant for Erie, Judge Wisdom ultimately disregarded Bradley in deciding Shelp. He began with the proposition that a federal court making its Erie "guess" should look at Louisiana law differently than at any other state's laws. In deciding an issue of Louisiana law, he argued, "[t]he Code, doctrinally, constitutes the whole body of private law" and "we must never forget that it is a Code we are expounding." Judge Wisdom then offered his own theory: the French version of the 1825 Code article included "doors" among the lessee's responsibilities even though the English translation did not do so, and the French version traditionally had been viewed as the authoritative law. Further, the governing Code of 1870 intended to copy the Code of 1825 except for unrelated changes relating to slavery and supplementation by new articles enacted since 1825.

Bradley had rejected the view, espoused in Shelp by Judge Wisdom, that the Code of 1870 was drafted to be a near carbon copy of the Code of 1825. The Bradley court concluded that such a position would not only transform every attempt at interpretation of the later Code into a detailed excursion into the former, thus multiplying the complexity of Code analysis, but it would also ignore the fact that the 1870 Code "contains many articles which were not included in the Code of 1825, and fails to

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Louisiana statute. The holding could not have been more directly opposite Judge Wisdom's in Shelp:

We are convinced that the rule for construction of the articles of the Code of 1825, in so far as relying on the French text of that code is concerned, is not applicable to the Revised Civil Code of 1870. If the article of the Revised Civil Code is not what was intended, it can be amended, as it was enacted by the Legislature.

Id.

76. Shelp, 333 F.2d at 435.
77. Id. at 435–36.
78. Id. at 436–38.
79. Id.
include many articles which were in the Code of 1825." The Bradley court did not feel free to disregard such obvious differences between the earlier and later Codes, differences that normally would be respected as plain, unambiguous indications of legislative intent. Judge Wisdom nonetheless rejected the Bradley court's reading of the Code on precisely the same issue. Under his reading, the omission of "doors" in the English version of the Code of 1825 was just a translation error which had been carried over to the Code of 1870 and thereafter. Finding no other reason to credit the omission when "doors" had stayed in the French Code of 1825, he held that the current article 2716, which followed the 1870 Code, "must yield" to its predecessor in the earlier French Code.

To deal with Erie, which he accused the plaintiffs of "clutching," Judge Wisdom classified Bradley v. Yancy and its natural, plain-meaning reading as "a single, aberrant deviation" from other past cases that found the French text of the 1825 Code binding. Yet none of those other cases addressed the factual issue in dispute in Shelp, a landlord's potential liability for maintaining the security of doors. Although Judge Wisdom cited cases dealing with differences between the French and English Codes of 1825 and the incorporation of those differences in later law, none of those cases dealt directly with the substantive issue in Shelp. The second circuit's decision in Bradley v. Yancy certainly did.

81. Id. at 113.
82. As the Bradley court pointed out, the legislature's reasons for omitting the word "door" from the 1870 Code "are not for us to know," and it "was not necessary for the lawmakers to provide in the article that they had deleted 'doors' in order to express their intention. It is enough that doors were not included." Id. at 113.
83. Shelp, 333 F.2d at 438.
84. Id. at 439.
85. Id. at 438-39.
86. Judge Wisdom cited a series of cases and authorities on the supremacy of the French version of the Code of 1825, including cases decided long after the Code of 1870 was adopted (and so recognizing the continued supremacy of the earlier French Code in its later incarnation). See id. at 438; see infra note 91 and accompanying text. As noted below, these other cases offered an alternative basis for claiming a conflict among state law, and then deciding the case his way in full fidelity to Erie without announcing the new principle that federal courts can disregard intermediate Louisiana appellate decisions.
Had Judge Wisdom been willing to be bound by state law as required under *Erie* and the *West* line of cases, even if he felt his state counterpart had been in error and that he had a better reading of the law, he would have followed *Bradley v. Yancy*. The average *Erie* court would have done so and held the landlord liable for injuries from the defective door because article 2716 did not list doors as among the tenant's responsibilities. Indeed, as if to underline Judge Wisdom's refusal to honor Louisiana law as decided by its own judges, a Louisiana court of appeals just six years later followed *Bradley* in holding that the landlords were responsible for doors because "[c]riticism [citing *Shelp*] notwithstanding, it has not been overruled and the reasoning of the opinion is sound." Judge Wisdom obviously did not agree with the soundness of *Bradley*'s reasoning, but he still was bound to accept that *Bradley* was not overruled and to follow it because that is what *Erie* commands.

Judge Wisdom justified his disregard of state precedent by arguing that, in Louisiana, "the *Erie* obligation is to the Code, the 'solemn expression of legislative will.'" He assumed the freedom as a federal judge to uncover Louisiana's statutory purposes independently of the past views of state judges, at least intermediate Louisiana judges. Not discussing the *Erie* problems raised by substituting his reading for the intermediate state court's, Judge Wisdom thus launched, almost backhandedly, the principle that federal courts reviewing Louisiana law, unlike federal courts reviewing any other state's law, can make their own interpretation even in disregard of contrary state appellate decisions.

89. *Shelp*, 333 F.2d at 439.
90. Judge Wisdom might have tried to pronounce his legislative review to be the "other persuasive data" that justified disregarding the Louisiana Second Circuit Court of Appeals—that here was an objective basis for believing that the Louisiana Supreme Court would come out differently than *Bradley*. But he could hardly argue that his historical analysis of the priority given to the French Act of 1825 was a "new" fact or changed circumstance that would have produced a different outcome in *Bradley v. Yancy*, when that court rejected the
It is one of the unfortunate aspects of *Shelp* that Judge Wisdom had an easy way to reach the same outcome against the plaintiff-tenants without advocating a special federal right to disregard Louisiana's intermediate appellate decisions. He portrayed the record as having only one prior state case on-point, *Bradley*. Yet while *Bradley* was the only case addressing the substantive issue of whether "doors" remained within the tenant's responsibilities under the Code of 1870, its procedural insistence that the 1870 Code should be read without looking back to the Code of 1825 had been rejected by earlier Louisiana Supreme Court decisions, even if in cases addressing unrelated substantive issues. This surely was sufficient conflict in past precedent to question whether *Bradley* was good enough law that the Louisiana Supreme Court would follow it on the *Shelp* issue.

The other most influential authority in spawning the no-deference *Erie* rule for Louisiana is not a case, but a 1988 article in the Louisiana Law Review. The author was Judge Alvin Rubin, the article, *Hazards of a Civilian Venturer in Federal Court: Travel and Travail on the Erie Railroad*. Judge Rubin penned a somewhat despairing look at the prospects for civilian lawyers operating in the federal courts. His bottom line, one somewhat ironic for an article that has helped persuade federal courts to expand the special Louisiana exception to *Erie*, was that the chances for civilian adjudication surviving in federal court were slim. Subsequent federal courts have cited Rubin's discussion of

precise position he adopted, *id.* at 437. This conflict may be why Judge Wisdom stressed instead his claim of special power to ignore intermediate state authority when reading Louisiana law.


93. Judge Rubin's pessimistic assessment that federal courts were likely to ignore civilian principles led him to urge that "the lawyer who wishes the case tried by civilian principles should shun diversity jurisdiction. The only way to avoid being dragged unwillingly onto the treacherous common law railroad is to join in a movement for the abolition of diversity jurisdiction." *Id.* at 1380.

Rubin's pessimism stemmed in part from his sense that federal judges used to an independent role would have a hard time accepting the submission to legislative will required of civilians; that briefs in federal court invariably use case citations pulled from the Westlaw and Lexis databases; and that even many
Louisiana’s civilian tradition as justification for giving Louisiana intermediate decisions less deference than they would accord other states’ intermediate courts.94

A more recent case showing the license that the Shelp approach has granted federal courts to disregard state law is Green v. Walker,95 a 1990 Fifth Circuit opinion. The issue was whether a physician hired in Louisiana to do company physicals incurred any liability when he failed to diagnose an employee’s lung cancer. A recent Louisiana Supreme Court case, Ducote v. Albert,96 had held that Louisiana workers compensation law did not immunize from liability a company doctor who had been treating an employee for a hand injury. Ducote unmistakably described a company doctor’s relationship with patients as a traditional doctor-patient

Louisiana cases involve statutes, not the Code, which he said federal judges interpret using common-law statutory interpretive principles. Id. at 1377–78. Judge Rubin claimed that only twenty-three percent of reported federal cases on Louisiana law in 1986–1987 cited a Code provision; and that in a sample of Louisiana state appellate decisions for those two years, only thirty-seven percent mentioned a Code article. Id. at 1378. He interpreted these low percentages as signs of the rapid spread of common-law adjudication over the retreating waters of Louisiana’s civilian tradition.

94. See, e.g., In re Orso, 283 F.3d 686, 695 & n.29 (5th Cir. 2002); Prytania Park Hotel, Ltd. v. General Star Indemnity Co., 179 F.3d 169, 175 & n.9 (5th Cir. 1999); Songbyrd v. Bearsville Records, Inc., 104 F.3d 773, 776 & n.7 (5th Cir. 1997).

Among the differences between common-law adjudication and traditional civilian analysis is in fact that, as Rubin noted, stare decisis does not bind a civil judge and that “each judge, trial and appellate, may consult the civil code and draw anew from its principles.” 48 La. L. Rev. at 1372. In addition, he claimed that a Louisiana trial court’s fact findings are diminished because reviewing courts can assess the facts in a way unknown to the common law. Id.

In a later article that would have been as influential, had Judge Rubin’s article not preceded his, Judge Dennis contrasted the civilian and common-law uses of precedent. He argued that Louisiana’s system of judicial elections, which produces judges with “strong personalities,” tends to yield jurists who fit the common-law model of the judge as lawmaker rather than the civilian model of judges bound by legislative will. James Dennis, Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent, 54 La. L. Rev. 1, 1 (1994). Judge Dennis described the basic contrast as follows: precedent has a “leading role” in the common law, while in the civilian tradition it “plays only a supporting role. The Civil Code is the primary source of law . . . .” Id. at 3; see also id. 14–15 (discussing ways in which Judge Dennis found the common-law case method “incompatible with the civilian tradition).

95. 910 F.2d 291 (5th Cir. 1990).
96. 521 So. 2d 399 (La. 1988).
relationship, in terms not limited to the special situation of workers compensation. Thus, when deciding *Green*, the Fifth Circuit could have relied on *Ducote*, a decision of Louisiana's highest court, and resolved the issue by finding no immunity.

But the *Green* panel did not read *Ducote* as controlling. Instead, the court suggested that *Ducote* might have been limited by its workers compensation setting (the immediate issue having been whether Louisiana's workers compensation statute created a company immunity that extended to the physician), and turned to a case from Louisiana's third circuit, *Thomas v. Kenton*, which held that company doctors conducting routine annual physical examinations did not have a physician-patient relationship with employees and so were not liable for malpractice. The *Green* panel decided that *Thomas v. Kenton*, not *Ducote*, was "arguably... on all fours with the case at bar."

Because the Fifth Circuit did not read the Louisiana Supreme Court's decision in *Ducote* as governing in *Green*, it could not treat *Ducote*, with its strong language about the doctor-patient relationship, in terms not limited to the special situation of workers compensation. 97 In *Ducote*, the narrow issue was whether the company doctor, whom the plaintiff had seen to treat an on-the-job hand injury, was immunized under Louisiana's workers compensation statute. The Louisiana Supreme Court held that the doctor was not shielded because he was working in a "dual capacity," as a company employee but also within a doctor-patient relationship. The court followed and discussed at length authority from other jurisdictions holding that a company doctor's role was "identical to that of a doctor in private practice with a patient." 98 *Id.* at 401. The Louisiana Supreme Court rejected the idea that a doctor's employment arrangements might confer immunity for malpractice, particularly when the employer could not control the doctor's professional activities. *Id.* at 403-04. The opinion included language inconsistent with the idea that company doctors would be immune from malpractice liability: "[W]hen the doctor... treats a patient he treats the patient as a doctor. Vis-à-vis his patients he is a doctor, not a co-employee." 99 *Id.* at 404.

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98. 425 So. 2d 396 (La. App. 3d Cir. 1982). *Ducote* and the third circuit's earlier decision in *Thomas* can be distinguished in theory on the grounds that in *Ducote* the doctor committed malpractice in treating the specific condition for which he was consulted. 521 So. 2d at 400. In *Thomas*, the doctor missed a specific condition but was only consulted for a general check-up. 100 *Green*, 910 F.2d at 293. Yet such distinctions would be flatly contrary to the Louisiana Supreme Court's reliance on the basic nature of the doctor-patient relationship in *Ducote*. In that light, the Fifth Circuit seems to have reached the right result, but for a much too indirect reason. It should have read the suggestions in *Thomas* that a company doctor might have immunity never available to private doctors as overruled by *Ducote*.


100. *Green*, 910 F.2d at 293.
relationship, as having overruled *Thomas v. Kenton*. The resulting *Erie* question is whether the Fifth Circuit resolved the conflict with appropriate deference, given its reading of the state cases. On that score, the court wielded *Shelp* to justify disregarding the intermediate case that it believed was so much more on-point than *Ducote*.

Having framed the issue as whether it had to follow *Thomas v. Kenton*, the *Green* panel used *Shelp* to avoid that precedent. It cited *Shelp* for the principle that *Erie* “does not command blind allegiance to [any] case on all fours with the case before the court,” and, moreover, that this “flexibility is even greater” when analyzing the law in Louisiana, a state where caselaw is only “secondary information.” With this dispensation, the panel apparently felt safe to disregard *Thomas v. Kenton*, and never cited it again. Instead, the panel turned to much more remote authorities, a general Louisiana statute on tort responsibility (one not dealing just with physician liability) and a Louisiana Supreme Court decision that held physicians to a broad professional responsibility to an unborn child (a politically charged issue that is certainly not much authority on a company physician’s liability). On this thin and indirect foundation, the *Green* court decided that under Louisiana law, a company medical examination did indeed create a physician-patient relationship “at least to the extent of the tests conducted.”

101. *Id.* at 294.
102. The broad Louisiana statute on the duty of care, article 2315 of the Louisiana Civil Code, read that “Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.” *Id.* at 294 (citing La. Civ. Code. art. 2315 (1997)). The Louisiana Supreme Court case, *Pitre v. Opelousas General Hospital*, 530 So. 2d 1151 (La. 1988), arose over the failure of a physician’s tubal ligation surgery and the subsequent birth of an albino child. In holding that the doctor had a duty not only to the parents but also to the unborn child, the court extended the physician’s duty to the child, while using strong language that the special position and knowledge enjoyed by physicians should give them a corresponding responsibility. *Id.* at 1157. The *Green* court also cited the statutory duty imposed on Louisiana physicians to perform with “the degree of care ordinarily exercised by physicians in active practice in a similar community under similar circumstances” under La. R.S. 9:2794(A)(1) (1997). 910 F.2d at 295.
103. *Id.* at 295–96.
In *FDIC v. Abraham*, the Fifth Circuit not only used the special Louisiana rule to disregard an intermediate appellate decision but, if its decision can be taken at face value, it leveraged this anti-*Erie* disregard to bolster a more general justification for disregarding intermediate state courts in any jurisdiction. In *Abraham*, fifteen former officers and directors of a savings bank allegedly breached their fiduciary duty. The issue was whether Louisiana’s relatively short prescription period for unintentional torts, instead of its longer period for breach of fiduciary duty, governed the case. The trial court had granted summary judgment for the defendants based on a one-year statute for unintentional torts; the FDIC argued on appeal to the Fifth Circuit that the longer fiduciary breach statute should be applied.

A prior Fifth Circuit panel had held that gross negligence by corporate directors did not rise to the level of a breach of fiduciary duty under Louisiana law unless coupled with “fraud, a breach of trust or other ill acts.” Louisiana’s First Circuit Court of Appeals, however, held shortly thereafter in *Theriot v. Bourg* that corporate officers and directors could be liable for breach of fiduciary duty without a gross negligence finding. The Louisiana Supreme Court, though clearly aware of the Fifth Circuit’s contrary position because it had been cited in the briefs, denied the writ in *Theriot*. Thus Louisiana courts rejected the Fifth Circuit’s conservative effort to narrow application of Louisiana’s fiduciary law and refused to require fraud or other intentional conduct before exposing officers and directors to fiduciary-duty claims.

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104. 137 F.3d 264 (5th Cir. 1998).
105. Id. at 266, 268.
106. Id. at 266–67 (citing FDIC v. Barton, 96 F.3d 128 (5th Cir. 1996)).
107. 96-0466 (La. App. 1st Cir. 2/14/97), 691 So. 2d 213, writ denied, 97-1151 (La. 06/30/97), 696 So. 2d 1008.
108. See id. at 220–22; Abraham, 137 F.3d at 267 (discussing Theriot). In Theriot, although it did not address prescription, the First Circuit rejected the argument that a director’s breach of fiduciary duty claim required gross negligence. 691 So. 2d at 221–22. It also specifically rejected another Fifth Circuit decision, *Louisiana World Exposition v. Federal Insurance Company*, 864 F.2d 1147 (5th Cir. 1989), that had accepted the Fifth Circuit’s protective view of corporate liability that required gross negligence. See Theriot, 691 So. 2d at 222.
109. Abraham, 137 F.3d at 267.
Against this background, the *Abraham* panel, apparently seeking a way to ignore *Theriot*, tried to minimize the conflict between its past decisions calling for a heightened burden of proof and *Theriot*'s mere negligence standard in two ways. First, it noted that a 1992 Louisiana statute provided separate prescription periods for negligent and for intentional violations by bank officers and directors.\textsuperscript{110} Yet the court conspicuously did not claim that this statute governed the dispute before it (were that the case, the opinion could have ended with that one short point); and another Fifth Circuit opinion had already held that Louisiana's statute, although purporting to be retroactive, could not apply retroactively to cases where the RTC had been appointed a receiver prior to the 1992 statute.\textsuperscript{111} This exclusion surely rendered the new statute's prescription periods inapplicable to *Abraham*.\textsuperscript{112}

Second, the panel noted that its past decision denying that gross negligence could sustain a breach of fiduciary duty claim had dealt specifically with limitations, the issue in *FDIC v. Abraham*; in contrast, the contrary and more recent intermediate state court decision in *Theriot* found that mere negligence could sustain a fiduciary violation in a dispute over corporate officers' substantive duty of care, but did not address the statute of limitations.\textsuperscript{113} Yet the limitations portion of the prior Fifth Circuit decision turned entirely on a substantive view that even grossly negligent directors did not breach their fiduciary duty under Louisiana law unless the plaintiff could show "fraud, a breach of trust or other ill acts."\textsuperscript{114} *Theriot* thus conflicted directly and irreconcilably with that holding.

The *Abraham* opinion bore telltale signs that the panel understood it was rejecting an existing state rule. Its rendition of

\begin{itemize}
  \item \textsuperscript{110} *Id.* at 268 (citing La. R.S. 6:293 (2005) and La. R.S. 6:787 (2005)).
  \item \textsuperscript{111} See *FDIC v. Barton*, 96 F.3d 128, 133 (5th Cir. 1996).
  \item \textsuperscript{112} In *Barton*, the RTC was appointed as receiver eight months before Louisiana passed its new bank prescription statute, and had filed suit in October 1994. See *id.* at 131–32. The RTC filed the *Abraham* complaint in June 1993, sixteen months before the *Barton* complaint. *Abraham*, 137 F.3d at 266. So the Louisiana statute surely was just as inapplicable to *Abraham* as it was to *Barton*. And if the statute did not apply, the Fifth Circuit should not have been able to import it indirectly via an implicit use of the statute as evidence on Louisiana law.
  \item \textsuperscript{113} *Abraham*, 137 F.3d at 269–70.
  \item \textsuperscript{114} *Barton*, 96 F.3d at 133–34.
\end{itemize}
Erie for Louisiana stressed that intermediate decisions were merely to “guide” a federal court. It dismissively added that “if we are chary to rely on—much less be bound by—the holding of one intermediate state appellate court” (the exact evidence that Erie intends federal courts “rely on”), it was doubly chary when Louisiana law was at stake, where “the primary sources of law are its constitution, codes, and statutes and the decisions of its courts are secondary sources of law until and unless the numbers and unanimity of such decisions achieve the force of law through the Civil Law doctrine of jurisprudence constante.”

Even then, perhaps uncomfortable that it had disregarded a so-directly-on-point holding by an intermediate state court, the Abraham panel retreated behind yet another interpretive doctrine. It claimed that the prior Fifth Circuit decision bound it, as a later panel in the same circuit, unless a “subsequent state court decision” showed that the Fifth Circuit’s prior reading of state law was “clearly wrong.” The court thus used the historical coincidence that the state law issue in Abraham had first appeared in federal court to reverse the presumptively binding Erie nature of the state court decision, while at the same time elevating the initial federal reading to a binding decision that would prevail over later intermediate state decisions unless “clearly wrong.”

In this way, a federal decision that turned out to be wrong under the prism of state law nonetheless was infused with new life, flipping Erie’s burden of review and shifting the presumption back in favor of the federal system, simply because the federal judge happened to rule first. Thus, primacy alone lowered the required federal deference to state court precedent and helped the federal decision to perpetuate itself. Erie commands deference to state court jurisprudence; but Abraham holds that if a federal judge gets there first, subsequent federal courts need not defer to any but the state’s highest court. Finding with angel-on-a-pinhead logic that the “pure holding” of Theriot was not “clearly contrary” to the

115. Abraham, 137 F.3d at 268 n. 13.
116. Id. at 268.
117. Id. (emphasis added).
118. Id. at 269. The prior Fifth Circuit cases were Pruitt v. Levi Strauss & Co., 932 F.2d 458, 465 (5th Cir.), reh’g denied, 936 F.2d 571 (5th Cir. 1991); Franham v. Bristow Helicopters, Inc., 776 F.2d 535, 537 (5th Cir. 1985); and Lee v. Frozen Food Express, Inc., 592 F.2d 271, 272 (5th Cir. 1979).
Fifth Circuit’s earlier decision, the panel persuaded itself that it could disregard the contrary state decision.

The improper no-deference Louisiana rule thus operated in Abraham to bolster an equally improper no-deference rule based solely on the temporal priority of a prior federal panel ruling, one of the several tragedies of this departure from Erie. As noted, Erie aims to prevent federal judges from indulging in their own readings of a given state’s law if there is a state determination at the time of their ruling. Federal judges are not to substitute their readings, not even if they fervently believe that the state interpretation is really wrong. (All of this is what deference means: if federal courts only follow state rules they like, they are no longer giving state decisions a presumption of correctness.) Yet under Abraham’s past-precedent rule, the Fifth Circuit is free to confirm a rule contrary to state law just because the issue happens to have come up first in a federal court, not a state court. This is the exact opposite of circuits that reverse their own rulings when state courts have adopted different interpretations. The fact that a federal court may have won a first-to-decide competition does nothing to lessen the twin Erie evils of discriminatory dual systems of law and institutional depreciation of the state judiciary.

To say that the Fifth Circuit will agree to follow a later state decision, but only if the pre-existing Fifth Circuit rule is “clearly wrong,” sends a clear invitation to federal courts to invent sophist distinctions that will sustain their preferred reading of state law even in the face of contrary intermediate state court holdings. Worse, this prior-federal-holding presumption can apply to any level of state court, not just intermediate courts. The same logic invites federal courts to hairsplit even decisions of the Louisiana Supreme Court (or other states) so that the Fifth Circuit can continue with its own preferred readings of Louisiana law. None of this institutional disregard has any legitimate foundation in the fertile soil of Erie jurisprudence.

119. Abraham, 137 F.3d at 269–70.
120. For a very recent affirmation of this first-in-time reason to disregard Erie, see Lamar Advertising Co. v. Continental Casualty Co., 396 F.3d 654, 663 n. 8 (5th Cir. 2005).
Shelp-based incursions into the *Erie* doctrine continue to be fruitful and multiply.\(^{122}\) A recent example occurred in *Chevron v. Vermillion Parish School Board*.\(^{123}\) The dispute arose in six consolidated royalty lawsuits against some of the largest oil

122. Another recent case of Fifth Circuit disregard of Louisiana law based on the Shelp principle is *Terrebonne Parish School Board v. Columbia Gulf Transmission Co.*, 290 F.3d 303 (5th Cir. 2003). The case presented an issue that has rapidly become critical to Louisiana's economic future, the responsibility for coastal erosion. Columbia had trespassed on school board property and begun building a pipeline on it in the mid-1960s. *Id.* at 308. When the board discovered the trespass, it entered a servitude agreement with the pipeline. *Id.* at 308–09. Columbia allegedly had not properly maintained the canals in the decades that followed. *Id.* at 309. The evidence suggested "that breaches in the canals' banks have exposed the floating marsh to tidal surges, which have washed away, and continue to wash away, the light organic soil necessary for the marsh mats to cohere." *Id.*

The district court granted summary judgment for the pipeline defendants, in part by applying a general one-year *ex delicto* tort prescription period and not the ten-year *ex contractu* period. *Id.* at 307, 309. The Fifth Circuit found only one prior intermediate Louisiana decision on what it viewed as the appropriate prescription period, the period "for a claim of aggravation to the servient estate." *Id.* at 317–18. In *Stephens v. International Paper Co.*, 542 So. 2d 35, 38–40 (La. App. 2d Cir. 1989), Louisiana's Second Circuit Court of Appeals held that timber cutters' duty to keep gates closed on a property while cutting timber (to avoid letting cattle loose), because it "did not arise from a 'special' obligation contractually assumed," rested only on the general duty to avoid aggravating a servient estate, instead of the much longer contract period. *Id.* at 38–40. The *Terrebonne* panel based its decision on the same general statutory duty to avoid aggravating the servient estate. 290 F.3d at 315–17 (citing *Stephens*, 542 So. 2d at 39). It nonetheless rejected the short one-year *ex delicto* prescription period applied in *Stephens* and by the *Terrebonne* trial court. *Id.* at 318.

The Fifth Circuit did admit it was bound to look to intermediate state decisions for "guidance," and that such decisions cannot be disregarded without "other persuasive data." *Id.* at 317 (citations omitted). Nonetheless, it speculated—and it was pure speculation—that "[t]he *Stephens* court, however, may have misapplied this fundamental principle, and the district court may be persuaded that if the Louisiana Supreme Court were to consider this issue, it would adopt the opposite rule." *Id.* at 318. *Terrebonne* does not mention the special Louisiana no-deference rule, but it would have been hard to treat *Stephens* more dismissively. The panel remanded to the trial judge to make a new determination of Louisiana law, under this freer standard. *Id.*

The Fifth Circuit did suggest that the Louisiana Supreme Court might distinguish *Terrebonne Parish* from *Stevens* because the *Terrebonne* estate-holders were not adjoining parties but instead bound by contract over the same property, but it never explained the relevance of this difference when the particular obligation did not arise from contract.

123. 128 F. Supp. 2d 961 (W.D. La. 2001), appeal dismissed, 294 F.3d 716 (5th Cir. 2002). As noted at the outset of this article, the author was one of the counsel for the putative class in this case, which introduced him to the special *Erie* rule for Louisiana.
companies operating in Louisiana, and rested on allegations that they had underpaid natural gas royalties by not passing on the full value they or their affiliates received for the gas and by deducting too many costs from the gas price. The dispositive issue turned out to be whether Louisiana’s Mineral Code, which requires a royalty owner to give written notice thirty days before suing, allows a class representative to give notice for an entire class. The only two intermediate state courts to address the precise issue, both in cases involving Texaco, had held that class notice is entirely proper, as had the one prior federal judge to face the issue. The federal judge even went so far as to quite correctly hold that the contrary argument, that Louisiana’s Mineral Code prohibits class-wide notice, “contradicts both Louisiana case law and common sense.” Nothing in the Louisiana Mineral Code prohibits class notice.

In Vermillion Parish, unfortunately, Louisiana case law did not prevail, nor did it prevent a Louisiana federal district judge and the Fifth Circuit from writing a new individual-notice requirement into the Louisiana Mineral Code. To preface his revision to the Code, the Vermillion Parish trial judge cited pastiches of past Fifth Circuit decisions for the proposition that while he was “bound to apply the law as interpreted by the state’s highest court,” his job in the absence of state supreme court adjudication was “to determine, to the best of [his] ability, how that court would rule if the issue were before it.” Under this very non-deferential standard, the

124. See Lewis v. Texaco, 96-1458 (La. App. 1st Cir. 07/30/97), 698 So. 2d 1001, writ denied, 97-2437 (La. 12/19/97), 706 So. 2d 454; and Duhe v. Texaco, 99-2002 (La. App. 3d Cir. 02/07/01), 779 So. 2d 1070, writ denied, 01-0637 (La. 04/27/01), 791 So. 2d 637. In Lewis, the first circuit rejected Texaco’s argument that the class representatives had to give statutory pre-suit notice for every class member individually in a gas royalty case involving a huge class of over 4,200 members in the Hollywood field in Terrebonne Parish. 698 So. 2d at 1008-11. In Duhe, an oil posted-price royalty case, the defendant again was Texaco. 779 So. 2d 1070. The third circuit followed Lewis and held that certification was appropriate for a statewide class over approximately 6,000 “active” leases, with approximately 13,000 to 14,000 lessors. Id. at 1087.

125. The federal case in which the class-action notice issue arose was the national oil posted-price litigation before Judge Jack in federal court in Corpus Christi, Texas. In re Lease Oil Antitrust Litig. (No. II) (“MDL 1206”), 186 F.R.D. 403 (S.D. Tex. 1999).


127. Vermillion Parish, 128 F. Supp. 2d at 967.
trial judge felt free to "consider all authority relevant to what it concludes the Louisiana Supreme Court would look to in order to decide the issue at bar."\textsuperscript{128} In other words, the judge would conduct his own \textit{de novo} analysis. By virtue of having been appointed in the federal system, the judge stepped into the shoes of the Louisiana Supreme Court, the very problem \textit{Erie} tried to eradicate.

Assuming the right to make his own analysis, the \textit{Vermillion Parish} trial judge then concluded that by using the singular word "he" in requiring that a lessor "must give his lessee written notice" in La. R.S. 31:137,\textsuperscript{129} the Louisiana Legislature must have intended to forbid class representatives from giving class notice. Because an oil royalty class representative will generally not even know the names of the class members unless the court allows certification discovery, this holding treated the Code as if the legislature must have intended to bar class actions. \textit{Vermillion Parish}'s only remaining reference to deference was to observe that if required to wade into Louisiana intermediate law, the court would find it conflicting, a position reached by marshalling cases that were not even class actions as if they present a conflict with class cases holding class notice proper.\textsuperscript{130}

\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.} at 967–68.
\textsuperscript{130} This portion of \textit{Vermillion Parish} essentially follows the oil company position in claiming that three cases that did not contain any intermediate court holdings on class notice nonetheless created a conflict with two cases that did. The idea that cases with specific holdings approving class notice can be offset by cases that do \textit{not} address the issue, including non-class cases, is an example of conservative judicial activism thwarting the natural operation of Federal Rule of Civil Procedure 23.

The \textit{Vermillion Parish} trial court held that the Louisiana First Circuit Court of Appeals decision in \textit{Stoute v. Wagner & Brown}, 637 So.2d 1199 (La. App. 1st Cir. 5/20/94) conflicted with and was better law than the later opinion in \textit{Lewis v. Texaco}. 96-1458 (La. App. 1st Cir. 07/30/97), 698 So. 2d 1001, \textit{writ denied}, 97-2437 (La. 12/19/97), 706 So. 2d 454. Indeed, the court treated \textit{Stoute} as dispositive in its statement that "the Louisiana Court of Appeal for the First Circuit was correct in the \textit{Stoute} case in its interpretation of the notice requirement of article 137." \textit{Vermillion Parish}, 128 F. Supp. 2d at 968.

But \textit{Stoute} did not contain an appellate holding on class notice, while \textit{Lewis} did. As the \textit{Vermillion Parish} court itself admitted, the only issue on appeal in \textit{Stoute} was whether the court properly denied certification. \textit{Id.} at 966. In \textit{Stoute}, at the trial court level, the judge had required individual class notice. 637 So. 2d at 1200–01. That holding, however, which was not the issue on appeal, was not dispositive because the \textit{Stoute} opinion ultimately held that a class action would
not be a superior method of adjudicating a royalty dispute in a small field in which an unusual number of class members already had sued individually. *Id.* (The *Stoute* court also repeated the inevitable oil-company line that each lease is "different," *id.* at 1201, a trap for unwary judges who may not know that oil-and-gas leases tend to use standard terms).

In contrast, the same first circuit, in *Lewis*, squarely addressed and rejected an oil-company challenge to the availability of class notice under article 137. The issue had even more prominence in this case because oil industry amici filed briefs, and the decision was unsuccessfully appealed to the Louisiana Supreme Court. The *Lewis* court rejected the attack on class notice. It noted that the individual-language theory, the theory *Vermillion Parish*’s federal judge later adopted, makes no sense in a Code whose starting sections define the singular to include the plural and vice versa. *Lewis*, 698 So. 2d at 1009.

The *Vermillion Parish* judge distinguished *Lewis* because it concerned only a single field, not the statewide classes before him. *Vermillion Parish*, 128 F. Supp. 2d at 968. This distinction could not separate these cases because the company argument was that the Louisiana Mineral Code requires individual notice by *all* class members—not that it allows class representative notice in single-field classes but not statewide classes. Moreover, as *Lewis* involved well over 4,000 royalty owners, a huge class, 698 So. 2d at 1006, it is hard to see why statewide classes would fall under a different rule. The *Vermillion Parish* judge did not suggest any reason to differentiate it from a statewide class.

The fact that *Stoute* does not represent a holding on article 137 notice issues can be established conclusively because the same circuit rejected the argument that *Stoute* had decided this issue when it later decided *Lewis*. *Lewis* did not adopt the position the *Vermillion Parish* oil companies claimed had been adopted in *Stoute*, but *Lewis* would have been bound to do so had *Stoute* been good law on the class-notice issue since the first circuit follows the law-of-the-circuit rule. *See*, e.g., Louisiana Employers-Managed Insurance Co. v. Litchfield, 01-0123 (La. App. 1st Cir. 12/28/01), 805 So. 2d 386, 391.

The *Vermillion* trial court relied almost as heavily on a second case cited by the oil companies, *Willis v. Franklin*, 420 So. 2d 1243 (La. App. 3d Cir. 1982), as though it supported an individual-notice requirement. *See Vermillion Parish*, 128 F. Supp. 2d at 966, 968. But *Willis* could hardly decide a class-notice issue, for it set out to determine an issue of a different nature—whether a party choosing to proceed by individual litigation but failing to give proper notice can nonetheless piggyback on the individual notice of another plaintiff. 420 So. 2d 1244-46. The *Willis* court held that an ordinary individual notice does not extend to other parties. *Id.*

The *Vermillion Parish* opinion noted that the oil-company individual-notice argument had been rejected in *Duhe v. Texaco*, No. 86-848 (Parish of Iberia, 16th Judicial Dist.), with the third circuit denying Texaco’s writ application in that case, but made no effort to distinguish *Duhe*. *See Vermillion Parish*, 128 F. Supp. 2d at 967.

Finally, the *Vermillion Parish* judge cited *Rivers v. Sun Exploration and Production Co.*, 559 So. 2d 963 (La. App. 2d Cir. 1990), as an expression of the notice requirement’s general purpose. *Vermillion Parish*, 128 F. Supp. 2d at 965. The *Rivers* issue, however, was readily distinguishable. The *Rivers* court merely held that a notice letter complaining about price underpayments could not be stretched to include a claim for nonpayment, a failure to pay at all, for certain production. 559 So. 2d at 969–70. As far as a general standard, the
On appeal, when the Fifth Circuit finally addressed the substantive issue in *Vermillion Parish*, it affirmed and offered yet another prime example of federal judges imposing their preferred reading of state law despite existing state decisions. Following neither of the relevant Louisiana intermediate decisions and relying instead on the same cases that did not address class notice as the trial court, the Fifth Circuit claimed a state law conflict where none existed. Once thus unshackled from its *Erie* opinion actually contains liberal language that notice need not be a demand for performance, but need merely put the lessee on notice. The court stated that there is no precise or specific requirement for the notice; the lessee just has to receive enough information so that he can investigate. *Id.* at 968–69.

On remand from a first appeal, the *Vermillion Parish* judge again relied on *Stoute* and *Willis* as his primary substantive authority on the class-notice issue. *Chevron v. Vermillion Parish School Bd.*, 215 F.R.D. 511, 513, 515 n.4 (W.D. La. 2003), *certified to Louisiana Supreme Court*, 364 F.3d 607 (5th Cir.), *certified question refused*, 872 So. 2d 533, *underlying opinion aff’d*, 377 F.3d 459 (5th Cir. 2004).

131. The Fifth Circuit chose not to decide the merits in a first appeal. See *infra* note 135. On remand, the trial court granted summary judgment on the same class-notice grounds on which he had dismissed the case the first time. *Vermillion Parish*, 215 F.R.D. 511, 515–16 (W.D. La. 2003) (deciding, in addition, that Louisiana school boards are not proper parties to bring class actions, *id.* at 516–17), and the Fifth Circuit unsuccessfully tried to certify the question to the Louisiana Supreme Court. See *infra* note 135.

132. The Fifth Circuit was vague on the exact conflict in Louisiana law, as if it did not want to directly endorse the trial court’s (and oil companies’) proposition that a conflict does exist. In its order certifying the question to the Louisiana Supreme Court, the Fifth Circuit nonetheless attempted to suggest a conflict within Louisiana law to help support its request for the Louisiana Supreme Court to take the issue. The Fifth Circuit began by citing the trial judge’s conclusion that *Stoute* conflicted with *Lewis*. *Chevron v. Vermillion Parish School Bd.*, 364 F.3d 607, 610–11 (5th Cir. 2004). Yet the Fifth Circuit admitted that *Stoute* does not “expressly consider whether a class demand letter satisfies Article 137” and discussed the two Louisiana cases that do (*Lewis v. Texaco* and *Duhe v. Texaco*) before incorrectly concluding that there “are conflicting rulings on this point by the Louisiana Courts of Appeal.” *Id.* at 610–12.

The Fifth Circuit thus never demonstrated any actual conflict in Louisiana law. And, after the Louisiana Supreme Court refused to hear the certified class-notice question, the Fifth Circuit merely reiterated that “decisions of Louisiana intermediate appellate courts are conflicting.” *Chevron v. Vermillion Parish School Bd.*, 377 F.3d 459, 461 (5th Cir. 2004). The court did, in a footnote, cite *Lewis* and *Duhe*—which are not conflicting, and are the only intermediate Louisiana cases to decide the issue—and *Stoute*, which does not contain a holding on class notice. *Id.* at 461 n.2. The court then quickly went on to state that “[e]ven if the Louisiana intermediate appellate court decisions were not in
bonds, the panel decided *Vermillion Parish* through a feat of judicial activism. Making an independent factual determination that oil companies could not reasonably respond to class-wide notice within the thirty-day statutory period (a factual determination made without any evidence on the point), the court found that the Louisiana Legislature therefore must not have intended to allow class-wide pre-suit notice under the Mineral Code.\(^{133}\) Not only did the Fifth Circuit make this factual assertion without evidence (or legislative history) supporting the corporate protection it was writing into Louisiana law, but it never mentioned the trial court's refusal, over class counsel's objection, to permit the class discovery into this very issue (the ease of response). Indeed, the trial court refused discovery even though the class had accurately predicted that the oil companies would exploit the absence of a record to make precisely these unsupported factual arguments about the impossibility of responding.\(^{134}\) This example of conservative judicial activism

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conflict" it would still perform its own textual analysis of Louisiana law in the full *Shelp* tradition. *Id.* at 461–62.  
133. 377 F.3d at 462–64.  
134. When the putative class filed a motion to compel, after the oil companies had refused to allow any discovery at all and would not produce a single piece of paper, it predicted that the very companies claiming discovery was irrelevant would argue on appeal that individual differences were so complex that the class could not be certified—and that the class would be denied the information needed to prove that the claims were very simple and common. See, e.g., Motion to Compel Consolidated Oil Companies to Finally Allow the Beginning of Certification Discovery, *passim*, Chevron v. Vermillion Parish School Bd., Civil Action No. 00-0279 (Oct. 7, 2002). For instance, the class pointed out that:

> If the oil companies are not required to produce the documents that show generally their payment practices for the class, they nonetheless will argue to the court that numerous differences in those practices should defeat certification. Yet they will have thwarted discovery that would show, in reality, that they pay royalties and make NGL adjustments based on common practices that are uniform throughout Louisiana. *Id.* at 9–10.

This is exactly what happened. The Fifth Circuit's conclusion that oil companies could not reasonably be expected to respond to a class claim in thirty days is a factual conclusion that is based on no evidence, and assumes facts on the very topic on which the trial court refused discovery. Neither court gave the class its day in court on this issue. While judicial efficiency requires federal courts to keep their dockets moving, it should never be at the expense of the full,
became possible only through the Fifth Circuit's use of *Shelp* as a justification to disregard contrary on-point state law.\textsuperscript{135}

This new and very activist federal engraftment onto the Louisiana Mineral Code guarantees out-of-state oil companies that whenever they are sued in a class action involving Louisiana royalty owners, all they need to do is remove to federal court and they will find an automatic exemption from class actions. For instance, in recent briefing over a national class action for natural-gas royalty owners against Exxon, a federal court did not even have to reach the ordinary certification battle for the Louisiana subclass, but simply denied Louisiana royalty owners any right to participate because of *Vermillion*'s holding on class notice.\textsuperscript{136} This extremely damaging dual system of law is exactly why *Erie* instructed federal judges not to make their own determination of state law.

This long line of cases, from *Shelp* in 1964 to the recent *Vermillion Parish* decision, withholds the deference and respect

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fair adjudication that the Federal Rules of Civil Procedure are designed to ensure all litigants, even if their claims are presented on a class basis.

In fact, the issue presented in each class notice was very simple and easy to answer: Did the oil companies pass on the price they received for natural gas and deduct only their actual, reasonable costs in making royalty payments? Each company has uniform practices for paying royalties and their royalty divisions could have told them whether they agreed with the claims the day they received the class notice. The oil companies did not need a week, much less thirty days, to know how they should respond.

\textsuperscript{135} In the first appeal, the Fifth Circuit remanded the case without decision on jurisdictional grounds. *Chevron v. Vermillion Parish School Bd.*, 294 F.3d 716 (5th Cir. 2002). The second time up, the court certified the notice issue to the Louisiana Supreme Court. *Chevron v. Vermillion Parish School Bd.*, 364 F.3d 607 (5th Cir. 2004). Unfortunately, in spite of the great significance of this issue to one of the major industries in Louisiana and to the hundreds of thousands of royalty owners in that state, a significance so great that even the trial court had certified its first decision as final so that the issue could go to the Louisiana Supreme Court, *Vermillion Parish*, 128 F. Supp. 2d at 969, that court refused to take the certified question without any explanation. See *Chevron v. Vermillion Parish School Bd.*, 872 So. 2d 533 (La. 2004).

\textsuperscript{136} *Hunter v. Exxon*, 2005 WL 357682 (W.D. Tex. Jan. 7, 2005). As the court noted, in *Vermillion* the Fifth Circuit "seems to have foreclosed the possibility of bringing the Louisiana claims." *Id.* at *5. While the court did later determine on discretionary grounds that it should decertify the class for other states, for Louisiana it did not even reach the merits of certification. *Vermillion* is the equivalent of a "get out of court" card for any out-of-state oil company sued in a purported class action involving Louisiana royalty owners.
that *Erie* ordered federal courts to cede to their state counterparts on issues of state law.\textsuperscript{137} This novel Louisiana-only mutation encourages and recreates the dual system of law *Erie* set out to eliminate. It lets federal judges decide whether they agree with existing Louisiana precedent, and whether they think they have a better reading of the state’s law than its own courts. Though purportedly based on civilian interpretive principles that Louisiana judges are supposed to apply, it confuses those principles with the proper *Erie* question, namely, which body is the right one to apply those principles. The end result is a unique disregard of the very courts which *Erie* indicates are supposed to decide questions of substantive state law.

As the next section shows, not all Fifth Circuit opinions reviewing questions of Louisiana law have adopted the non-deferential standard in *Shelp* and its progeny.

### III. Other Fifth Circuit Decisions Continue to Analyze Louisiana Law Under Proper *Erie* Standards

One of the funny things about the no-deference *Erie* rule that some Fifth Circuit panels have applied when deciding issues of Louisiana law is that other Fifth Circuit panels, often with some of the same judges, have approached the state’s law by following its intermediate state court decisions, as *Erie* requires, and have done so without a hint of a special Louisiana no-deference rule. Their approach is indistinguishable from an ordinary *Erie* federal court’s review of a substantive state law decision.

In *Lavespere v. Niagara Machine & Tool Works, Inc.*\textsuperscript{138} a metal-working-machine manufacturer failed to install a press brake safeguard before selling one of its machines to a small Louisiana manufacturer.\textsuperscript{139} A new employee just out of high school crushed his hand in one of the machines.\textsuperscript{140} The case turned on what

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\textsuperscript{137} See also American International Specialty Lines Ins. Co. v. Canal Indemnity Co., 352 F.3d 254, 265 (5th Cir. 2003) (discussing intermediate decisions as only “secondary” authority, *id.* at 260–61, and stating that even if those cases were on point, they would not have the “numerosity and unanimity of decisions needed to rise to the level of jurisprudence constante, *id.* at 265).

\textsuperscript{138} 910 F.2d 167 (5th Cir. 1990).

\textsuperscript{139} *Id.* at 170–71.

\textsuperscript{140} *Id.* at 171.
product-liability standard applied, and on whether the feasibility of factory installation of a press brake safeguard by the manufacturer, who did not necessarily know how the machine would be used by a given customer, was relevant. Because the post-accident Louisiana Products Liability Act required proof that alternative designs existed and could pass a cost-benefit analysis, proof the Fifth Circuit felt the plaintiff had not met, the decision hung on whether this statute was retroactive. Applying Louisiana law holding that procedural measures are retroactive unless the legislature says otherwise, the Fifth Circuit concluded that the Act was indeed retroactive.

The *Lavespere* court treated intermediate Louisiana cases on legislative retroactivity as serious authority that it would have to follow when applicable. It distinguished the one prior intermediate case on the Act’s retroactivity, which had held that the Act was not retroactive, as dealing only with a substantive portion of the Act, and carefully distinguished the machine maker’s key pre-Act

141. *Id.* at 179, 181–83.
142. *Id.* at 179–80.
143. *Id.* at 181.
144. *Id.* at 181–83.
145. *Id.* at 182–83 (discussing *McCoy* v. Otis Elevator Co., 546 So. 2d 229 (La. App. 2d Cir.), *writ denied*, 551 So. 2d 636 (1989)). *Lavespere* treated *McCoy* as limited to the reach of just one substantive portion of the Louisiana Products Liability Act, the Act’s exclusive-remedy section that eliminated the cause of action for *per se* unreasonably dangerous products, a section *McCoy* held could not be applied retroactively under Louisiana law. 910 F.2d at 182–83. The Fifth Circuit cited authority that at least once in the past, Louisiana courts had found some portions of a statute retroactive, and others not. *See id.* at 183 n.83.

Though the court distinguished *Lavespere* as involving the “procedural” issue of the “burden of proof” for proving defective design in an elevator, *see id.* at 181–83, the cases were much closer than that. *Both Lavespere and McCoy* involved alleged defects in elevators, and the added showing required of the plaintiff in *Lavespere* sounds like part of the substantive cause of action. Moreover, the second circuit’s broad language in *McCoy* certainly sounded as if it was classifying the entire statute, and not merely a portion of its provisions, as substantive and therefore only prospective in application. *Compare Lavespere*, 910 F.2d at 182–83 with *McCoy*, 546 So. 2d at 232.

This purported distinction of *McCoy* shows how even under a traditional standard of review, courts can skirt the import of *Erie* merely by redefining the law. Yet plasticity exists under any legal test. One of the challenges of any system of laws, those rooted in common law or in the civilian tradition, is that a court can almost always find some distinction to separate a case before it from past precedent. The plausibility of the distinction is a test of the integrity and skill of the court.
authority as also inapplicable.\textsuperscript{146} The court gave not the slightest hint that it could choose to disregard those decisions, had it thought they applied, just because it disagreed with their interpretation of Louisiana law.

Notably, \textit{Lavespere} did not announce, as Judge Wisdom did in \textit{Shelp}, that because the court was interpreting a statute, it was free to disregard contrary intermediate decisions made by state courts. \textit{Lavespere} contains no statements to the effect that it is a Code the court was interpreting, and that Louisiana courts read their law differently than other state courts do theirs. Though the Fifth Circuit may have in fact disregarded at least one intermediate state case, it buried that conflict without any affirmative suggestion that it was free to ignore the case or that federal courts have license to disregard what intermediate Louisiana judges think about their own law.

A more traditional \textit{Erie}-deference opinion is a slightly later case, \textit{Brocato v. Traina},\textsuperscript{147} a bankruptcy appeal that turned on Louisiana’s homestead exemption.\textsuperscript{148} In a very short decision, the Fifth Circuit cited the ordinary \textit{Erie} duty to give “proper regard” to decisions of Louisiana intermediate courts, found that those courts had resolved the dispositive issue, and followed their lead.\textsuperscript{149} The court quoted the language of the homestead statute, but unlike a true civilian court, it did not discuss what the language meant before indicating its obeisance to intermediate state court decisions.\textsuperscript{150} This is the kind of deference envisioned in \textit{Erie}.\textsuperscript{151}

\begin{itemize}
\item \textsuperscript{146} \textit{Lavespere}, 910 F.2d at 184 (see discussion of Sawyer v. Niagara Machine & Tool Works, Inc., 535 So. 2d 1057 (La. App. 2d Cir. 1988), writ denied, 536 So. 2d 1222 (1989)).
\item \textsuperscript{147} 30 F.3d 641 (5th Cir. 1994).
\item \textsuperscript{148} \textit{id.} at 642.
\item \textsuperscript{149} \textit{id.} at 642-43.
\item \textsuperscript{150} The only part of \textit{Brocato} where the court addressed statutory language is when it rebutted the appellants’ claim that the homestead provision was changed by the 1974 Constitution. \textit{Id.} at 642. Even there, the court followed intermediate state law in rejecting that argument. It cited a state court decision, \textit{Gulfco Finance Co. v. Browder}, 482 So. 2d 1019 (La. App. 3d Cir. 1986), which it took as binding, to clinch its conclusion that the Constitution did not change this standard. \textit{Brocato}, 30 F.3d at 643.
\item \textsuperscript{151} For another relatively early and deferential opinion, see \textit{Rogers v. Corrosion Products, Inc.}, 42 F.3d 292 (5th Cir.), \textit{cert. denied}, 515 U.S. 1160, 115 S. Ct. 2614 (1995). The \textit{Rogers} panel did offer a very loose version of the \textit{Erie} rule, that intermediate decisions are “given some weight, but they are not controlling,” but it did not suggest that this was a special Louisiana rule. \textit{Id.} at
\end{itemize}
Other Fifth Circuit decisions show similar respect to Louisiana state court interpretations of Louisiana law, with nary a hint that there should be a special discount applied against mid-level Louisiana state court justice. In *Matheny v. Glen Falls Insurance Co.*, an insurer tried to avoid paying for damages caused by an uninsured motorist when the insured’s son was killed in a car accident. The insureds had rejected uninsured motorist coverage, but Louisiana law required insurers to re-offer uninsured motorist coverage every time there was a “new” policy. The *Matheny* court concluded that the plaintiffs had received a “new” policy when they added their son to their existing coverage. For that reason, the insurer—who should have offered uninsured motorist coverage again at that time, but did not—was on the hook. This conclusion appeared after a five-page discussion focusing almost entirely on intermediate state decisions. The court spent an inordinate amount of time showing that it was construing state law in accordance with Louisiana precedent, an entirely unnecessary endeavor if it was free to blaze its own path through Louisiana’s civilian thicket without such deference.

Although the Fifth Circuit did cite one opinion in the no-deference line for the proposition that intermediate authorities “provide guidance, but are not controlling,” mentioned an underlying legislative policy favoring uninsured motorist coverage, and suggested that “numerous decisions of the Louisiana Supreme Court” (none actually cited in the opinion) reflected that underlying policy, *Matheny’s ratio decidendi* was derived entirely from a universe of intermediate state decisions. Here, again, one finds none of the analysis a court would have had to undertake had

295. Moreover, it gave a painstaking analysis of the four intermediate state cases and, because two contained only dicta, refused to follow them and instead followed the other two in not suspending limitations for bankruptcy. *Id.* The court reasoned that “the jurisprudence here counsels us not to broaden suspension to include bankruptcy proceedings.” *Id.* This is classic *Erie* analysis.

152. 152 F.3d 348 (5th Cir. 1998).
153. *Id.* at 349–50.
154. *Id.*
155. *Id.* at 350.
156. *See id.* at 350–54.
157. *Id.*
it believed it could begin and end with the Code and commentators interpreting it, with at best a bit role filled by intermediate judicial authorities.

Another broadly deferential opinion, a classic Erie application, is the Fifth Circuit's 2000 decision in *Howe v. Scottsdale Insurance Co.* The issue in *Howe* was whether a charity hospital, one of whose patients had been injured in an auto accident, had to pass on part of the patient's legal expenses from the cost reimbursement the hospital received from the patient's insurer. By statute, Louisiana provided a medical lien privilege, and allowed charity hospitals to intervene and protect their right to reimbursement when the patient sued to seek his or her own compensation. In somewhat analogous situations, the Louisiana Supreme Court had held that workers compensation carriers who intervened to recover their costs had to bear a portion of an injured worker's legal fees, and had even required that a health insurer bear part of the recovery costs when it sued on a contractual right to sue the tortfeasor. But four of five intermediate state courts had refused to extend that Supreme Court precedent to charity hospitals, a rule that would reduce their recovery by making them bear some of the patient's legal expenses.

*Howe* certainly presented a slate upon which a non-deferential court could have written from the direct source materials of Louisiana law. It invited a pure Code analysis in a circumstance where the Louisiana Supreme Court had not squarely reached the issue and intermediate courts were not unanimous (i.e., one state court split with the other four). But the panel treated itself as bound to follow the majority of intermediate state courts. It noted that in the absence of direct Supreme Court precedent, the court had to "seek guidance" from those court decisions. Finding four of five cases going one way, the court did not even identify the

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158. 204 F.3d 624 (5th Cir. 2000).
159. *Id.* at 626–28.
160. *Id.* at 626 (listing medical lien privilege at La. R.S. 9:4752 (1991) and authorization for charity hospital intervention in La. R.S. 46:7 (1999)).
161. *Id.* at 627–28 (citing Moody v. Arabie, 498 So. 2d 1081 (La. 1986) and Barreca v. Cobb, 95-1651 (La. 02/28/96), 668 So. 2d 1129).
162. *Id.* at 628.
163. *Id.*
lone contrary case. Instead, it held itself unable to “disregard a plethora of precedent provided by the intermediate appellate courts of Louisiana,” in the absence of any sign that the Louisiana Supreme Court would decide differently. The court spent no time on the purposes of the relevant statutes, the views of commentators, or the language of the statutes (which receive much more deference in civilian systems than in common law adjudication). It just followed the trend in intermediate state decisions a la Erie. Thus here, too, a Fifth Circuit panel quite correctly applied the general no-deference rule in effect since 1938.

Finally, in 2002 the Fifth Circuit issued another pure Erie decision without suggesting any reason to lower its regard for Louisiana intermediate state courts. In Patin v. Thoroughbred Power Boats, Inc., the key issue in a case decided under Florida substantive law was whose law Louisiana would apply in a dispute over piercing the corporate veil. The Louisiana Supreme Court had not spoken on the issue, but one intermediate Louisiana court had. The Fifth Circuit recited the general mantra that it would be “guided by the decisions of state intermediate appellate courts unless other persuasive data indicates that the Louisiana Supreme Court would decide otherwise.” The court actually cited Texas authority within the Fifth Circuit for the non-controversial, general Erie standard, thus maintaining the general rule of high deference to state courts without any exception for Louisiana. Though the Patin court did note that other federal courts had interpreted Louisiana law the same way as the Louisiana intermediate court, the opinion gives no indication that it would have varied from

164. See id. (listing only the four supportive intermediate Louisiana authorities).
165. Id.
167. 294 F.3d 640 (5th Cir. 2002).
168. Id. at 646–47.
169. Id.
170. Id. at 646.
171. See id. (citing First Nat'l Bank of Durant v. Douglass, 142 F.3d 802, 809 (5th Cir. 1998)).
172. Id. at 646–47.
Louisiana's intermediate decision if federal courts had disagreed with the state case, or that the panel believed it needed to apply any special rule to the issue.\textsuperscript{173}

Thus, contrary to Shelp and the other no-deference cases, a separate line of Fifth Circuit decisions has continued to give appropriate \textit{Erie} respect to state court decisions. These cases avoid creating a separate federal refuge for non-citizens seeking to avoid the strictures of Louisiana law as decided by Louisiana's own courts. These panels did not insist on adopting their own readings of Louisiana law, even if they happened to think there was a better rule than the one state courts had announced. They displayed a full, proper understanding that under our federalist system, Louisiana courts, even intermediate Louisiana state courts, are best suited to determine their own law.

IV. THE NO-DEFERENCE RULE SHOULD NOT BE ALLOWED TO THWART \textit{Erie}

Not all federal cases treating a question of Louisiana law have to take a stand on the deference due to state courts. A number of Fifth Circuit opinions read as if they are ready to follow the special Louisiana rule, but either find no state court conflict or find a resolution in a manner that does not conflict with state cases. These cases endorse Shelp's distinctive, non-deferential standard of review in the comfortable realm of dicta, but they do not

\textsuperscript{173} For other cases applying \textit{Erie} without suggesting a special Louisiana exception, see \textit{Holden v. Connex-Metalma Management Consulting Group}, 302 F.3d 358, 365–66 & n.9 (5th Cir. 2002) (following intermediate state court decision, only authority on point, as "persuasive authority"); \textit{Scarborough v. Northern Assurance Co.}, 718 F.2d 130, 134–37 (5th Cir. 1983) (following intermediate state decisions on insurance coverage question and noting that these decisions "are controlling, absent strong indication that the Supreme Court of Louisiana would have decided them differently"); \textit{Cormier v. Williams/Sedco/Horn Constructors}, 460 F. Supp. 1010, 1012–13 (E.D. La. 1978) (following intermediate Louisiana courts on applicability of Jones Act, and noting that "re-examination of a state intermediate appellate court's decision on an issue of state law is not something that this court will lightly undertake."). The traditional analysis also appears in a case like \textit{Washington v. Western & Southern Ins. Co.}, 107 Fed. Appx. 433, 435–36 (5th Cir. 2004), in which the Fifth Circuit treated two conflicting intermediate decisions as serious precedent with no suggestion that it was free to disregard that level of Louisiana justice if it disagreed, as it decided another insurance coverage question.
themselves disregard state court decisions.\textsuperscript{174} Other cases involving Louisiana law sail through the at-times turbulent seas of the Fifth Circuit without suggesting any lower-deference rule, either because the Louisiana Supreme Court has spoken clearly on the issue or because there is no intermediate state law to direct the court.\textsuperscript{175} But as \textit{Shelp} and its progeny show, the no-deference

\textsuperscript{174} One of these cases applied a rule of less deference because it was a tax case, but did not cite any contrary intermediate decisions. This non-deferential case does not fit the strict \textit{Erie} category, given that it was a tax case. \textit{Delaune v. United States}, 143 F.3d 995, 998 (5th Cir. 1998), \textit{cert. denied}, 525 U.S. 1072, 119 S. Ct. 805 (1999), addressed whether Louisiana allowed renunciation of an inheritance in the context of federal income tax. The standard of review applied by the Fifth Circuit was a special rule for state-law questions decided in federal income-tax disputes, a context in which the court concluded that the relevant standard was that it “need accord no particular deference” to state decisions. \textit{Id.} at 1001–02. \textit{Delaune} nonetheless has to be placed on the shelf near the \textit{Shelp} line of cases because it cited \textit{Shelp} and its presumption that federal courts making civil law interpretations undertake something “fundamentally different from the common law process . . . .” \textit{See id.} at 1002 \& n.6. In an analysis very similar to \textit{Shelp}’s, the court grappled with what it concluded was an inadvertent omission of the term “repudiate” from the Digest of 1808 and subsequent codes; discussed the language of the Code and commentators; and like Judge Wisdom in \textit{Shelp}, ended up applying the “clear French text” in the Code of 1825. \textit{Id.} at 1003–05.

Another example of non-deferential dictum is a case over Louisiana’s statutory exemption of annuity contracts from debt liability, including seizure under the federal bankruptcy laws. \textit{In re Orso}, 283 F.3d 686 (5th Cir. 2002). The Fifth Circuit found the statute clear and unambiguous and did not cite any contrary cases, even though it did endorse the civilian tradition and primacy of the Code. \textit{Id.} at 695 \& n.29.

A third case cited the no-deference standard as background to a decision over what it found to be an unambiguous property-insurance agreement, a conclusion the court presumably would have reached in a common law jurisdiction as well. \textit{Prytania Park Hotel, Ltd. v. General Star Indemnity Co.}, 179 F.3d 169 (5th Cir. 1999). The panel emitted civil overtones as it criticized the trial court for beginning its analysis with a judicial decision, even though it was a Louisiana Supreme Court decision. \textit{Id.} at 173–74. For \textit{Prytania}’s stress on the contrary civilian approach, \textit{see id.} at 175 \& n.9.

\textit{Hulin v. Fibreboard Corp.}, 178 F.3d 316, 319–21 (5th Cir. 1999), discussed the special nature of Code adjudication, but only as a preface to explaining how the retroactivity doctrine applies to a product-liability decision of the Louisiana Supreme Court. \textit{Hulin} addressed the retroactivity of the Louisiana Supreme Court decision in \textit{Halphen v. Johns-Manville Sales Corp.}, 484 So. 2d 110 (La. 1986), \textit{superceded by statute}, Louisiana Products Liability Act, 1988 La. Acts No. 64, an opinion answering a question certified by the Fifth Circuit to the Louisiana Supreme Court.

\textsuperscript{175} \textit{See, e.g.}, \textit{In re Liljeberg Enterprises}, 304 F.3d 410, 424 (5th Cir. 2002) (reciting general \textit{Erie} standard), 454–55 (discussing “classic \textit{Erie} question” but finding neither caselaw nor statute to resolve it); \textit{Hawking v. Ford Motor Credit Co.}, 210 F.3d 540, 546–47 \& n.21 (5th Cir. 2000) (factually distinguishing
doctrine is extremely important because it can change case outcomes when it does apply.

The Fifth Circuit's no-deference rule is an uneasy principle of interpretation, as shown by the haphazard way that some panels adopt the rule and others do not. That it is applied so inconsistently is one sign that the Erie-for-Louisiana rule is in trouble. The last two sections have shown that some panels start off with the proposition that federal courts can treat intermediate Louisiana courts in a much more cavalier fashion than intermediate decisions from other states, and apply Shelp-like standards without apology. A separate group of cases in the same general time period approaches Louisiana law like any other state's law, without any suggestion of a material difference. Some of the same judges have sat on panels in both groups of cases. Such internal

intermediate cases on agency issue), 548 (finding no Louisiana authority on proper interpretation of Uniform Fiduciaries Act).

Another case distinguished a narrowly different intermediate Louisiana decision because it turned on a contract not before the Fifth Circuit. See Labiche v. Legal Security Life Ins. Co., 31 F.3d 350 (5th Cir. 1994). In Labiche, a subrogation dispute, the Fifth Circuit cited the loose language favored by non-deferential courts that lower state court decisions "should be given some weight, but they are not controlling," id. at 351-52, yet nonetheless went on to distinguish the potentially conflicting intermediate court decision as if it had to take that precedent seriously. See id. at 353-54.

In 2001, the Fifth Circuit again decided an Erie case that was written in a way to avoid suggesting any special rule of lesser deference. In Verdine v. Ensco Offshore Co., 255 F.3d 246 (5th Cir. 2001), the issue was whether a contractor was exempted from indemnification by Louisiana's Anti-Indemnity Act. Id. at 250. Intermediate state courts initially had read the Act's exemption broadly as designed to protect oilfield contractors from "defense and indemnity provisions forced on" them. Id. The Fifth Circuit then adopted a rule that would narrow the exemption to agreements that pertained to a well or wells. Id. at 251. The Louisiana Supreme Court subsequently adopted that narrower reading. Id. at 252-53. The Fifth Circuit thus was easily able to distinguish two contrary intermediate Louisiana decisions that occurred before the Louisiana Supreme Court adopted the Fifth Circuit interpretation. Id. at 252-53. Verdine also recites the strong language of West v. AT&T, 311 U.S. 223, 61 S. Ct. 179 (1940), that a reviewing court will not disregard intermediate decisions unless "convinced by other persuasive data," Verdine, 255 F.3d at 252, with no mention of any special rule.

176. For instance, Judge Higginbotham, who was a member of panels that espoused the Shelp standard in Delaune v. United States, 143 F.3d 995 (5th Cir. 1998), cert. denied, 552 U.S. 1072, 119 S. Ct. 805 (1999) (see supra note 174) and Songbyrd v. Bearsville Records, Inc., 104 F.3d 773 (5th Cir. 1997) (see infra notes 188-93 and accompanying text) was also on panels that enunciated a
inconsistency is one sign that there is something wrong with the rule.

The plasticity of phrase and ease of verbal manipulation that accompanies these mixed messages sends another warning call. Appellate panels wanting to affirm what is, in their view, a better rule provided by their own federal trial courts, tend to cite the second half of West's admonition that the decisions of intermediate courts, though a "guide," are not "controlling". They need not be as blunt as Shelp itself, with its blunt phrase that "Erie does not command blind allegiance to a case on all fours with the case before the court." Courts wanting to bestow proper Erie rule of traditional deference in Howe v. Scottsdale Ins. Co., 204 F.3d 624 (5th Cir.), cert. denied, 531 U.S. 824, 121 S. Ct. 68 (2000) (see supra notes 158–66 and accompanying text) and Patin v. Thoroughbred Power Boats, Inc., 294 F.3d 640 (5th Cir. 2002) (see supra notes 167–73 and accompanying text). Judge Dennis, a member of the non-deferential panel in Hulin v. Fibreboard Corp., 178 F.3d 316 (5th Cir. 1999) (see infra note 174), nonetheless authored the deferential Matheny v. Glen Falls Ins. Co., 152 F.3d 348 (5th Cir. 1998) (see supra notes 152–57 and accompanying text). Judge Barksdale, who sat in with the Vermillion Parish panel (see supra notes 123–35 and accompanying text), also joined the traditionally deferential opinions in Matheny, Brocato v. Traina, 30 F.3d 641 (5th Cir. 1994) (see supra notes 147–51 and accompanying text), and Lavespere v. Niagara Machine & Tool Works, Inc., 910 F.2d 167 (5th Cir. 1990), cert. denied, 510 U.S. 859, 114 S. Ct. 171 (1993) (see supra notes 138–46 and accompanying text). Judge Davis, who wrote the second and third Vermillion Parish opinions and was on the Songbyrd panel, also joined the opinion in Brocato. Judge Jones sat both in the nondeferential Prytania Park Hotel, Ltd. v. General Star Indemnity Co., 179 F.3d 169 (5th Cir. 1999), but also in the deferential Lavespere panel. All of these judges were on the en banc court that endorsed the aggressively non-deferential, non-Erie test in In re Orso, 283 F.3d 686 (5th Cir. 2002) (supra note 174); yet a number of them also sat in the cases discussed in supra note 175 that do not suggest any special Erie test, even though not finding an actual conflict in Louisiana law needing resolution.

177. For instance, see Chevron v. Vermilion Parish School Board, 128 F. Supp. 2d 961, 967 (W.D. La. 2001) (citing Rogers v. Corrosion Products, Inc., 42 F.3d 292, 295 (5th Cir.), cert. denied, 515 U.S. 1160, 115 S. Ct. 2614 (1995)), for this language. Rogers in turn cited Commissioner v. Estate of Bosch, 387 U.S. 456, 465, 87 S. Ct. 1776, 1782 (1967), a somewhat irrelevant case given the special standard of review in tax cases, for the proposition that "decisions of lower state courts should be given some weight, but they are not controlling where the highest state court has not spoken on the subject." Rogers, 42 F.3d at 295. Or consider Green v. Walker's rendition, citing West, that "[t]he decision of an intermediate appellate state court guides, but does not necessarily control a federal court's determination of the applicable state law." 910 F.2d 291, 294 (5th Cir. 1990).

deference focus instead on the principle that in the absence of "other persuasive data,"\(^{179}\) a federal court must follow its state counterparts. When these courts also write about state decisions being a "guide," they mean a guide one has to follow unless an extraordinary roadblock forces one to take a different path.\(^ {180}\)

When Shelp does apply, the made-for-Louisiana rule of dismissive interpretation creates both of the evils that Erie intended to eradicate. Linguistic games cannot hide the fact that allowing federal judges a larger sphere in which they can accept or reject the prior determinations of intermediate Louisiana courts resurrects the dual system of law. Non-citizens receive an extra chance to avoid state rules they do not like through the mere expedient of going to federal court, and the discrimination and disrespect that the Erie Court thought it had eradicated reappears on the judicial landscape.

Such dual rules have a predictable impact on identifiable classes of citizens and non-citizens. Louisiana is a very poor state. As measured by the 2000 Census, Louisiana ranked forty-fifth in the nation in average per-capita income ($21,794 for 1999), the same rank it had in 1990.\(^ {181}\) Fully 19.1% of the state's population live below the poverty level, an abysmally high percentage surpassed only by one other state, New Mexico (20.4%), and by the District of Columbia (22.3%).\(^ {182}\) The recent devastation from two large hurricanes has weakened the state further. Like many other poor states, Louisiana's economy depends heavily on out-of-state corporations.

These large foreign corporations often invoke a federal court's power in an effort to avoid settled Louisiana law. The existence of a non-deferential backup federal forum gives these corporations an added layer of protection against Louisiana citizens trying to

\(^{179}\) West, 311 U.S. at 237, 61 S. Ct. at 183.

\(^{180}\) Thus, for instance, when the Fifth Circuit spoke in Patin v. Thoroughbred Power Boats, Inc., 294 F.3d 640, 646 (5th Cir. 2002), of being "guided by the decisions of state intermediate appellate courts," and in Howe v. Scottsdale Insurance Company, 204 F.3d 624, 628 (5th Cir. 2000), of seeking "guidance" from intermediate courts, it meant actually following existing decisions without second-guessing the state judges' analysis.


\(^{182}\) Id. at 477 tbl. 759.
enforce their own rights. *Chevron v. Vermillion Parish* is a prime example. In that case, six out-of-state oil companies, including two of the largest multinational companies in the world (ExxonMobil and ChevronTexaco), successfully sought out federal jurisdiction to strip tens of thousands of Louisiana royalty owners of their rights to initiate a class action under existing law in state court. The pre-*Erie* dual system revived under the no-deference rule is not just an abstract transfer of power from citizens to non-citizens; it also represents a large shift of power from individuals to wealthy non-citizen corporations. This is no victory for the administration of justice.

The no-deference rule, of course, continues to spawn the other *Erie* evil as well, damage to the federalist structure. Because Louisiana is a civilian rather than common law state, when federal judges assume greater power to wade directly into Louisiana law, they are necessarily encouraged to disregard Louisiana judges' capability to decide their own law. When the *Shelp* opinion portrayed an embarrassingly contrary decision of the Louisiana second circuit as a "single, aberrant deviation,"183 when the court in *Green v. Walker* gave short shrift to an arguably controlling state court decision because it viewed Louisiana cases as merely "secondary information,"184 when the Fifth Circuit in *FDIC v. Abraham* announced that it was "chary to rely on" a contrary first circuit opinion,185 or, most stunningly of all, when the Fifth Circuit, in a case discussed below, announced that it need not even account for opinions of the Louisiana Supreme Court unless they reached the density of *jurisprudence constante*,186 federal courts are injecting the "disturbing and irritating" disruption into state and federal relations that Justice Field bemoaned in *Baltimore & Ohio...
and that *Erie* sought to remove from federal jurisprudence.

Justifying a federal court’s disregard of a Louisiana state decision on the theory that Louisiana judges are not as tightly bound by precedent as judges in common law states fails to answer either the federalist problem or the dual-system problem. A federal judge is still free to indulge a personal view that a state judge got it wrong. *Erie* is designed to prevent federal judges from using mere disagreement as an excuse to ignore a state decision. When a federal judge downplays the opinion of a state counterpart in the belief that the latter did not properly apply state interpretive principles (for instance did not read the Code or commentators correctly), the federal judge is really just disagreeing with the state judge’s reasoning. In Louisiana, unlike common law states, that reasoning may tend to favor the Code and commentary more than jurisprudence, but the Louisiana non-deference exception to *Erie* still represents no more than the federal judge rejecting the thinking of the state judge and substituting his or her own ideas. The damage from this violation is no less severe because the disregarded state opinion concerns more statute and less caselaw than might occur in a common law jurisdiction.

It is one sign of just how extreme the *Shelp* principle really is that its logic does not stop with intermediate state court decisions. If cases are much less the foundation of law in Louisiana compared to other states, and if this difference frees federal courts from their ordinary respect for state decisions, there is no reason to defer to the Louisiana Supreme Court either. *Shelp* originated from an effort to dodge one intermediate decision, and all but one of the *Shelp* line of opinions seem to be aimed at avoiding intermediate state court opinions. But the rationale for a standard of reduced deference is just as applicable to the decisions of the Louisiana Supreme Court.

In 1997, a Fifth Circuit panel, at least in articulation, took *Shelp* all the way. In *Songbyrd, Inc. v. Bearsville Records, Inc.*, the court confronted whether an action to recover master tapes

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188. 104 F.3d 773.
made by "Professor Longhair," a well-known New Orleans rhythm-and-blues pianist, was subject to "liberative" (statutory) or "acquisitive" (possessory) prescription.\textsuperscript{1} The substantive discussion began with a traditional \textit{Shelp} approach emphasizing the secondary nature of judicial decisions in Louisiana.\textsuperscript{190} In true civilian fashion, the panel analyzed the Code and the views of a leading commentator, Professor A. N. Yiannopoulos of Tulane University, before turning to Louisiana precedent.\textsuperscript{191} In reviewing the available jurisprudence, the panel found conflicting Louisiana Supreme Court authority and noted that the most recent "pronouncement" of that court supported the panel's reading.\textsuperscript{192} The panel also held, however, that in the absence of \textit{jurisprudence constante}, the line of precedent required for a rule to be binding within the Louisiana state court system, it could refuse to be bound by precedent even though the decision came from Louisiana's highest court:

But regardless whether the most recent pronouncement of the Louisiana Supreme Court supports our analysis of the Civil Code and that of Professor Yiannopoulos, there is simply no \textit{jurisprudence constante} on the question. It follows, then, that our \textit{Erie}-bound decision to follow the plain wording and indisputable structure of the Louisiana Civil Code and Professor Yiannopoulos' analysis is either supported by or at least does no violence to Louisiana's jurisprudence as a secondary source of law.\textsuperscript{193}

What the Fifth Circuit was thus saying, at least in dictum, was that in the absence of a long line of Louisiana Supreme Court cases, a Fifth Circuit panel need not be bound by decisions of the Louisiana Supreme Court, even if such decisions are clear and on-point. Federal courts could wield the doctrine of \textit{jurisprudence constante} to avoid a single decision or even a handful of decisions of the state supreme court any time their own readings of the law seem more beguiling. This set of circumstances demonstrates the

\textsuperscript{189} Id. at 777.  
\textsuperscript{190} See id. at 776.  
\textsuperscript{191} Id. at 777–78.  
\textsuperscript{192} Id. at 778–79.  
\textsuperscript{193} Id. at 779.
pure, unadulterated logic of *Shelp*, and in the clarity of *Songbyrd’s* expression, renders *Shelp*’s extremism plain for all to see.

The low-deference, often no-deference Louisiana rule is particularly odd because, recalling Justice Holmes’s argument in his *Black & White Taxicab* dissent before *Erie*, the unique civilian characteristics of Louisiana’s state law should make federal judges particularly wary of unilaterally deciding issues that the state’s courts have already addressed. In questioning the need for a general federal common law, Justice Holmes’s choice of Louisiana as an example reflected his understanding that, particularly in Louisiana, the state with the most distinctly different system of jurisprudence, federal judges should not meddle with state affairs.

Though fortunately the *Shelp* non-deference rule has been limited thus far to intermediate state courts, *Songbyrd* is correct that the logic of the non-deference position applies just as clearly to decisions of the Louisiana Supreme Court. If federal courts are free to treat Louisiana law as different and non-precedential; if they can disregard the two institutional problems that motivated *Erie* itself, the discriminatory dual-system of law and the affront to the federalist structure; if they can go straight to the Code without worrying overmuch about how state courts have read the Code; if they can so skirt the views of state judges generally, nothing in the *Shelp*’s logic says that they can do so for intermediate courts but not the Louisiana Supreme Court itself. This final extension shows how contrary the special Louisiana rule is to *Erie* itself.

Federal courts should return to the unalloyed deference commanded by *Erie*. It is time to jettison the appealing license for federal judges to decide Louisiana state law that is the dubious legacy of *Shelp*.

194. *See supra* notes 36–38 and accompanying text.