Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?

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The conventional wisdom is that state courts need not follow lower federal court precedent when interpreting federal law. Upon closer inspection, however, the question of how state courts should treat lower federal court precedent is not so clear. Although most state courts now take the conventional approach, a few contend that they are obligated to follow the lower federal courts, and two federal courts of appeals have declared that their decisions are binding on state courts. The Constitution's text and structure send mixed messages about the relationship between state and lower federal courts, and the Supreme Court has never squarely addressed the matter. Remarkably, this significant question about the interplay between the state and federal judicial systems lingers unresolved more than two-hundred years after the Constitution's ratification.

This Article uses this question to explore the relationship between state and lower federal courts. As a constitutional matter, it can be argued that state courts were intended to play a subordinate role to the lower federal courts when interpreting federal law, even if they are viewed as equals when it comes to finding facts and applying facts to law. Furthermore, Congress's decision to create the lower federal courts, and then assign them broad federal question jurisdiction, arguably displaces state court authority to interpret federal law independently—particularly in an era in which the Supreme Court lacks the capacity to resolve many of the splits between the federal and state court systems. Finally, as a practical matter, allowing state courts to diverge from lower federal court precedent on matters of federal law can create disruptive intrastate conflicts that lead to forum shopping and can sometimes take years to resolve.

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Although state courts are unlikely to reverse course and declare that they are bound by the decisions of the lower federal courts, both Congress and the Supreme Court arguably have the authority to require that they do so. The Article concludes by describing the source of these institutions' authority over state courts, as well as the costs and benefits of requiring state courts to follow lower federal court precedent.

I. INTRODUCTION

Lower federal court precedent cannot bind state courts, or so we are told. Most state courts assert that they are free to reach their own conclusions about the meaning of federal law, even when doing so creates a conflict with the federal court of appeals presiding over the geographic region in which they sit.[1] Several federal circuits have

1. *See, e.g.*, Danner v. MBNA Am. Bank, N.A., 255 S.W.3d 863, 868 (Ark. 2007) ("[D]ecisions of the federal circuit courts are not binding on this court . . . ."); Abela v. Gen. Motors Corp., 677 N.W.2d 325, 327 (Mich. 2004) ("Although state courts are bound by the decisions of the United States Supreme Court construing federal law . . . there is no similar obligation with respect to decisions of the lower federal courts."). For a detailed discussion of state court treatment of lower federal court precedent, see *infra* Part II.

conceded that their decisions are not binding on state courts,[2] and, in concurring opinions, two justices have emphatically agreed.[3] A number of federal courts scholars have declared that state courts need not follow lower federal court precedent because state courts are "coordinate" with lower federal courts and not "subordinate" to them.[4]

And yet, upon closer inspection, the role of lower federal court precedent in state court decisionmaking remains unclear. A few state courts appear to believe that they are bound to follow the decisions of the federal courts of appeals on questions of federal law, and many others have issued inconsistent opinions on that question.[5] The U.S. Courts of Appeals for the Eighth and Ninth Circuits claim that state courts must follow their lead on federal questions, creating a circuit split that has never been resolved by the Supreme Court.[6] Only a handful of legal scholars have opined on the matter, and most have done

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2. *See, e.g.*, Freeman v. Lane, 962 F.2d 1252, 1258 (7th Cir. 1992) ("[T]he Supremacy Clause did not require the Illinois courts to follow Seventh Circuit precedent interpreting the Fifth Amendment."); *see also* Bromely v. Crisp, 561 F.2d 1351, 1354 (10th Cir. 1977) ("[T]he Oklahoma Courts may express their differing views on the retroactivity problem or similar federal questions until we are all guided by a binding decision of the Supreme Court."); Owsley v. Peyton, 352 F.2d 804, 805 (4th Cir. 1965) ("Though state courts may for policy reasons follow the decisions of the Court of Appeals whose circuit includes their state . . . they are not obliged to do so.").

3. *See* Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring); Steffel v. Thompson, 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., concurring). See *infra* Part II.C for further discussion of the Supreme Court's jurisprudence on this question.

4. *See, e.g.*, Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1904 (2011) ("[B]ecause the state supreme courts are coordinate (not inferior) to the federal courts of appeals on matters of federal law, state courts have no obligation to harmonize their interpretive choices with the decision of their local federal courts of appeals."); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1231 n.495 (1986) (stating that decisions of lower federal courts are no more than persuasive precedent for state courts); David L. Shapiro, *State Courts and Federal Declaratory Judgments,* 74 NW. U. L. REV. 759, 771 (1979) (declaring that state courts need not follow lower federal court precedent because "[lower] federal courts are no more than coordinate with the state courts on issues of federal law"). *But see* Kevin Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1, 31 (2006) ("[T]he question of whether state courts are bound by lower federal courts on the federal law's content remains open.").

5. *See infra* Part II. Of course, state courts never follow federal courts when it comes to the meaning of state law; rather, federal courts must follow the precedent set by the highest court in the state on such questions. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). This Article concerns only the precedential force of lower federal court decisions on questions of *federal* law, and thus all references in this Article to lower federal court precedent refers to precedent regarding the meaning of federal law.

6. Fretwell v. Lockhart, 946 F.2d 571, 577 (8th Cir. 1991) (assuming that an Arkansas state trial court would be obligated to follow its precedent on a question of federal constitutional law), *rev'd on other grounds*, 506 U.S. 364 (1993); Yniguez v. Arizona, 939 F.2d 727, 736 (9th Cir. 1991) ("Despite the authorities that take the view that state courts are free to ignore decisions of the lower federal courts on federal questions, we have serious doubts as to the wisdom of this view.").

so in passing in articles devoted to other subjects.[7] Remarkably, then, this significant question about the interplay between the state and federal judicial systems lingers unresolved more than two-hundred years after the Constitution's ratification.[8]

The relationship between the lower federal courts and the state courts raises foundational questions about the place of those federal courts in our constitutional structure. Are the lower federal courts' interpretations of federal law binding on the states under the Supremacy Clause, as the Supreme Court considers its own precedent to be?[9] Alternatively, are state and lower federal courts coequals under the Constitution such that neither can control the other's rulings? Does Congress or the Supreme Court have the constitutional authority to require that state courts follow lower federal court precedent? If not, is it because principles of federalism forbid such interference with state institutions, or because such a rule undermines judicial independence, or both?[10]

Similar foundational questions were raised seventy-five years ago in *Erie Railroad v. Tompkins*,[11] when the Supreme Court overruled *Swift v. Tyson*[12] and held that federal courts must follow state law as articulated by a state's highest court. The Court explained that federal courts undermined state sovereignty by failing to treat state courts'

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7. *See* Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1444 (1999) ("Scholarly treatment of [the weight of lower federal court precedent in state court] is . . . brief and conclusory."). Zeigler's article is the only article in the last fifty years to address the question in any detail, and his article does not engage in a sustained analysis of the constitutional questions at the heart of this Article. For further discussion of Zeigler's article, see *infra* Part II.D.

8. *See* Annotation, *Duty of State Courts to Follow Decisions of Federal Courts*, *Other than the Supreme Court, on Federal Questions*, 147 A.L.R. 857 (1943):

> If the United States Supreme Court has not passed upon a Federal question but there are decisions of one or more of the United States Circuit Courts of Appeals or of the United States District Courts, is a state court bound to follow them? On this there is a conflict of authority.

9. According to the Supreme Court, the Supremacy Clause requires that state courts follow its interpretation of federal law. *See* Danforth v. Missouri, 552 U.S. 264, 308 (2008); Cooper v. Aaron, 358 U.S. 1, 17–18 (1954). A number of scholars have questioned that conclusion, however. *See* Daniel A. Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387, 403–04 (summarizing the critiques of *Cooper v. Aaron*).

10. A leading federal courts casebook asks whether it would be "constitutional for Congress to require a state court to treat as controlling precedent the decisions of the federal circuit court of appeals within whose boundaries the state sits?" The authors do not answer that question. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 446 (6th ed. 2009).

11. 304 U.S. 64, 71 (1938).

12. 41 U.S. (16 Pet.) 1, 18 (1842).

views on state law as controlling.[13] Although *Erie* focused on the federal courts' obligation to adopt state common law, the decision confirmed that federal courts must follow state courts' interpretations of state positive law as well.[14] The bottom line after *Erie* is that state courts have the final word on the meaning of state law.

Erie is one of a handful of iconic cases that has shaped our understanding of not only the relationship between state and federal courts but also our entire federal system. According to John Hart Ely, *Erie* "implicates, indeed perhaps it is, the very essence of our federalism."[15] And yet *Erie* left the job half done. The case tells us how federal courts should treat state courts' precedent on state law, but it does not address how state courts should respond to federal courts' interpretation of federal law. Of course, some might argue that *Erie* supports the conclusion that state courts are bound only by the Supreme Court on questions of federal law, just as federal courts are required to follow only the precedent of the highest court of the state on questions of state law. And yet the unique and limited role of the Supreme Court creates a significant disjunction: the Court cannot quickly resolve disputes between state and federal courts on the meaning of federal law, leaving intrastate splits to linger between these court systems for decades.[16]

A few recent examples of some significant state–lower federal court splits illustrate the point:

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13. 304 U.S. at 78 ("[W]hether 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.").

14. *Erie* overruled *Swift v. Tyson*'s assertion that federal courts are not required to follow state common law but affirmed *Swift*'s view that federal courts must follow "the positive statutes of the state, and the construction thereof adopted by local tribunals." 41 U.S. (16 Pet.) at 18.

15. John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 695 (1974).

16. *See, e.g.*, JAMES E. PFANDER, ONE SUPREME COURT 90 (2009) ("[S]tate courts now exercise final authority in virtually every federal question case that comes before them."); Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1505–06 (2006) ("In reality, state court judgments resting upon the interpretation of federal statutes may—indeed, in the overwhelming majority of cases today, do—govern the rights and duties of parties subject to them without Supreme Court review."); Henry J. Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 412 (1972):

> [T]he Supreme Court's inability to hear more than a relatively few cases each term, its desire sometimes to let the dust settle before moving in, and other factors permit each circuit to make its own federal law in limited areas at least for a short time and occasionally . . . for a long one.

Gluck, *supra* note 4, at 1966 (noting that the Supreme Court rarely reviews state court decisions, thus concluding that it is "unrealistic" to rely on the Supreme Court to compel uniform interpretation of federal law); Tara Leigh Grove, *The Structural Case for Vertical Maximalism,* 95 CORNELL L. REV. 1, 4 (2009) ("[I]n our current judiciary, the Court can review only a fraction of the lower federal and state court cases raising federal questions.").

- Virginia state courts have repeatedly upheld the constitutionality of a Virginia statute criminalizing sodomy as applied to cases involving minors, distinguishing the Supreme Court's decision in *Lawrence v. Texas* holding a Texas antisodomy statute unconstitutional in a case involving sodomy between consenting adults. In contrast, the Fourth Circuit has declared that *Lawrence* requires invalidating the Virginia antisodomy statute in all its applications and has thus granted habeas relief to defendants convicted in Virginia state courts.[17]

- California state courts have held that provisions of the Federal Bankruptcy Code governing the avoidance of preferential transfers do not preempt the provisions of the California Code of Civil Procedure that allow assignment to avoid certain preferential transfers. Those decisions are in direct conflict with the Ninth Circuit's decision holding that the California law is preempted by federal law.[18]

- The Fourth Circuit has held that the stream of commerce of goods into a state, taken alone, is not sufficient to establish personal jurisdiction over the manufacturer of those goods,[19] a position that is at odds with the high courts of South Carolina and West Virginia, both of which are located within that circuit.[20] Thus, manufacturers are potentially subject to suit in state court but not in federal court for harm caused by products that find their way into those states.

- In 2000, the Texas Court of Criminal Appeals held that the Fifth Amendment requires only that law enforcement inform a

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17. *See* Saunders v. Commonwealth, 753 S.E.2d 602, 607–08 (Va. Ct. App. 2014) (following the Virginia Supreme Court's conclusion in *McDonald v. Commonwealth*, 645 S.E.2d 918 (Va. 2007), that the law is constitutional and rejecting the Fourth Circuit's contrary decision in *MacDonald v. Moose,* 710 F.3d 154 (4th Cir. 2013)). See *infra* Part IV.A.1 for a discussion of the provision of the Antiterrorism and Effective Death Penalty Act of 1996 barring habeas relief for state court decisions that conflict only with lower federal court decisions, and not decisions of the U.S. Supreme Court.

18. *See* Credit Managers Ass'n of Cal. v. Countrywide Home Loans, Inc., 50 Cal. Rptr. 3d 259, 264 (Ct. App. 2006) (describing split between *Haberbush v. Charles & Dorothy Cummins Family Ltd.,* 43 Cal. Rptr. 3d 814 (Ct. App. 2006), and *Sherwood Partners v. Lycos, Inc.*, 394 F.3d 1198 (9th Cir. 2005)).

19. Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 946–47 (4th Cir. 1994).

20. State v. NV Sumatra Tobacco Trading, Co., 666 S.E.2d 218, 222–23 (S.C. 2008); West Virginia *ex rel.* CSR, Ltd. v. MacQueen, 441 S.E.2d 658, 660–61 (W. Va. 1994). The Supreme Court failed to resolve this question in its recent decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011).

> suspect that he has a right to counsel *prior* to interrogation, without specifying that counsel may be present *during* the interrogation. That decision is in direct conflict with the 1968 decision by the U.S. Court of Appeals for the Fifth Circuit holding that a suspect must be informed that he has a right to counsel before and *during* interrogation.[21] Accordingly, the standard for Mirandizing a suspect in the state of Texas varies depending on whether the case would be tried in state or federal court.[22]

As these examples show, the interaction between lower federal courts and state courts is worth examining for both academic and practical reasons. As a matter of constitutional theory, we should have a better handle on the relationship between the two systems. As a practical matter, we should resolve ongoing confusion about the role of lower federal court precedent in state courts. Although commentators have endlessly analyzed the costs and benefits of federalism generally, less attention has been paid to the Constitution's most creative harnessing of federal and state institutions: the interdependent structures of the federal and state court systems.[23] A deeper understanding of the ways in which state and federal courts can, do, and *should* interact is long overdue. Articulating the rationales underlying state court treatment of lower federal court precedent will help to illuminate that relationship.

Furthermore, if, as most assume, state courts are not constitutionally obligated to follow precedent set by the lower federal courts, then we should determine whether it is constitutionally permissible for Congress or the Supreme Court to require them to do so. Arguably, legislation seeking to control the weight of lower federal

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21. Atwell v. United States, 398 F.2d 507, 510 (5th Cir. 1968); *see also* Bridgers v. Dretke, 431 F.3d 853, 858–59 (5th Cir. 2005) (describing the split).

22. In *Florida v. Powell*, 559 U.S. 50 (2010), the Supreme Court held that police officers satisfied Miranda when they told a suspect that he had a right to talk to a lawyer before answering questions, and that he could exercise any of his rights at any time during the interview, because the officers made sufficiently clear that the suspect had a right to counsel during questioning. The Court did not address whether Miranda would be satisfied were an officer to state only that counsel would be made available before questioning. Thus, the division between the Fifth Circuit and the Texas state courts has yet to be fully resolved.

23. Of course there are important exceptions. *See, e.g.*, Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between the State and Federal Courts*, 104 COLUM. L. REV. 1211 (2004). Furthermore, a number of recent articles have addressed the related question of how state courts should employ rules of statutory interpretation when interpreting federal statutes. *See, e.g.*, Clermont, *supra* note 4, at 30–32; Gluck, *supra* note 4, at 1904.

court precedent in state court is justified under Congress's power to enact all laws necessary and proper to effectuate the work of the lower federal courts—courts that Congress created under its authority to "constitute Tribunals inferior to the supreme Court."[24] Likewise, the Supreme Court's authority to fashion common-law rules of procedure to safeguard the uniformity and supremacy of federal law could justify a rule mandating that state courts follow lower federal court precedent. On the other hand, any attempt by Congress or the Supreme Court to tell states how to treat federal court precedent raises thorny questions about the scope of state sovereignty and the need to preserve judicial independence. These questions are worthy of further examination.

The Article proceeds as follows: Part II begins by canvassing state courts' varied treatment of lower federal court precedent and then briefly describes the views of the federal courts of appeals, the Supreme Court, and academic commentators on the question.

Part III analyzes the competing arguments from the Constitution's text and structure regarding the force of lower federal court precedent in state court. Article III of the Constitution permits the federal and state systems to exist side by side, exercising concurrent jurisdiction over cases involving both state and federal law, but does not explain how these separate court systems are to treat each other's decisions. Although the Constitution does not clearly address the issue, it is possible to draw inferences about the intended relationship between the state courts and the lower federal courts from the Madisonian Compromise, the original understanding, and these courts' respective institutional competencies. Although the evidence from these sources is mixed, sound arguments can be made that state courts were not intended to stand entirely apart from the lower federal courts when it comes to interpreting federal law. Furthermore, Congress's decision to create the lower federal courts and then vest them with broad federal question jurisdiction should also play a role in our understanding of the evolving relationship between these two court systems. In short, the constitutional arguments in favor of the conventional view that state courts are assumed to operate independently of the lower federal courts are surprisingly weak.

Admittedly, however, the Constitution does not speak clearly about the relationship between the state and lower federal courts. Thus, the more important question is whether Congress could enact a law requiring state courts to follow lower federal court precedent on questions of federal law or whether the Supreme Court could establish a common-law rule to the same effect. Part IV addresses this question.

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24. U.S. CONST. art. I, § 8.

Part V then outlines the costs and benefits of a rule requiring state court adherence to lower federal court precedent and concludes that, under some circumstances, it would be wise to tie a state court's hands by mandating that it follow the precedent of the federal court of appeals for the geographic region in which that state is located.

II. STATE COURT TREATMENT OF LOWER FEDERAL COURT PRECEDENT

A. The State Courts

State courts vary in the weight they give to lower federal court precedent on questions of federal law, ranging from "slavishly follow" to "totally disregard."[25] State courts rarely explain the rationale for their views regarding lower federal court precedent, and many have issued inconsistent opinions on the question.[26] That said, it is possible to (loosely) categorize states into three basic camps: those that consider opinions by lower federal courts to be persuasive precedent, those that give those decisions no weight, and those that consider them binding.[27]

The majority of state courts consider decisions by the inferior federal courts to be persuasive authority. For example, the Alabama Supreme Court declared, "While decisions of the federal circuit courts are not binding on this court, we find the First Circuit's interpretation of the [Federal Arbitration Act] to be highly persuasive."[28] Likewise, the Connecticut Supreme Court wrote that "decisions of the Second Circuit Court of Appeals, although often persuasive, are not binding on this court."[29] These state courts will typically follow the lead of those federal circuits that have opined on a federal question unless they strongly disagree with the position taken by those courts, or the lower federal courts themselves are in disagreement.

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25. Zeigler, *supra* note 7, at 1153.

26. For example, compare Martin v. Cullum, 299 P.2d 29, 30 (Cal. App. Dep't Super. Ct. 1956) ("This court cannot indulge in the luxury of its own ideas where a federal statute is concerned, but is bound by the decisions of the federal courts, and particularly, by the decisions of the United States Supreme Court."), with People v. Williams, 940 P.2d 710, 736 (Cal. 1997) ("Decisions of lower federal courts interpreting federal law are not binding on state courts.").

27. As employed here, the terms "precedent" and "binding precedent" refer to the holding in a judicial decision that must be followed in subsequent cases raising the same issue. In contrast, "persuasive precedent" carries special weight, but a court may disregard it if it concludes the earlier decision is incorrect.

28. *See, e.g.*, Danner v. MBNA Am. Bank, N.A., 255 S.W.3d 863, 868 (Ark. 2007) ("While decisions of the federal circuit courts are not binding on this court, we find the First Circuit's interpretation of the FAA to be highly persuasive.").

29. Chapman Lumber, Inc. v. Tager, 952 A.2d 1, 17 n.24 (Conn. 2008); *see also* Coral Constr., Inc. v. City & Cnty. of S.F., 235 P.3d 947, 958 (Cal. 2010) ("While the lower federal courts' decisions do not bind us, we give them 'great weight' when they reflect a consensus, as they do here.").

A few state courts appear to give federal appellate precedent very little weight when making their own determinations about the meaning of federal law. The Maryland Court of Appeals stated, "Although we certainly consider federal court decisions when interpreting the United States Constitution, it is our interpretation of the Fourth Amendment, confined by Supreme Court precedent, that is relevant . . . ."[30] The Indiana Supreme Court explained that if its decisions are in accord with the Seventh Circuit, it is only because it is in "substantive agreement on the merits" rather than because it owes "perfunctory deference to the Seventh Circuit."[31] The Louisiana Supreme Court declared that it is "not bound by the decisions of the lower federal courts," though it will review them for "guidance."[32]

Finally, at least a few state supreme courts appear to consider themselves bound by lower federal court decisions on questions of federal law, although that number has shrunk in recent years. In *King v. Grand Casinos of Mississippi, Inc.*, the Mississippi Supreme Court stated that the "Court's task in the present case is simplified greatly by the fact that there is a Fifth Circuit Court of Appeals decision on point, which this Court considers to be controlling with regard to the present issue of federal law."[33] The Arkansas Supreme Court explained that it is "bound by the decisions of the Federal Courts" in construing federal law, and then referred to and cited decisions of the federal district courts and the Sixth Circuit in making its decision.[34] The high courts in Delaware,[35] New Hampshire,[36] and South Carolina[37] have similarly suggested that lower federal court precedent is controlling when addressing federal questions.[38] However, it is not clear whether these

30. Agurs v. State, 998 A.2d 868, 884 n.13 (Md. 2010).

31. Indiana Dep't. of Pub. Welfare v. Payne, 622 N.E.2d 461, 468 (Ind. 1993).

32. FIA Card Servs., N.A. v. Weaver, 62 So.3d 709, 714 (La. 2011).

33. 697 So.2d 439, 440 (Miss. 1997).

34. Malvern Gravel Co. v. Mitchell, 385 S.W.2d 144, 147–48 (Ark. 1964).

35. Atlas Mut. Benefit Ass'n v. Portscheller, 46 A.2d 643, 646–50 (Del. 1945) ("[Q]uestions relating to due process of law under the Federal Constitution should be resolved in accordance with the decisions of the Supreme Court of the United States and other federal courts, rather than with the decisions of state courts . . . .").

36. Desmarais v. Joy Mfg. Co., 538 A.2d 1218, 1220 (N.H. 1988) ("[I]n exercising our jurisdiction with respect to what is essentially a federal question, we are guided and bound by federal statutes and decisions of the federal courts interpreting those statutes.").

37. Massey v. War Emergency Co-Operative Ass'n, 39 S.E.2d 907, 912 (S.C. 1946) ("[W]e are bound by the decisions of the Federal Courts, if any, in construing the Federal statute and the rules of the Interstate Commerce Commission promulgated pursuant to that statute.").

38. In addition, California and Alabama state courts have suggested that they are bound by interpretations of the inferior federal courts when those decisions are "numerous and consistent." Etcheverry v. TRI-AG Serv., Inc., 993 P.2d 366, 368 (Cal. 2000); *Ex parte* Bozeman, 781 So.2d 165, 168 (Ala. 2000), *aff'd sub nom.* Alabama v. Bozeman, 533 U.S. 146 (2001).

courts voluntarily take this position or whether they believe that they are constitutionally compelled to do so. And far fewer state courts declare that they are compelled to follow lower federal court precedent today than in the past.[39]

Although most states can be grouped into one of these three camps, it is not unusual to find state courts issuing inconsistent opinions on the question or for state lower courts take a different position from that same state's high court—each court apparently unaware of the other's conflicting views. In short, the state courts themselves appear to be confused about the weight to give lower federal court precedent on questions of federal law.

B. The Federal Courts of Appeals

In 1991, the Eighth and Ninth Circuits declared that state courts are bound by federal courts of appeals' decisions regarding the meaning of federal law. In *Yniguez v. Arizona*,[40] the Ninth Circuit wrote that it had "serious doubts" whether state courts were free to disregard the precedent set by the lower federal courts. It reasoned that, by choosing to create the lower federal courts, "Congress may have intended that . . . federal courts . . . have the final word on questions of federal law," and noted that the "contrary view could lead to considerable friction between state and federal courts as well as duplicative litigation."[41] Likewise, in *Fretwell v. Lockhart*, the Eighth Circuit observed that "state courts are bound by the Supremacy Clause to obey federal constitutional law," which in turn meant that "a reasonable state trial court" should follow Eighth Circuit precedent on constitutional questions.[42]

Several other federal courts of appeals assume that state courts are *not* bound by the lower federal courts, however. The Fourth Circuit declared that "[t]hough state courts may for policy reasons follow the decisions of the Court of Appeals whose circuit includes their state, they are not obliged to do so."[43] And the Tenth Circuit agreed that "[state

39. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 825 n.32 (1994) (concluding that state courts need not follow lower federal court precedent, but acknowledging that the "doctrinal rule lay somewhat unsettled until recently, as various state courts suggested that in certain circumstances they were bound to follow local federal court decisions").

40. 939 F.2d 727, 736 (9th Cir. 1991).

41. *Id.*

42. 946 F.2d 571, 577 (8th Cir. 1991), *rev'd on other grounds*, 506 U.S. 364 (1993).

43. Owsley v. Peyton, 352 F.2d 804, 805 (4th Cir. 1965) (internal citations omitted).

courts] may express their differing views on . . . federal questions until we are all guided by a binding decision of the Supreme Court."[44]

C. The Supreme Court

Although a majority of the Supreme Court has never directly addressed the weight state courts should give lower federal court precedent, two Justices have stated in concurrences that state courts are not constitutionally obligated to follow inferior federal courts, and a recent majority opinion contains dicta suggesting that state courts are not bound by the decisions of the lower federal courts.

In *Lockhart v. Fretwell,*[45] Justice Thomas wrote separately to explain that state courts are under no constitutional obligation to follow lower federal court precedent. The case came to the Supreme Court from the Eighth Circuit, which had reversed a defendant's death sentence after concluding that the defendant had been prejudiced by his lawyer's failure to object to the use of a sentencing factor barred by a previous Eighth Circuit decision. The Eighth Circuit explained that "since state courts are bound by the Supremacy Clause to obey federal constitutional law, we conclude that a reasonable state trial court would have sustained an objection based on [the Eighth Circuit's precedent] had [the defendant's] attorney made one."[46] The Supreme Court reversed, finding that the lawyer's failure to object was not prejudicial because it did not deprive the defendant of a substantive or procedural right to which he was entitled.[47]

Justice Thomas wrote separately to "call attention to what can only be described as a fundamental misunderstanding of the Supremacy Clause on the part of the Court of Appeals."[48] Thomas went on to explain:

> [T]he Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our

44. Bromely v. Crisp, 561 F.2d 1351, 1354 (10th Cir. 1977).

45. 506 U.S. 364, 376 (1993) (Thomas, J., concurring).

46. *Fretwell,* 946 F.2d at 577.

47. *Lockhart*, 506 U.S. at 364.

48. *Id.* at 375 (Thomas, J., concurring). No other Justice joined the concurrence. However, an oddly cryptic footnote in the Court's unanimous opinion in *Arizonans for Official English v. Arizona* stated that the Ninth Circuit's view that state courts within the Ninth Circuit must follow its precedent was "remarkable," citing Justice Thomas's concurrence in *Lockhart*. 520 U.S. 43, 58 n.11 (1997).

> federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.[49]

Then-Justice Rehnquist also mentioned the issue in a footnote in a concurring opinion in *Steffel v. Thompson,* decided nineteen years earlier.[50] Rehnquist explained that a federal appellate decision "would not be accorded the stare decisis effect in state court that it would have in a subsequent proceeding within the same federal jurisdiction." He was the only justice to address that question.[51]

Finally, in 2013, a majority of the Court appeared to agree with Justice Thomas and Justice Rehnquist, declaring in *Johnson v. Williams* that the "views of the federal courts of appeals do not bind the California Supreme Court when it decides a federal constitutional question."[52] But that statement falls short of a definitive resolution of the issue for at least two reasons.

First, *Johnson* discussed the Antiterrorism and Effective Death Penalty Act of 1996's ("AEDPA") deferential standard of review, which permits a federal court to grant habeas relief on an issue adjudicated on the merits in state court *only* if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*."[53] As will be discussed in more detail in Part IV, Congress has considerable authority to alter precedential rules. In enacting the provision quoted above, Congress explicitly sought to free state courts of any obligation to obey lower federal court precedent by prohibiting federal courts from granting habeas relief when state courts deviated from lower federal court precedent. Thus, the Court's comment in the context of AEDPA litigation does not clearly address the question of whether state courts are free to ignore all lower federal court precedent in circumstances in which there is no statute addressing that question.

Second, the case itself did not turn on whether state courts must follow lower federal court precedent, rendering the Court's statement dicta. The issue in *Johnson* was whether the state court had "adjudicated on the merits" the habeas petitioner's federal

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49. *Lockhart*, 506 U.S. at 376 (Thomas, J., concurring). By inserting parentheses around the word "lower," Justice Thomas may have been suggesting that state courts need not follow even the U.S. Supreme Court's interpretation of federal law—a far more radical position that is at odds with almost all federal and state case law but that has nonetheless been promoted by a few academic commentators. *See* Farber, *supra* note 9 (discussing scholarly disagreement over the precedential force of U.S. Supreme Court decisions).

50. 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., concurring).

51. *Id.*; *see also* Perez v. Ledesma, 401 U.S. 82, 125 (1971) (Brennan, J., dissenting) (explaining that lower federal court precedent has "persuasive force" in state court).

52. 133 S. Ct. 1088, 1098 (2013).

53. 28 U.S.C. § 2254(d)(1) (2012) (emphasis added).

constitutional claim; if it did, AEDPA's deferential standard applied.[54] The Ninth Circuit held that the state court had not "adjudicated" the federal constitutional question but instead had addressed only a related state law question. As evidence for this conclusion, the Ninth Circuit noted that the state court had not cited to any of the lower federal court precedent addressing the federal issue in its opinion.[55] The Ninth Circuit did *not* declare that the state court was bound to follow lower federal court precedent, and none of the parties raised that issue in their briefs. Thus, the question before both the Ninth Circuit and the Supreme Court was whether the state court addressed the federal issue in its opinion and not whether it was required to follow lower federal court precedent when it did so.

In any case, the Court cited nothing to support the statement, nor did it explain why lower federal court decisions have no binding effect on state courts. Thus, whatever the Court's views on this question, it has never provided a rationale that would help to clarify the relationship between state and federal courts.

D. The Academic Literature

Although academic commentary is sparse, the nearly unanimous conclusion is that lower federal court precedent is not binding on state courts. In 1979, Professor David Shapiro stated that state courts are free to disregard constitutional decisions by the federal courts of appeals. "Only rulings of the Supreme Court are thought eligible for that distinction," Shapiro declared, "since only the Supreme Court sits atop the state courts in the national hierarchy. Other federal courts are no more than coordinate with the state courts on issues of federal law."[56] Shapiro admitted, however, that the "appealing purity" of this model is "somewhat muddied" by habeas corpus, which gives the lower federal courts quasi-appellate power over some state court criminal cases.[57] He concluded, however, that even in habeas cases, state courts may choose whether to follow federal precedent, leaving it to the Supreme Court to resolve any conflict.[58]

In the thirty-plus years since Shapiro opined on the matter, only a handful of other scholars have addressed the issue, and then only

54. 133 S. Ct. at 1091–92.

55. Williams v. Cavazos, 646 F.3d 626, 639 (9th Cir. 2011), *rev'd sub nom.* Johnson v. Williams, 133 S. Ct. 1088 (2013).

56. Shapiro, *supra* note 4, at 771.

57. *Id.*

58. *Id.*

briefly in articles devoted to other subjects.[59] For example, Professor Richard Fallon agreed that "state courts and lower federal courts stand in a coordinate, rather than a hierarchical, relationship" and thus decisions of lower federal courts do not bind the states.[60] Professor Daniel Meltzer likewise wrote that "[d]ecisions of lower federal courts on issues of federal law are not binding precedents for a state court." In contrast, Professor Kevin Clermont has noted that "the question of whether state courts are bound by lower federal courts on the federal law's content remains open."[61] None of these scholars engaged in a detailed discussion of that question, however.

Donald Zeigler's 1999 article in the *William & Mary Law Review* provides the only sustained examination of the role of lower federal court precedent in state court. Zeigler provides a thoughtful analysis of the costs and benefits of different approaches by state courts to lower federal precedent and concludes that "state courts should decide questions of federal law the way they think the Supreme Court would decide them" without necessarily giving significant weight to lower federal court decisions.[62] Zeigler flags, but does not address at any length, the questions at the heart of this Article about the constitutionally prescribed relationship between the states and the lower federal courts[63] and the question of whether Congress or the Supreme Court could control state court treatment of lower federal court precedent.[64]

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59. *See* Caminker, *supra* note 39, at 825 ("[A] state court need not follow the holdings of any inferior federal court, including the court of appeals in whose geographic region the state court sits."); Clermont, *supra* note 4, at 31 ("[T]he question of whether state courts are bound by lower federal courts on the federal law's content remains open."); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 853–854 (1991) ("Because state courts and lower federal courts stand in a coordinate, rather than a hierarchical, relationship, the binding effect of the federal judgment extends no further than the parties to the lawsuit."); Henry M. Hart, Jr., *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 510 (1954) ("The suggestion seems never to have been seriously made that the courts of the states are formally bound by the decisions of federal district courts or even of federal courts of appeal on questions of federal law."); Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction,* 71 CAL. L. REV. 1399, 1422 n.94 (1983) ("[T]he state and lower courts are bound to follow their own view of what the federal law means, in spite of conflicting decisions by other lower courts."); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1231 n.495 (1986) (stating that decisions of lower federal courts are no more than persuasive precedent for state courts).

60. Fallon, *supra* note 59, at 853–54.

61. Clermont, *supra* note 4, at 31.

62. Zeigler, *supra* note 7, at 1145.

63. *Id.* at 1177–79.

64. *Id.* at 1145 n.7.

E. Conclusion

The most compelling reason to take a closer look at the weight that state courts should give lower federal court precedent is that at least some state courts have issued confused and inconsistent opinions on that question. The great majority of state courts seem to believe that they must give lower federal courts' decisions on questions of federal law *some* deference—though they do not make clear whether that is a policy choice that they are free to abandon or an external restraint on their decisionmaking. Finally, the Eighth and Ninth Circuits both concluded that at least those state courts within their jurisdiction are obligated to follow their pronouncements on federal law, putting them at odds with the academic and judicial mainstream as well. If nothing else, this ongoing confusion about the role of lower federal court precedent in state court should be addressed and resolved.

In addition, the question deserves attention because no compelling justification has been advanced to support the mainstream view. If state courts are free to depart from the precedent set by lower federal courts in their region, thereby creating inconsistent legal standards that confound local populations and require Supreme Court resolution, we should be able to explain why that is so. And yet, as discussed below, the reasons are far from obvious. Neither the text nor the structure of the Constitution provides a clear answer to this question, which renders the academic consensus particularly odd. Moreover, it may be possible to change the status quo. As described in Part V, strong arguments can be made in support of congressional authority to require state courts to follow lower federal court precedent or to allow the Supreme Court to fashion such a rule as a matter of federal common law.

III. THE STATE COURTS, THE LOWER FEDERAL COURTS, AND THE CONSTITUTIONAL HIERARCHY

Does the Constitution guarantee state courts' independence from lower federal court precedent, as several scholars have concluded? Alternatively, is it plausible to read the Constitution to require state courts to follow lower federal court precedent on questions of federal law—meaning that the majority of state courts have got it all wrong? Or does the Constitution take a middle ground, permitting Congress or the Supreme Court to impose such a rule but not otherwise requiring state court fidelity to lower federal courts? Perhaps the Constitution is silent on the matter, leaving it to future generations to define their relationship. Answering these questions requires examining the

constitutional relationship between the state courts and lower federal courts.

A number of courts and commentators have declared that state courts are equal, not inferior, to the lower federal courts, which is why they are under no obligation to follow, or even defer to, lower federal court precedent.[65] However, as discussed in Section A below, evidence from the Constitution's text and structure, as well as the expansion of the size and jurisdiction of the lower federal courts over the past two hundred years, arguably supports the conclusion that the lower federal courts are superior to state courts *when interpreting federal law*, even if they are not when finding facts, applying facts to law, or hearing state law claims. In other words, although the Constitution assumes that state courts are *competent* to hear disputes over the meaning of federal law, it does not necessarily treat them as *equal* to the lower federal courts when doing so.

Even if state and lower federal courts are coequals when it comes to interpreting federal law, Section B asks whether that coequal status automatically provides state courts with complete independence from lower federal court precedent. As explained in more detail below, the power to bind does not require superiority—that is, it does not depend on whether one court is "above" another in the constitutional hierarchy—rather, it may turn on the relative institutional competence of the decisionmaker or even simple administrability.

A. State and Lower Federal Courts in the Constitutional Hierarchy

1. Origins of the Problem: The Madisonian Compromise

The Framers were conflicted about how to distribute judicial power between the state and federal courts, which may explain why the relationship between these institutions remains hazy today. One group, including James Madison, argued in favor of a national federal judiciary to hear Article III cases in the first instance, in part out of fear that state courts would subvert federal interests.[66] The opposing camp, led by John Rutledge of South Carolina, worried that a multiplicity of federal courts would undermine state sovereignty and diminish the

65. *See, e.g.*, Fallon, *supra* note 59, at 853–54; Gluck, *supra* note 4, at 1960; Shapiro, *supra* note 4, at 771; *see also* Iowa Nat'l Bank v. Stewart, 232 N.W. 445, 454 (Iowa 1930) (stating that state and lower federal courts are "as to the laws of the United States, co-ordinate courts"), *rev'd on other grounds sub nom.* Iowa-Des Moines Natl'l Bank v. Bennett, 284 U.S. 239 (1931).

66. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., rev. ed. 1937). James Madison strongly advocated for the creation of the lower federal courts, arguing that Supreme Court review would be unable to rectify decisions reached "under the biased directions of a dependent Judge, or the local prejudices of an undirected jury." *Id.*

stature of the state judiciary, and so preferred a single Supreme Court that would hear appeals from the state courts.[67]

The conflict was resolved after Madison brokered a compromise that allowed, but did not require, Congress to create "inferior" federal courts. The "Madisonian Compromise" can be found in the first sentence of Article III, which vests the federal judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Complementing this language, Article I empowers Congress to create "Tribunals inferior to the supreme Court."[68] Significantly, Congress immediately took up the invitation in the Judiciary Act of 1789, and the lower federal courts have existed in varying forms ever since. At least in theory, however, Congress could abolish these courts at any time.[69]

The Madisonian Compromise shaped the development of the federal judiciary, perhaps in more ways than the Framers intended. Both Congress and the courts have assumed that Congress's greater power to forgo creation of the lower federal courts implies that Congress has the lesser power to control their jurisdiction, size, and structure.[70] Although Congress's discretion is not unbounded—for example, there are external constitutional constraints on its power to strip the lower federal courts of jurisdiction—the Madisonian Compromise gives Congress broad authority over these courts.

Most relevant to the subject of this Article, the Madisonian Compromise also informs our understanding of the role of the state courts in the constitutional structure. State courts are presumptively competent to hear and decide federal claims.[71] Indeed, because the

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67. *Id.* At the Constitutional Convention, John Rutledge, Chair of the Committee of Detail, questioned whether the Constitution should establish the lower federal courts, arguing:

> [T]he State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgments: that it was making an unnecessary encroachment on the jurisdiction of the States, and creating unnecessary obstacles to their adoption of the new system.

Id. Pierce Butler feared that the "States will revolt at such encroachments." *Id.* at 125.

68. U.S. CONST. art. I, § 8, cl. 9. For a detailed discussion of the debates leading up to the Madisonian Compromise, see PFANDER, *supra* note 16, at 54.

69. *See, e.g.*, Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803) (holding that Congress has the constitutional authority to abolish federal judgeships).

70. *See, e.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850) ("Congress, having the power to establish the [lower federal] courts, must define their respective jurisdictions."); *Stuart*, 5 U.S. (1 Cranch) 299.

71. Tafflin v. Levitt, 493 U.S. 455, 458 (1990) ("[W]e have consistently held that state courts have inherent authority, and thus are presumptively competent, to adjudicate claims arising under the laws of the United States."); *Sheldon*, 49 U.S. (8 How.) at 449; *see also* THE FEDERALIST NO. 82 (Alexander Hamilton) (concluding that state courts presumptively exercise concurrent

lower federal courts exist at Congress's discretion, and because the Supreme Court has limited original jurisdiction, state courts *must* be available to hear cases falling within Article III's subject matter headings to ensure a forum for these cases.[72] Applying this logic, the Supreme Court has explained that state courts are obligated to hear cases raising federal claims[73] and must employ certain federal procedural rules that are bound up with federal claims of right.[74]

Today, lower federal courts and state courts exercise concurrent jurisdiction over most cases arising under federal law. Although the scope of federal subject-matter jurisdiction has varied over the years, state courts have always had presumptive jurisdiction over cases that can be brought as an original matter in federal district court unless Congress explicitly states otherwise. As Alexander Hamilton explained in *Federalist* No. 82, the "inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."[75]

In sum, the Framers established a system in which lower federal courts and state courts share jurisdiction over cases about the meaning of federal law. Decisions by both institutions can be reviewed by the Supreme Court, and both sets of courts consider themselves obligated to follow Supreme Court precedent about the meaning of federal law.[76]

The open question is whether state courts are under any constitutional obligation to defer to lower federal courts' views on the interpretation of federal law. The Madisonian Compromise does not answer that question. In fact, it cuts both ways. The Madisonian Compromise presumes that state courts are competent to decide

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jurisdiction over cases falling within federal courts' subject-matter jurisdiction except where Congress expressly states otherwise).

72. *See, e.g.*, Testa v. Katt, 330 U.S. 386, 389–91 (1947) (holding that state courts must hear and enforce claims brought under federal law)); *see also* Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 311 n.3 (1976) ("[T]he framers assumed that if Congress chose not to create lower federal courts, the state courts could serve as trial forums in federal cases.").

73. *Testa*, 330 U.S. at 391. States may refuse to hear a federal claim when they have a "valid excuse" to do so, however. Douglas v. N.Y., New Haven & Hartford R.R., 279 U.S. 377, 387–88 (1929); *see also* Haywood v. Drown, 556 U.S. 729, 740 (2009) (holding that a state court could not refuse to hear a certain subset of claims under a particular federal statute once it had established courts of general jurisdiction competent to hear claims under that statute).

74. *See, e.g.*, Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 363 (1952) (holding that the right to a trial by jury is "too substantial a part of the rights accorded by the [Federal Employers' Liability] Act to permit it to be classified as a mere 'local rule of procedure' " that can be denied to a plaintiff bringing a claim under that Act).

75. *See* THE FEDERALIST NO. 82, at 493 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

76. Although almost everyone agrees that both state and federal courts must follow Supreme Court precedent on the meaning of federal law, scholars differ as to why that is so. *See supra* notes 8–10 and accompanying text.

questions of federal law, but it also gives Congress the option to create lower federal courts, at least in part because some of the Framers feared that the state courts would be hostile to federal claims.[77] In other words, the Framers were optimistic about the ability of state courts to decide cases falling within Article III's subject-matter jurisdiction headings and yet hedged their bets by allowing Congress to create the safety net of the lower federal court system to protect litigants in the event that state courts are not up to the task. As a result of this schizophrenia, the Madisonian Compromise provides no clear answer to the question of whether lower federal court precedent should bind state courts.[78]

2. The Evolving Role of the Lower Federal Courts

The Framer's ambivalence toward the state courts, as expressed in the Madisonian Compromise, suggests that the relationship between the state courts and the lower federal courts was expected to change over time. And it has. For even if state courts were considered equally competent interpreters of federal law at the time of the Framing, they have arguably been demoted by subsequent events.

a. The Expansion of the Lower Federal Courts

In the Judiciary Act of 1789, Congress immediately took up the Madisonian Compromise's invitation to create lower federal courts. But it did not give these courts general federal question jurisdiction until 1875,[79] and it staffed them lightly. Over the years, it has expanded the number and size of those courts, as well as their jurisdiction. Today, under 28 U.S.C. § 1331, if either the plaintiff or the defendant prefers a federal forum for a case in which a federal question arises on the face of a well-pleaded complaint, a federal court must hear the case. Arguably, then, state courts have lost status as interpreters of federal law in light of Congress's decision to create a permanent cadre of federal judges who are capable of taking the lead on these questions. As the Ninth Circuit put it: "Having chosen to create the lower federal courts, Congress may have intended that just as state courts have the final

77. *See supra* note 68.

78. As Michael Wells put it, there is a "broad consensus" that state courts are "constitutionally adequate" fora for federal claims, and yet at the same time are not federal courts' equals when doing so. Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. Rev. 609, 615 (1991).

79. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, 470–71 (current version at 28 U.S.C. § 1331 (2012)).

word on questions of state law, the federal courts ought to have the final word on questions of federal law."[80]

Federal preemption provides a good analogy. Under preemption doctrine, in most cases state law is valid and binding unless and until Congress enacts a conflicting federal law, after which the Supremacy Clause requires that state law give way.[81] Similarly, one could argue that state courts are intended to engage in independent analysis of federal questions only if no lower federal court has done so. Once Congress established a federal judicial system charged with deciding questions about the meaning of federal law in the first instance, federal judges were arguably intended to take the lead from state courts, meaning that state judges are no longer free to reach independent conclusions about the meaning of federal law.

b. The Evolution of State Judicial Elections

State judges today may be less reliable protectors of federal claims of right than in the past as a result of developments in the process by which states select their judges. Although many states have long relied on elections to fill judgeships, in recent years these elections have become increasingly politicized. Elected judges must fundraise and campaign for office as never before, raising the concern that they are biased in favor of the special interests that contribute and campaign on their behalf, and that they will hesitate to take positions that might be used against them in an upcoming election.[82] Numerous studies demonstrate that in election years state judges are more likely to impose the death penalty and longer prison sentences than in years when they are not up for reelection.[83] Political scientists have demonstrated that out-of-state defendants are treated more harshly by

80. Yniguez v. Arizona, 939 F.2d 727, 736 (9th Cir. 1991) (emphasis added).

81. *See, e.g.*, Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1030–31 (1967) ("Congress has power to regulate interstate and foreign commerce, but, subject to certain limits, the authority of the states to act within this sphere of congressional competence remains undiminished until Congress actually exercise its power; in effect, an act of Congress is required to federalize the area." (footnote omitted)). However, so-called "field preemption" is a narrow exception to the general rule that state law will only be preempted by conflicting federal law. *See, e.g*, Kurns v. R.R. Friction Prods. Corp., 132 S. Ct. 1261, 1264 (2012).

82. *See, e.g.*, Deborah Goldberg, *Interest Group Participation in Judicial Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL AND LEGAL STAKES OF JUDICIAL ELECTIONS 73, 76 (Matthew J. Streb ed., 2007); David Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2006).

83. *See infra* Part V.A.4.

elected judges than appointed judges.[84] Indeed, elected judges themselves concede that elections affect their decisionmaking.[85] In short, state courts today may be less willing to protect unpopular groups or vindicate unpopular federal rights—particularly the rights of defendants in criminal cases. Of course, there have been other periods in our nation's history when state courts were unreliable, but in the new era of big-money, high-salience judicial elections, some scholars (and judges) have begun to question the quality of state court justice.[86]

These problems are exacerbated by the Supreme Court's inability to review most state court decisions. As James Pfander has noted, the state courts "play a vastly different role in the adjudication of federal issues than they did during the early Republic" because they now "enjoy far greater decisional independence."[87] In the nation's formative years, state courts were subject to as-of-right review in the Supreme Court for denying any federal claim of right. For many years, the Supreme Court had the capacity to review most major state court decisions on questions of federal law and thus served as a general supervisor of the state courts. Today, the Supreme Court reviews an average of only twelve state court decisions each term, meaning that "state courts . . . exercise final authority in virtually every federal question case that comes before them."[88] In this changed world, the lower federal courts arguably should take the lead in interpreting federal law, even if that was not the role initially intended for them.

3. Rebutting Counterarguments

The courts and commentators who declare that state courts have no obligation to follow lower federal court precedent make two observations. First, they note that state courts are constitutionally

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84. *See* Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 163, 186 (1999).

85. *See infra* Part V.A.4.

86. *See* Erwin Chemerinksy, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1988 (1988) ("I strongly favor the abolition of judicial elections in all states."); Sandra Day O'Connor, *How to Save Our Courts*, PARADE, Feb. 24, 2008, *available at* https://justicebeginshere.wordpress.com/tag/justice-sandra-day-oconnor/, *archived at* http://perma.cc/8ZZ5-NMMZ (criticizing judicial elections as undermining judicial independence); Chief Justice Margaret H. Marshall, President of the Conference of Chief Justices, Remarks to the American Bar Association House of Delegates 5–6 (Feb. 16, 2009) (quoting Justice Sandra Day O'Connor as calling judicial elections the "single greatest threat to judicial independence"), *available at* http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1407 (noting that increased involvement of interest groups in judicial elections increases the risk that "judges will tailor their decisions to the sources of their financial and electoral support"). *See generally* Goldberg, *supra* note 82, at 91.

87. PFANDER, *supra* note 16, at 90.

88. *Id.*

empowered—indeed, required—to hear and resolve questions about the meaning of federal law, which these commentators assume means that state courts are intended to be independent interpreters of federal law. Second, lower federal courts do not review state court decisions, and therefore the lower federal courts have no power to reverse a state court's decision on a question of federal law.[89] Accordingly, these jurists and scholars declare that state courts are federal courts' equals when it comes to interpreting federal law and thus cannot be required to adhere to lower federal court precedent.[90] As explained below, however, that logic does not necessarily follow.

a. The Significance of Concurrent Jurisdiction

That state and federal courts exercise concurrent jurisdiction over federal claims does not mean that state courts should be completely independent of the lower federal courts when deciding cases. After all, federal courts regularly decide state law claims, and yet federal courts are subordinate to the state courts in the interpretation of state law. *Erie* requires federal courts to follow the state high court's interpretation of state common law, statutes, and constitutional law, even if the federal judge disagrees with the state court's view.[91] Despite sharing jurisdiction over state law, federal courts are clearly inferior to state courts when interpreting state law and thus concurrent jurisdiction does not imply equal interpretive status.

Furthermore, lots of state and federal *non*judicial actors are also obligated to interpret and apply federal law in the first instance, and yet lower federal courts have the authority to dictate the meaning of federal law for these officials. For example, the landmark case of *Ex parte Young*[92] empowers lower federal courts to impose their view of federal law on state executive branch officials. *Ex parte Young* held that a federal trial court may enjoin a state attorney general from enforcing a state statute that the federal court concluded was unconstitutional,

89. *See, e.g.*, Caminker, *supra* note 39, at 825 ("[S]tate and territorial judges are not bound by precedents established by courts that do not have the authority to review those judges' decisions, since . . . authority to establish precedent follows the path of appellate review."); Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 742 (1995) (noting that a state court deciding federal issues does not have to follow inferior federal courts in its region because state court decisions are not subject to review by the lower federal courts). As Professor David Shapiro acknowledged, habeas corpus "muddie[s]" this argument by giving federal courts quasi-appellate review of state court decisions. Shapiro, *supra* note 4, at 771.

90. *See, e.g.*, Iowa Nat'l Bank v. Stewart, 232 N.W. 445, 454 (Iowa 1930) (stating that state and lower federal courts are "as to the laws of the United States, co-ordinate courts"); Shapiro, *supra* note 4, at 771.

91. 304 U.S. 64, 78 (1938).

92. 209 U.S. 123 (1908).

ignoring the contrary views of state officials and suggesting distrust of state judges. In fact, Justice Harlan's dissent objected to this "radical change in our governmental system" that would "enable the subordinate Federal courts to supervise and control the official action of the States as if they were 'dependencies' or provinces."[93] Similarly, state officials can be held liable for violating federal constitutional rights, as long as those rights are "clearly established" by the Supreme Court *or* by the lower federal courts.[94]

In sum, state courts' presumptive exercise of concurrent jurisdiction suggests that they are constitutionally adequate fora for hearing and resolving federal claims, but this exercise of power cannot be cited as evidence that they are equal to federal courts when doing so.

b. The Significance of Revisory Review

Some courts and commentators contend that the obligation to obey precedent relates directly to the power of revisory review.[95] That is, a "higher" court's decisions are binding on a "lower" court if it has the power to review and reverse the lower court. Indeed, it is thought that the power to review and reverse is what renders one court "higher" in the first place. Because state courts are not subject to review by the lower federal courts, these experts conclude that state courts have no obligation to follow the precedent of the lower federal courts.[96]

There is logic to this position. As a functional matter, the duty to follow precedent can best be enforced—perhaps can *only* be

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93. *Id.* at 175 (Harlan, J., dissenting).

94. *See, e.g.*, Wilson v. Layne, 526 U.S. 603, 617 (1999) (holding that a state official can be held liable for violating an individual's constitutional rights if there is "controlling authority in [the] jurisdiction at the time of the incident that clearly established the rule" or if there is a "consensus of cases of persuasive authority"); United States v. Lanier, 520 U.S. 259, 268–69 (1997) (holding that a right may be "clearly established" based on lower court consensus, even if there is no Supreme Court decision directly on point).

95. *See, e.g.*, United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072, 1076 (7th Cir. 1970) ("[B]ecause lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts."); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction,* 65 B.U. L. REV. 205, 258 n.170 (1985):

> Current rules of precedent are thus governed not by any inherent judicial hierarchy in the structure of the Constitution or by the natural 'supremacy' of the Supreme Court but by the mechanisms of review that Congress provides for: state courts are currently bound to follow Supreme Court precedent because of the simple fact that if they do not, they can be reversed.

(citation omitted).

96. *Id.*; *see also* People v. Barber, 799 P.2d 936, 940 (Colo. 1990) ("Lower federal courts do not have appellate jurisdiction over state courts and their decisions are not conclusive on state courts, even on questions of federal law.").

enforced—by a reviewing court. Furthermore, under our current system, precedential force and appellate structure are closely related. District courts are not bound by each other's rulings but follow the decisions of the federal courts of appeals that review them. The federal circuits are free to disagree with one another but must fall in line behind the Supreme Court. The state court systems have a similar structure and follow similar precedential rules.[97] In such hierarchical systems, lower or "inferior" courts are obligated to follow the precedent of only those courts above them in the appellate hierarchy.

The obligation to follow precedent does not perfectly track the power of revisory review, however.[98] After all, state courts do not review decisions by federal courts, and yet *Erie* requires the federal courts to follow state high court precedent on questions of state law. Precedent set by a three-judge panel on a federal court of appeals binds all subsequent panels in that federal circuit, despite the lack of revisory review, unless and until the court sits en banc to reverse the original panel's decision.[99] And the Federal Circuit asserts that its precedent on questions over which it has jurisdiction, such as patent law, bind all the other federal courts of appeals, despite its inability to review those courts.[100] Similarly, most courts and commentators conclude that state courts are obligated to follow Supreme Court precedent even in cases in which there will be no possibility of Supreme Court review—for example, when there is an independent and adequate state law ground for the decision or when Congress has eliminated the subject area from Supreme Court review.[101]

Moreover, in determining the constitutional relationship between state and federal courts, the important question is whether the Constitution would *permit* the lower federal courts to review state court decisions on questions of federal law if Congress so chose. And clearly the Constitution does. Alexander Hamilton assumed as much in

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97. Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1458 n.16 (2010).

98. Caminker, *supra* note 39, at 824 n.31. *But see* Jehovah's Witnesses v. King Cnty. Hosp., 278 F. Supp. 488, 504–06 (W.D. Wash. 1967) (per curiam) ("In this special three-judge court case we are not bound by any judicial decisions other than those of the United States Supreme Court.").

99. Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1017–18 (2003) (describing the rule "that one panel cannot overrule another," which is followed in every circuit).

100. *See, e.g.*, Midwest Indus., Inc. v. Karavan Trailers, Inc., 175 F.3d 1356, 1357–58 (Fed. Cir. 1999) (en banc).

101. *See, e.g.*, Caminker, *supra* note 39, at 867–69. *But see* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 85 (1989) (arguing that a state court is not "constitutionally insubordinate" if it chooses not to follow precedent of a higher federal court).

Federalist No. 82, when he wrote that he could perceive "no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals."[102] In fact, such "appeals" occur today in the form of habeas corpus petitions filed by prisoners seeking review of their state court convictions.[103] As the Supreme Court explained in *Exxon Mobil v. Saudi Basic Industries Corp.,* "Congress, if so minded, may explicitly empower district courts to oversee certain state-court judgments and has done so, most notably, in authorizing federal habeas review of state prisoners' petitions."[104] The federal courts' constitutional capacity to review and reverse state court decisions on questions of federal law further suggests that the Constitution places the lower federal courts above state courts on matters of federal law, despite the fact that the lower federal courts typically do not review state court decisions.

B. The Disconnect Between Hierarchy and Precedent

In any case, whether state courts are equal or subordinate to lower federal courts may be irrelevant to the question whether state courts must follow lower federal court precedent. As Evan Caminker observed, there is "nothing inherently illogical about 'coordinate' courts binding one another."[105] As already noted, a decision by one three-judge panel will bind all future panels in that circuit, even though the first panel is not hierarchically superior to those panels that face the issue in the future.[106] Likewise, the Federal Circuit considers its decisions on matters of patent law to bind the other federal courts of appeals, even though the federal courts of appeals are not subordinate to the Federal Circuit.[107] As these examples illustrate, binding precedent may have as much to do with administrative values—such as certainty and finality—as hierarchical status.

As discussed in more detail in Part V, for purely practical reasons, it makes sense for the federal courts of appeals to bind those state courts within their circuit. The federal courts of appeals have a

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102. THE FEDERALIST NO. 82, at 495 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

103. *See, e.g.*, Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 254 (1988) (explaining that "through habeas review" the lower federal courts "in effect exercis[e] appellate jurisdiction over state criminal proceedings"); Zeigler, *supra* note 7, at 1215 ("Although a habeas action is technically a collateral proceeding, as a practical matter the lower federal courts exercise appellate jurisdiction over the state courts in such cases.").

104. 544 U.S. 280, 292 n.8 (2005) (citing 28 U.S.C. § 2254(a)).

105. Caminker, *supra* note 39, at 871.

106. *See* Barrett, *supra* note 99, at 1017–18.

107. Midwest Indus., Inc. v. Karavan Trailers, Inc., 175 F.3d 1356, 1361 (Fed. Cir. 1999) (en banc).

broader geographic jurisdiction than state courts, and thus it would be natural to let them take the lead in establishing the interpretation of federal law for a particular region rather than let state courts develop piecemeal rules that differ from the regional appellate court and the neighboring state courts. Indeed, if a state court differs from the federal circuit in its region, it may put its citizens in the awkward position of trying to obey conflicting interpretations of the same federal obligation—a result that should be avoided whenever possible.[108]

Of course, there are also benefits from obtaining a diversity of views about the meaning of federal law, which is why the Supreme Court likes to let federal questions "percolate" in the lower courts—including the state courts—before it will grant a writ of certiorari to resolve the disagreement. State courts provide a different perspective on federal law, and their views may assist the Supreme Court in its decisionmaking. But it is not obvious that these benefits outweigh the high costs of *intra*state judicial conflict, as discussed further in Part V. Nor is it clear what result the Framers intended. Thus, even assuming commentators are correct that state courts are "coordinate," that status does not tell us whether the Constitution could be read to require state courts to follow lower federal court precedent.

C. Conclusion

As this Part has shown, the generally accepted rule that state courts are free to ignore lower federal court precedent rests on surprisingly shaky foundations. The Constitution's text provides little evidence to support the rule, and good arguments can be made that state courts are less competent than federal courts at interpreting federal law, even if one concedes that they are constitutionally adequate fora in which to resolve disputes about federal questions. Furthermore, the expansion of the lower federal courts, both in size and in the scope of their jurisdiction, accompanied by the Supreme Court's shrinking docket, further supports the conclusion that state courts should follow the lower federal courts' lead. Even if these arguments are not clear winners, they are as strong as the arguments justifying our current system in which two courts in the same geographic region are allowed to reach different results about the meaning of the same federal law.

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108. In a previous article, I asserted that courts and commentators have at times overvalued nationwide uniformity in the interpretation of federal law. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1581 (2008). However, I also explained that the arguments in favor of *intra*state uniformity are strong, especially where the conflict puts a state's citizens in the untenable position of having to comply with two inconsistent legal standards. *See id.* at 1584 & nn. 48–50

Admittedly, however, the constitutional case is not overwhelming, and so the large majority of state courts that have long considered themselves free to disregard the lower federal courts are unlikely to change their minds now.[109] Thus, whatever the merits of their position, most state courts will not voluntarily give up their power to engage in independent interpretation of federal law and start following lower federal court precedent instead. The more important question, then, is whether Congress or the Supreme Court could establish a rule requiring state courts to obey lower federal court precedent.

IV. FEDERAL AUTHORITY TO REQUIRE STATE COURTS TO FOLLOW LOWER FEDERAL COURT PRECEDENT

This Part analyzes the sources of Congress's and the Supreme Court's authority over state courts, as well as the limits on that authority imposed by state sovereignty and norms of judicial independence, to determine whether these federal institutions could require state courts to follow lower federal court precedent on the meaning of federal law.

A. The Sources of Congress's Authority to Control the Rules of Precedent in State Courts

1. The Inferior Tribunals Clause and the Sweeping Clause

Congress can require state courts to follow precedent set by the lower federal courts pursuant to its Article I, Section 8 power to "constitute Tribunals inferior to the Supreme Court," coupled with its authority under the Sweeping Clause to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States."[110] The Inferior Tribunals Clause enables Congress to implement the Madisonian Compromise's invitation to create the lower federal courts and, together with the Sweeping Clause, gives Congress the power to control lower federal courts' jurisdiction and other aspects of those courts' day-to-day operations. Together, they are the source of Congress's authority to assign federal causes of action concurrently to state and federal courts and to give the defendant a

109. See *supra* Part II.A for a discussion of state court treatment of lower federal court precedent.

110. U.S. CONST. art. I, § 8, cl. 18.

right to remove such cases to federal court, or to provide for exclusive jurisdiction over such cases in federal court.[111]

Several legal scholars have already concluded that the Sweeping Clause permits Congress to establish the rules of precedent for *federal* courts—rules that are currently controlled by federal common law. In an article devoted to the subject, John Harrison states that Congress has "substantial authority" over the rules of precedent in federal court, though he concedes that Congress cannot manipulate precedent in ways that undermine judicial independence or control outcomes.[112] As Harrison points out, Congress already exercises considerable control over the lower federal courts through legislation dictating their size, structure, jurisdiction, and budget. Congress has the authority to establish the Federal Rules of Civil Procedure and the Federal Rules of Evidence that govern proceedings in federal court. In light of Congress's control over many aspects of the lower federal courts' day-to-day functions, Congress must be able to exercise similar authority over the rules of precedent they follow.

Whether Congress can mandate the rules of precedent for *state* courts poses a different, and harder, problem.[113] Congress likely cannot control the rules of precedent for state courts on questions of state law because such legislation would bear no relationship to Congress's power to create the lower federal courts under the Inferior Tribunals Clause, or any other suitable federal interest.[114] But legislation requiring state courts to follow lower federal court precedent on questions of federal law could be justified as "necessary and proper" to realize Congress's goals in establishing the lower federal courts in the first place. Congress created the lower federal courts for many reasons, including promoting uniform interpretation of federal law and protecting federal law against a hostile reception in state courts. Requiring state courts to follow lower

111. FALLON ET AL., *supra* note 10, at 745.

112. John Harrison, *The Power of Congress over the Rules of Precedent,* 50 DUKE L.J. 503, 505–06 (2000); *see also* Caminker, *supra* note 39, at 838 ("I presume that the Necessary and Proper Clause allows Congress to command the federal courts to follow precedents established by other courts."). *But see* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMM. 191 (2001) (concluding that Congress lacks authority to regulate federal courts' use of precedent).

113. *See* Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 949 (2001) ("The bounds of federal authority over the way state courts conduct their business have remained undefined for over 200 years.").

114. *Cf. id.* at 951 n.14 (citing articles expressing a range of opinions on the question whether Congress can regulate procedures for state courts in state law cases).

federal court precedent would serve both purposes and thus would be within Congress's constitutional authority.[115]

Furthermore, Congress's greater authority to exclude state courts from hearing federal question cases altogether suggests it has the lesser authority to control the methods by which state courts decide those cases, as long as those methods are reasonable and related to Congress's purpose in creating the lower federal courts. The Court applied similar logic in *Federal Energy Regulatory Commission v. Mississippi*,[116] where it explained that because Congress could preempt state public utility regulation entirely, Congress could require the state administrative agency to follow "certain procedural minima as that body goes about undertaking its tasks."[117] Finally, because Congress can allow appeals from state court decisions to the lower federal courts, which would enable the lower federal courts to reverse state court judgments, Congress should have the related power to require state courts to adhere to lower federal court precedent.[118]

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115. Interestingly, Congress took the opposite tack in the AEDPA, impliedly freeing the state courts from any obligation to follow lower federal court precedent in state criminal proceedings. *See* 28 U.S.C. § 2254 (2012). AEDPA limits habeas relief to claims adjudicated on the merits in state court only if the state court issued a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States." Id.* § 2254(d)(1) (emphasis added). In other words, AEDPA makes clear that state courts in criminal proceedings can disregard lower federal court precedent—even that set by its regional federal court of appeals—without fear that its decisions will be overturned by a federal court sitting in habeas.

116. 456 U.S. 742, 771 (1982) ("If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a preemptible field—and we hold today that it can—there is nothing unconstitutional about Congress' requiring certain procedural minima as that body goes about undertaking its tasks.")

117. *Id.*

118. *See supra* notes 102–04 and accompanying text for discussion of Congress's power to establish appeals from state courts to lower federal courts.

James Pfander contends that state courts should be viewed as lower federal courts when deciding cases about the meaning of federal law. *See* PFANDER, *supra* note 16. If he is correct, the case for Congress's power to control state court precedent becomes even stronger. Pfander argues that the Inferior Tribunals Clause permits Congress to "appoint" state courts to act as inferior federal tribunals for the purpose of hearing cases that fall within the federal courts' Article III subject-matter jurisdiction, noting that Alexander Hamilton cited the Inferior Tribunals Clause in *Federalist* No. 81 as the source of Congress's power to require state courts to hear matters arising under federal law. Indeed, Pfander contends that Congress implicitly designated state tribunals as inferior federal courts by giving state courts concurrent jurisdiction to hear cases arising under federal law.

Under Pfander's theory, state and lower federal courts can be viewed as all serving in one system—that of the "inferior" federal tribunals—making it easier to justify Congress's control over the force of precedent in state courts. Under current practice, district courts are bound by the precedent set by the circuit court that exercises jurisdiction over its region; if state courts are simply another type of federal tribunal, they can just as easily be bound. Moreover, if state courts have the same status as the congressionally created lower federal courts when hearing federal

2. Congress's Power to Control Interpretation of Its Enactments

In addition to its power under the Inferior Tribunals Clause and the Sweeping Clause, Congress has significant authority to control the interpretive rules applied to its own statutory enactments. Accordingly, Congress can define the terms used, and it can mandate (or prohibit) use of specific textual canons or interpretive theories by those charged with construing its statutes.[119] In other words, interpretive rules are part and parcel of the statute and thus are within Congress's Article I, Section 7 authority to enact legislation.

Indeed, as Nicholas Quinn Rosenkranz convincingly argued a decade ago, Congress could enact a statute containing broad rules of statutory interpretation to be applied by *all* courts when interpreting the entire U.S. Code—a "Federal Rules of Statutory Interpretation."[120] Admittedly, as Rosenkranz acknowledges, there are some limits on Congress's power over statutory interpretation.[121] For example, Congress cannot seek to control substantive outcomes in individual cases through the guise of interpretive rules, and it cannot change rules of interpretation that are themselves constitutionally required. For the most part, however, Congress can mandate how courts should interpret its enactments.

Because Congress has broad authority to control the manner in which the federal and state courts interpret its statutes, it follows that Congress may delegate the interpretive task to a third party and then require courts to follow that third party's interpretations. In fact, *Chevron* deference does just that.[122] *Chevron* requires federal courts to adopt agencies' reasonable interpretations of ambiguous statutes—deference that is justified, in part, on the ground that Congress likely *intended* administrative agencies to take the lead from courts in such situations.[123] State courts have concluded that they are also bound by

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questions, then Congress can control precedent in state courts to the same degree that it can control such precedent in federal court.

119. *See, e.g.*, The Dictionary Act, 1 U.S.C. §§ 1–7 (2000).

120. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2108 (2002) (asserting that a "state court could not ignore federal . . . interpretive instructions, any more than it could ignore federal substantive rules").

121. *Id.* at 2108–09.

122. Chevron U.S.A., Inc. v. Natural Res. Def, Council, Inc., 467 U.S. 837 (1984).

123. *Id.* at 843–44:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron deference, even though state courts generally do not follow other interpretive principles employed by the Supreme Court when construing federal law.[124] *Chevron* is therefore strong evidence that Congress can require state and federal courts alike to defer to another institution's views on the meaning of federal law.

Of course, *Chevron* requires only that courts defer to reasonable agency interpretations of statutes and does not compel courts to adopt interpretations they believe are obviously incorrect, and thus it is less intrusive than a rule mandating that state courts adopt lower federal court precedent. Congress has never attempted to do what is suggested here—a rule requiring state courts to follow lower federal courts' interpretation of federal law. But the analogy with *Chevron* nonetheless provides further support for Congress's power to mandate that states abide by lower federal court precedent when interpreting federal statutes.[125]

B. The Sources of the Supreme Court's Authority to Control the Rules of Precedent in State Courts

The Supreme Court can also require state courts to follow lower federal court precedent pursuant to its authority to create procedural federal common law governing the litigation of federal questions.[126]

The Supreme Court clearly has the authority to create procedural common law for the lower federal courts, as illustrated by its precedent establishing rules of abstention,[127] exhaustion,[128] res judicata,[129] and forum non conveniens.[130] Most rules of precedent are common-law rules.[131] Although many of these rules were inherited from the English legal system or developed organically over time, the Supreme Court occasionally pronounces on the precedential force of its

124. *See* Gluck, *supra* note 4, at 1990 n.320.

125. Of course, any authority Congress has to control precedent as an aspect of its lawmaking power does not extend to requiring the states to follow lower federal court precedent on matters of constitutional law.

126. *See, e.g.*, Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 885–86 (1986) (discussing the two-fold inquiry used to determine whether federal common law governs those "legal issues thought to require federal solutions").

127. Younger v. Harris, 401 U.S. 37 (1971).

128. Prentis v. Atl. Coast Line, 211 U.S. 210 (1908).

129. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001).

130. Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 826 (2008).

131. *See, e.g.*, *id.* at 828 (describing the principles of stare decisis and stating that the "doctrine is generally regarded as a species of common law"); Harrison, *supra* note 112, at 525–29 (describing the rules of precedent as "federal common law").

own opinions as well as those of the lower courts.[132] Accordingly, the Court can set the precedential rules that govern in the lower federal courts.

Again, the harder question is whether the Court's common-lawmaking authority over the inferior federal courts extends to controlling the weight of precedent on federal questions in state courts—a question that has rarely been addressed in the academic literature.[133] At least when state courts are presiding over *federal* claims, however, the Court should have the power to impose procedural rules on state courts as part of its obligation to oversee adjudication of federal law.

According to James Pfander, state courts are quasi-federal courts when they preside over questions of federal law, suggesting that the Supreme Court has the same authority to regulate state court procedures in federal question cases as it does to regulate procedures used by the lower federal courts.[134] But even if one does not agree with Pfander's view that state courts take on the status of federal courts in federal question cases, the Supreme Court still must be able to ensure that state courts properly exercise their vital role as courts of original jurisdiction over cases raising federal questions. The Supreme Court's "essential functions" are to ensure the uniformity and supremacy of that federal law,[135] which includes overseeing the method by which those claims are heard and decided in courts of first instance—whether those courts are federal or state.

The Court has acted in the past to protect federal law from state courts. Pursuant to this common-lawmaking authority, the Court has altered or abolished state rules that it perceived as creating needless barriers to hearing and deciding federal claims. For example, in *Dice v. Akron, Canton & Youngstown R. Co.*, the Court required states to use juries, not judges, to decide all factual claims in a case brought under

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132. For example, the Supreme Court has frequently announced that district court opinions lack precedential force in any court, including within the issuing district. *See, e.g.*, Camreta v. Greene, 131 S. Ct. 2020, 2033 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (citation and internal quotation omitted)). Occasionally the Court has even tried to limit the precedential force of its own opinions, *see e.g.*, Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam) ("Our consideration is limited to the present circumstances . . . ."), though without much success. *See* Chad Flanders, *Please Don't Cite This Case! The Precedential Value of* Bush v. Gore, 116 YALE L.J. POCKET PART 141 (2006).

133. Barrett, *supra* note 130, at 832 ("[I]t is not clear whether the Supreme Court can impose rules of procedural common law upon the states. . . .").

134. See PFANDER, *supra* note 16.

135. Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201–02 (1960).

the Federal Employer Liability Act.[136] And in *Felder v. Casey* the Court barred the state from imposing a 120-day notice of claim requirement on cases brought under 42 U.S.C. § 1983, even though the state applied that same deadline to claims under state law.[137] Although these decisions acknowledged that state courts normally need not "mimic federal courts procedurally when they hear federal matters,"[138] the Supreme Court carved out exceptions to that principle when necessary to protect federal interests.

In short, there is historical precedent to support the Supreme Court's power to craft federal common-law rules regarding the role of lower federal court opinions in state court decisionmaking. The impetus for doing so would be similar to that which inspired the Court to alter state procedural rules hindering review of federal claims. Just as the Court has displaced state procedural rules that undermine federal law, it can displace state practices regarding the force of lower federal court precedent if it thinks such rules would promote the goals of protecting the uniformity and supremacy of federal law.[139]

C. Limits on Congress's and the Supreme Court's Authority to Control the Rules of Precedent in State Courts

Congress and the Supreme Court's constitutional authority to dictate the weight of lower federal court precedent in state court is not without limits, however. The exercise of that power is constrained both by the need to respect state sovereignty and by judicial independence. Accordingly, neither Congress nor the Court can regulate state court use of precedent in a manner that seeks to control case outcomes or manipulate the judicial decisionmaking process.

1. Limitations Imposed by State Sovereignty

State sovereignty is the most obvious impediment to any rule requiring state court fidelity to lower federal court opinions. State judges are a part of the machinery of state government. Their offices

136. 342 U.S. 359 (1952).

137. 487 U.S. 131, 138 (1988); *see also* F.E.R.C. v. Mississippi, 456 U.S. 742, 771 (1982) (holding that Congress could require a state administrative agency to follow "certain procedural minima as that body goes about undertaking its tasks").

138. Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise,* 1995 WIS. L. REV. 39, 178.

139. Amy Coney Barrett has suggested that the Court's power to create federal common-law rules of procedure may even exceed Congress's power to do so on rare occasions. *See* Barrett, *supra* note 130, at 816–17 (arguing that there is a "small core of inherent procedural authority that Congress cannot reach").

are created by state law, usually by the state's constitution, and they are placed in office through either appointment by the citizens' representatives in the political branches or popular election. A federal statute or common-law rule mandating that state judges follow a lower federal court's interpretations of federal law appears to be the kind of "commandeering" of state officers that the Constitution forbids. Interfering with the work of these state actors by requiring them to adopt the views of federal officials with whom they may disagree smacks of constitutionally forbidden interference with state sovereignty.

As every student of federal courts knows, however, state judges stand in a different position vis-à-vis the federal government than do other state actors. Congress cannot force state executive branch officials to implement federal laws,[140] and it cannot delegate federal lawmaking to state legislatures.[141] In contrast, the Constitution relies on state courts to entertain cases about the meaning of federal law. Indeed, the Madisonian Compromise assumes state courts are available to hear all cases falling under Article III's subject matter headings, save the few over which the Supreme Court has original jurisdiction.[142] Accordingly, the Supreme Court has concluded that state courts are constitutionally compelled to hear and decide federal questions and to do so using federal procedures when necessary to protect the substance of the federal rights at stake.[143]

Furthermore, Congress's power to take cases *away* from the state courts is also widely accepted. By statute, Congress has vested exclusive jurisdiction in the federal courts over federal crimes, among other subjects, and Congress could amend 28 U.S.C. § 1331 to give federal courts exclusive federal jurisdiction over all federal cases if it so chose. In light of this greater power to take federal cases entirely away from the state courts, Congress arguably has the lesser, and related, power to require states to follow lower federal court precedent when doing so.

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140. Printz v. United States, 521 U.S. 898 (1997).

141. New York v. United States, 505 U.S. 144 (1992).

142. In *New York v. United States*, which struck down federal legislation attempting to "commandeer" a state legislature, the Court distinguished *Testa v. Katt* on the ground that "[f]ederal statutes enforceable in state court do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate." 505 U.S. 144, 178–79 (1992).

143. *See New York*, 505 U.S. 144; Testa v. Katt, 330 U.S. 386 (1947); *see also* Bellia, *supra* note 113, at 958 ("[I]nsofar as Congress may require state courts to enforce federal claims, it has some authority to 'commandeer' them.").

The counterargument, however, is that Congress's binary authority to give or take away state courts' jurisdiction over federal question cases does not encompass the arguably more intrusive requirement that they decide these cases as another decisionmaker—a *federal* decisionmaker—prefers. Indeed, this could be just the kind of co-opting of state government that is most offensive from a federalism perspective, in that it appropriates the machinery of state government for federal ends and does so in ways that cloud the accountability of state and federal actors alike. For example, if state courts were bound to follow federal precedent, a New York citizen unhappy with a New York state court judge's decision finding a federal constitutional right to same-sex marriage might be confused about whether that decision is the product of the state court's independent decision or the federal court's mandate.

And yet it seems inevitable that the intertwined federal and state court systems blur the lines of accountability. For better or worse, the Framers chose to impose a cooperative federalism model onto the state courts and then to live with the confusion that follows when state actors are forced to carry out federal bidding. The Constitution's creation of a federal judiciary with the last word on the meaning of federal law necessarily displaces state judicial power to some degree. After all, state courts face the prospect of reversal should they flout Supreme Court precedent when interpreting federal law.[144] So the question is not whether state courts retain complete independence to interpret federal law but rather whether it would impermissibly intrude on state sovereignty to require state judges to follow the precedent set by the lower federal courts as well as the Supreme Court. Because state courts are not the last word on the meaning of federal law, it seems hard to argue that state sovereignty bars Congress or the Supreme Court from requiring that they adhere to the lower federal courts' views on federal questions.

2. Limitations Imposed by Judicial Independence

A statute requiring state courts to follow lower federal court precedent arguably interferes with the state court's independent exercise of its judicial power. The few academics to have addressed Congress's power to control the force of precedent have focused on the power of Congress to regulate precedent in *federal* courts, not state courts. Nonetheless, their analysis is relevant because they focus not only on separation of powers issues but also on the question whether

144. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816).

control over the force of precedent is a part of the core of "judicial power" that *all* courts must be allowed to exercise without interference.[145]

Professor John Harrison addressed Congress's power to alter the rules of vertical stare decisis in the federal courts.[146] He concludes that the current rules of precedent are the product of federal common law and thus can be altered by Congress pursuant to its authority under the Sweeping Clause.[147] For Professor Harrison, controlling the strength of precedent is not an essential attribute of the judicial power but rather resembles the type of evidentiary or procedural rule over which Congress has long exercised control. Harrison concedes that Congress would overstep were it to manipulate the rules of precedent to control case outcomes and the development of doctrine, but he argues that the mere potential for abuse does not deprive Congress of the authority to regulate such rules in a reasonable manner.[148] Thus, Harrison concludes that Congress could enact laws making district court decisions binding precedent, or establish a rule of intercircuit stare decisis, all without transgressing constitutional boundaries.[149] Under that same logic, Congress would be able to control state court rules of precedent without interfering with judicial independence.

United States v. Klein,[150] a Reconstruction Era case, is also relevant to the question. Congress had enacted a law requiring that persons whose property was seized by the Union during the Civil War be compensated if they could prove that they had remained loyal to the Union. The courts had awarded compensation to former Confederate sympathizers pardoned by the President, concluding that such individuals qualified as loyal. Unhappy with this result, Congress passed a new law providing that a court must treat a presidential pardon as conclusive evidence that the individual in question was *disloyal* and directed the Court to find that it lacked jurisdiction to hear any pending claim based on a presidential pardon. *Klein* struck down that statute because it sought to "prescribe rules of decision to the

145. Although state court judges generally lack the life tenure and salary protections that insulate the decisional independence of federal courts, they are nonetheless generally viewed as impartial adjudicators who decide cases free from outside interference. Whether that view comports with reality is a debatable question. *See supra* notes 83–87 and accompanying text.

146. *See* Harrison, *supra* note 112.

147. U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

148. *See* Harrison, *supra note* 112, at 531.

149 *Id.* at 535–36.

150. 80 U.S. (1 Wall.) 128 (1872).

Judicial Department of the government in cases pending before it."[151] Could a federal law purporting to control the weight of judicial precedent be struck down for similar reasons?

Klein's reasoning is far from clear, and so it is hard to apply its murky rationale to subsequent cases.[152] But in *Klein* it appeared that the Court was troubled by Congress's attempt to control the *application* of a substantive standard in particular cases, thereby threatening judicial independence. A generally applicable law controlling the use of precedent in state court would not raise the same concerns. Indeed, a statute dictating the force of precedent in state court is arguably no more an interference with judicial decisionmaking than a rule of evidence or a standard of review, which all agree Congress can control. As long as state courts are free to apply these generally applicable rules without interference, they maintain the independence that is essential for any healthy judiciary.

D. Conclusion

This Part concludes that either Congress or the Supreme Court can control the force of federal precedent in state courts if they wish to do so. When state courts hear federal questions, they are engaged in an activity that automatically falls under the authority of the federal government. Furthermore, regulating the state courts is essential to protecting the Supreme Court's authority to take appeals from state courts on questions of federal law. Thus, neither state sovereignty nor concerns for judicial independence bar these federal institutions from doing so.

V. THE COSTS AND BENEFITS OF INTERSYSTEMIC STARE DECISIS

Assuming that Congress and the Supreme Court have the constitutional authority to control the force of lower federal court precedent in state court, the next question is whether either institution *should* do so. Although there are obvious costs to the current system that allows state courts to differ from lower federal courts on the meaning of federal law, there are also benefits to giving state courts that measure of independence. Analyzing these costs and benefits will help to determine whether a federal rule establishing the force of lower

151. *Id.* at 146.

152. FALLON ET AL., *supra* note 10, at 303 (describing the Court's opinion as "rais[ing] more questions than it answers").

federal court precedent in state court would be worthwhile and, if so, what the contours of that rule should look like.

After engaging in this calculus, this Part concludes that disuniformity among *regions* is not a cause for concern, but *intrastate* disuniformity can cause confusion, create friction between state and federal court systems, and undermine the rule of law. Thus, either Congress or the Supreme Court should require that state courts follow the precedent set by the federal circuit court with jurisdiction over that state. Such a rule would eliminate the most costly and disruptive disagreements between state and federal courts, but retain the benefits of percolation and preserve state court authority to make independent pronouncements on the meaning of federal law when their regional federal court of appeals has not yet spoken.

A. The Costs of Allowing State Courts to Diverge from Precedent Set by Their Regional Federal Court of Appeals

1. Uniformity

Allowing state courts independently to interpret federal law comes with all the costs that accompany disuniformity. When state courts differ from federal courts over the meaning of a federal statute or constitutional provision, citizens are left confused about what the law requires of them and sometimes bear the added costs of complying with two (or more) different legal standards. Uniform interpretation of federal law among state as well as federal courts has long been recognized as a goal worth pursuing. As far back as *Martin v. Hunter's Lessee*, Justice Story's majority opinion stressed "the importance, and even necessity of *uniformity* of decisions throughout the whole United States" and decried the "mischiefs" that would result were the Supreme Court deprived of its ability to ensure such uniformity by reviewing state court decisions on federal questions.[153]

Yet uniformity should not always be the legal system's first priority.[154] Uniform interpretation and application of federal law is often sacrificed for other benefits, such as efficiency, finality, and state autonomy.[155] Indeed, our federal judicial system is structured in ways that regularly lead to divergent interpretations of the same statute or

153. 14 U.S. (1 Wheat.) 304, 347–48 (1816).

154. *See* Frost, *supra* note 108.

155. *See, e.g.*, Danforth v. Minnesota, 552 U.S. 264, 280 (2008) ("This interest in uniformity, however, does not outweigh the general principle that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees.").

constitutional provision. District court decisions carry no precedential weight even within their district, and the lack of intercircuit stare decisis consistently creates circuit splits that can linger on for years. Perhaps disuniform interpretations of federal law are the price to be paid for a large and multitiered legal system. Moreover, disuniformity *among* geographic regions can at times be beneficial; for example, it can allow laws to be tailored to regional circumstances and needs.[156]

However, the disuniformity created by a split between a state supreme court and its regional federal court of appeals is especially problematic because it leaves citizens in a single state subject to conflicting legal standards. Sometimes it is possible to adhere to two legal standards at the same time—for example, if one court's narrow interpretation of a law falls within the parameters of another court's broader interpretation of the same law, then conduct consistent with the narrower interpretation will satisfy both courts.[157] But when the two rulings are irreconcilable, the citizen is forced to choose whether to violate either the state court's or the federal court's view of federal law and then run the risk of being sanctioned by the court that took the opposing position.

The introduction to this Article provided some examples of particularly problematic intrastate disuniformity. South Carolina and West Virginia state courts both exercise personal jurisdiction over a manufacturer based solely on the stream of commerce of the manufacturer's goods into their state, even though the Fourth Circuit has declared that courts lack personal jurisdiction in such cases.[158] Virginia state courts convict defendants for violating a state sodomy statute that the Fourth Circuit has declared is unconstitutional.[159] California state courts have concluded that a state law allowing assignment to avoid certain preferential transfers is not preempted by federal law, even though the Ninth Circuit has held to the contrary.[160]

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156. Frost, *supra* note 108.

157. To give a concrete example, if a federal court holds that a search is permissible under the Fourth Amendment to the U.S. Constitution but a state court within that jurisdiction holds that such a search violates that same Amendment, state police officers will be in compliance with both rulings by forgoing such searches. *Cf.* Agurs v. State, 415 Md. 62, 92 (2010).

158. *Compare* Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 946–47 (4th Cir. 1994), *with* State v. NV Sumatra Tobacco Trading, Co., 666 S.E.2d 218, 222–23 (S.C. 2008), *and* West Virginia *ex rel.* CSR Ltd. v. MacQueen, 441 S.E.2d 658, 660–61 (W. Va. 1994).

159. *See* Saunders v. Commonwealth, 753 S.E.2d 602, 607-08 (Va. Ct. App. 2014) (following the Virginia Supreme Court's conclusion in *McDonald v. Commonwealth*, 645 S.E.2d 918 (Va. 2007) that the law is constitutional and rejecting the Fourth Circuit's contrary decision in *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013)).

160. *Compare* Sherwood Partners, Inc. v. Lycos, Inc., 394 F.3d 1198, 1206 (9th Cir. 2005) (holding a California statute is preempted by the Bankruptcy Code), *with* Credit Managers Ass'n

All these cases are examples of disruptive intrastate disuniformity that stems from the current rules allowing state courts to diverge from their regional court of appeals.

This type of intrastate disuniformity has always been viewed as a serious problem. It was the impetus for the *Erie* doctrine, in which the Court rejected the rule of *Swift v. Tyson* because it "prevented uniformity in the administration of the law of the state."[161] Avoiding intrastate disuniformity was also the basis for the Supreme Court's holding in *Van Dusen v. Barrack* that a transferee court must apply the same state law that would have been applied by the transferor court,[162] and for the decision in *Klaxon Co. v. Stentor Electric Manufacturing Co.* that federal courts must apply the choice-of-law rules of the state in which they sit.[163] And it explains why every federal court of appeals has adopted a rule requiring three-judge panels to follow the precedent set by a previous panel within the same circuit.[164] Our federal judicial system is willing to tolerate disuniformity *among* the federal courts of appeals but not disuniformity *within* a geographic region.[165] A rule requiring that state courts follow precedent set by the regional federal court of appeals would similarly serve that goal.

2. Forum Shopping

Permitting courts in the same geographic region to adopt different interpretations of the same laws will inevitably lead to forum shopping. The Supreme Court flagged the problem in *Erie*, concluding that the parties would always seek out the more favorable forum if rights were allowed to "vary according to whether enforcement was sought in the state or in the federal court."[166]

The same forum-selection problem exists in a regime in which state courts are free to disregard the precedent set by the federal court for their geographic region. Savvy litigants will know ahead of time whether the state or the federal system has the more favorable law and will try to bring or transfer their case into the forum that is best for

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of Cal. v. Countrywide Home Loans, Inc., 50 Cal. Rptr. 3d 259, 264 (Ct. App. 2006) (holding the Bankruptcy Code does not preempt the California statute).

161. Erie R.R. v. Tompkins, 304 U.S. 64, 75 (1938).

162. 376 U.S. 612, 638 (1964) ("[W]e should ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed.").

163. 313 U.S. 487, 496–498 (1941).

164. *See* Barrett, *supra* note 99, at 1017–18 & n.20 (2003) (describing the "rule, followed in every circuit, that one panel cannot overrule another").

165. *See supra* notes 154–156 and accompanying text.

166. 304 U.S. at 74–75.

them. Of course, the Supreme Court might eventually eliminate the problem by issuing a decision that is binding on all. But splits between state and federal courts can linger for decades, perhaps never to be resolved, leaving litigants in the same position as they were before the Court's 1938 decision in *Erie*.[167] The Pennsylvania Supreme Court recognized as much when it observed: "If [we] refuse to abide by [the Third Circuit's] conclusions, then the individual to whom we deny relief need only 'walk across the street' to gain a different result."[168]

Admittedly, requiring state courts to follow precedent set by their regional court of appeals will not put an end to forum shopping. Litigants may prefer federal or state court because of differences in the procedural rules, the judges, or the jury pools.[169] Forum shopping between state and federal courts will never be eradicated completely as long as those courts share jurisdiction and, in any case, can serve the useful purpose of ensuring that all parties trust the decisionmaker. However, eliminating intrastate disuniformity will remove the incentive for a party to seek out a forum because the party prefers that courts' interpretation of the substantive law, rather than because of procedural or demographic characteristics that inevitably will vary between state and federal court.

3. Rule of Law

Allowing courts to adopt different interpretations of the same legal text is in tension with the rule of law. Differing interpretations of the same statute or constitutional provision undermine the equality principle of treating like cases alike and weaken the integrity of the law itself by suggesting its meaning is not immutable.[170] Professor Peter

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167. *See, e.g.*, *supra* notes 23–24 and accompanying text.

168. Commonwealth v. Negri, 213 A.2d 670, 672 (Pa. 1965).

169. *See, e.g.*, Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 415 (2010) ("Divergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure.").

170. *See* RONALD DWORKIN, LAW'S EMPIRE 165 (1986) (arguing that political morality "requires government to . . . extend to everyone the substantive standards of justice or fairness it uses for some"); Clermont, *supra* note 4, at 36:

> Likewise under reverse-*Erie*, there is a federal interest in the uniformity of law applied in federal and state court. As to forum-shopping, there should still be some desire to avoid shopping by plaintiffs or defendants between the two systems. As to inequitable administration of the laws, there is still an unfairness in that certain classes of people have a choice of court systems.

Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1997 (1994) ("[T]he precept that like cases should be treated alike . . . [is] rooted both in the rule of law and in Article III's invocation of the 'judicial Power' . . . ."); Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1156 (1994) ("[R]espect for precedent protects expectations, engenders reliance, and procures stability, but it does this first of all by assuring the public that it is rule by law so conceived.").

Strauss asserted that the Supreme Court's inability to address divisions among the courts over the meaning of federal law is a "troubling development[ ] for a nation committed, as ours is, to the rule of law."[171] As Evan Caminker explained, if a federal law means "X" when interpreted by one court but "Y" when interpreted by another, then the public might presume that the courts are "unprincipled," incompetent, or that legal reasoning is "indeterminate," which "subverts the courts' efforts to be seen as oracles of exogenous, objective, and determinant legal principles."[172]

The rule of law values at risk from disuniform interpretation of federal law should not be overstated, however. Our federal judicial system allows the circuit courts to reach varying conclusions about the meaning of federal law that can linger for years, and yet there has been no apparent damage done to the public's respect for federal law and federal courts. Moreover, if federal law is truly ambiguous, allowing courts to reach differing interpretations of that law is perhaps more honest than presuming there can be only one true interpretation of open-ended language.

And yet there is something particularly troubling about allowing different interpretations of the same law to exist within a single state. When this occurs, the public may take greater notice of the disuniformity than it would when one federal circuit disagrees with another. State citizens will have to figure out which court's version of the law they plan to follow, further focusing public attention on the judicial disagreement. The divergence between state and federal courts will inevitably raise the parity issue, causing some to question the competence of state courts (or, less likely, federal courts) and creating tension between the two systems. Thus, even if interstate uniformity is not essential to maintaining rule of law values, intrastate uniformity may be.

4. Parity

The question of parity between state and federal courts has long been the subject of debate among legal scholars. The Framers assumed that state courts would be available to hear federal claims, and federal courts presume that state courts have concurrent jurisdiction over federal claims unless Congress chooses to make federal jurisdiction

171. Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1096–97, 1116 (1987).

172. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 40 (1994).

exclusive.[173] Indeed, many federal claims are embedded within state-law cases and thus can only be brought in state court under the well-pleaded complaint rule.[174] State courts are presumed to provide an adequate forum in which to air these claims.

That said, there are good reasons to think that federal judges are simply better at interpreting federal law than state judges. Federal claims make up a larger percentage of the federal courts' docket; federal judges are more likely to have experience with the federal government than state court judges and thus possess a better understanding of the goals of federal legislation and the ways in which federal laws play out "on the ground"; and federal judges have more time and resources to devote to their cases than do most state judges.[175]

Perhaps the most important reason to prefer federal to state court judges, in at least some cases, is that most state court judges do not have life tenure and must be either reelected or reappointed to retain their office. Accordingly, state courts' decisions may be skewed by political or popular pressure. Studies show that state court judges' decisions vary considerably depending on whether a plaintiff is a citizen or noncitizen, or whether an election is pending. A study of seven thousand tort cases found that the mean damages award against out-of-state defendants was $144,970 higher in states with elected judiciaries than in those with appointed judiciaries, which the authors speculated was caused by elected judges' incentives to distribute wealth from nonvoters to voters.[176] State judges are more likely to impose the death penalty and issue significantly longer criminal sentences in election years.[177] Indeed, elected state court judges openly admit that the prospect of reelection affects their decisionmaking.[178]

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173. *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 508 (1962) ("In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction.").

174. *See* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

175. *See* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 166–67 (1969) (concluding that federal judges have "an expertness in dealing with questions of federal law that comes from more extended contact with such questions than state court judges have"); *see also* Redish & Muench, *supra* note 72, at 329–30 (arguing that federal courts have greater expertise on matters of federal law than state courts).

176. Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 162–63, 186 (1999).

177. *See, e.g.*, Richard R. W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609, 610 (2002) (finding that "criminal defendants were approximately fifteen percent more likely to be sentenced to death when the sentence was issued during the judge's election year"); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 AM. J. POL. SCI. 247, 258 (2004).

178. *See* Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77

Legal scholars are increasingly concerned about the effect of elections on state judging. As Professor Steven Croley put it, judicial elections create a "majoritarian difficulty" that is the counterpart to the "counter-majoritarian difficulty" posed by appointed federal judges.[179] Elected judges are pressured to decide cases in ways that their constituents (or possibly interest groups) will prefer, even when doing so is at odds with the law.[180] As many scholars have noted, in recent years, judicial elections have morphed from "sleepy, low key affairs," in which the incumbent was usually reelected in a low-turnout vote, into high-profile events.[181] Judges are raising more money, spending more on advertising, and benefitting (or suffering) from the attention of nation-wide interest groups.[182] All of which means that voters are now paying attention to state judges' voting records as never before.[183] For example, after the Iowa Supreme Court held that the Iowa Constitution required the state to permit same-sex marriage, interest groups targeted those Justices who were up for reelection, ultimately defeating three of them.[184] One has to assume that their defeat will influence elected judges facing similar controversial cases in the future.

Requiring state court judges to follow lower federal court precedent would not completely solve the "majoritarian difficulty," but it would provide a counterweight to public opinion and possibly even serve as political cover for controversial decisions, just as Supreme Court precedent sometimes can.[185] If an elected judge's decision is clearly dictated by binding lower court precedent, she can explain that she had no choice but to vote in line with the federal court of appeals for her geographic region, thereby defusing some of her critics.

JUDICATURE 306, 315 (1994) (finding that a "very high percentage of judges . . . say judicial behavior is shaped by retention elections.").

179. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

180. *Id.* at 694.

181. Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 16–17 (2003).

182. *See* CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 30–33 (2009) ("Over the decade of the 1990s, state supreme court races have become more contested, competitive, and expensive.").

183. *See* Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 733–37 (2010) ("[W]e have entered a 'new era' in judicial elections in which voters pay for more attention to incumbents' voting records.").

184. A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1.

185. *Id.; see also* Frost & Lindquist, *supra* note 183, at 758 (describing how elected state judges can rely on federal decisions as "political cover"); Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 983 (1997).

5. Conserving Judicial Resources

Requiring state courts to follow lower federal court precedent would be more efficient, conserving both state and federal judicial resources. Under the current system, litigants cannot be sure how a state court will rule on a question of federal law even after that question has been definitively resolved by the federal court of appeals for the region. This uncertainty may inspire litigation by those seeking to take advantage of the potential divergence between state and federal courts on the meaning of the federal law—litigation that would not be brought were state courts bound to follow federal precedent.

Once a case is before a state court system, the state trial and appellate courts must then devote time and attention to the question, rather than simply fall in step behind the federal court of appeals. Finally, if the state court does deviate from the lower federal court, the conflict may lead the parties to seek review by the Supreme Court.[186] Although the Supreme Court has the capacity to decide only a few cases each term, it will have to consider whether to do so, and then potentially invest time to resolve the dispute, taking up one of the precious few spots on the Supreme Court's calendar.

Admittedly, conserving judicial resources is not the most compelling reason for changing longstanding rules of precedent. Our legal system regularly trades efficiency for fairness, accuracy, and legitimacy, among other values. As discussed below, the perspective of state court judges may be valuable to the Supreme Court in resolving the question. Even if reducing the burdens on federal and state judges is not the primary reason for changing the current rule, however, it would nonetheless be a fringe benefit of a world in which state courts simply followed the lead of their regional federal circuit.

B. The Benefits of Allowing State Courts to Diverge from Precedent Set by Their Regional Federal Court of Appeals

Most state courts today treat federal appellate precedent as persuasive, but not binding, authority.[187] In other words, they diverge from the decisions of the lower federal courts only in the fairly small subset of cases in which they conclude that the federal courts got it very wrong. Accordingly, requiring intersystemic stare decisis would alter the outcomes only in those few cases in which state courts strongly

186. SUP. CT. R. 10 (stating that a disagreement between a state and federal court on a question of federal law is one potential bases for the Supreme Court's decision to grant a petition for writ of certiorari).

187. *See supra* Part II.A.

disagree with their federal counterparts—that is, cases in which there are likely to be reasonable arguments on either side of the question.[188] Arguably, it is in just such cases in which it is most beneficial to allow state courts to come to their own conclusions about the meaning of federal law.

1. Percolation

The Supreme Court often allows an issue to percolate in the lower courts before addressing it, waiting for several federal circuits and/or state high courts to weigh in before granting certiorari.[189] The Court justifies this delay because the Justices benefit from the reasoning of the divided lower courts, from observing how the federal issue arises in a variety of different contexts, and from watching the lower courts' varied interpretations play out in practice.[190] Indeed, "percolation" is cited as one of the reasons to maintain our current system's lack of intercircuit stare decisis, in which the decision of one federal circuit does not bind another. Presumably, the Court reaps similar benefits by allowing the state courts to weigh in on federal issues as well.[191]

Input from the state court systems can be particularly valuable in the development of federal law. State courts provide a unique regional perspective that is (mostly) absent from federal courts.[192] State judges are elected or appointed, usually after participating for some period of time in a state's legal or political system. As a result of this experience, they have an understanding of how federal regulations, statutes, and constitutional provisions operate within state government

188. *See* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1156 (1990) (noting that courts disagree with one another in "hard cases").

189. *See, e.g.*, McCray v. New York, 461 U.S. 961, 961–63 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari):

> My vote to deny certiorari in these cases does not reflect disagreement with Justice Marshall's appraisal of the importance of the underlying issue . . . . In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.

190. *See* Revesz, *supra* note 188, at 1156–57 (discussing the benefits of percolation).

191. *See, e.g.*, Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 634 (1981) ("Do we not derive enormous benefits from having a variety of institutional 'sets' within which issues of federal constitutional law are addressed?").

192. Federal district judges are required to reside in or near the district in which they preside, 28 U.S.C. § 134, and thus may have a closer connection to the local population than federal appellate judges.

and affect state citizens—knowledge that many federal judges will lack.[193]

Furthermore, percolation benefits more than just the Supreme Court. Congress can observe the dialogue among the federal and state courts as well, which then informs the contents of future legislation.[194] Most obviously, the lower courts benefit from each other's discussion of hard questions of federal law. Like the Supreme Court, a federal court of appeals will gain insights from the decisions of those who have already grappled with the issue.[195]

Finally, divergence among state and federal courts is an important signaling device, alerting future courts to the fact that a legal question is difficult enough to lead two or more courts to differ from each other, ensuring that subsequent courts will give the issue special scrutiny.[196]

Although the benefits of percolation are significant, they can be realized without allowing state courts to differ from the federal court of appeals for their geographic region. Even without state court input, the circuit courts can express their different views on the meaning of federal law, leaving lots of opportunity for the Supreme Court to observe the various interpretations of federal law play out in practice. Furthermore, a rule requiring that state courts follow the precedent set by their regional federal circuit court would still allow state courts to contribute to the development of federal law because the state courts

193. *See* Gergory L. Acquaviva & John D. Castiglione, *Judicial Diversity on State Supreme Courts*, 39 SETON HALL. L. REV. 1203, 1207–08 (2009) (undertaking a "comprehensive examination of the demographic and experiential characteristics of all judges on the courts of last resort in the fifty states" and finding that the "average" state supreme court justice has been "heavily involved in both the bar and the greater local community," "likely spent some portion, if not all, of his undergraduate and law school days at a school in the state over which he would eventually preside," and has "[c]ommunity ties" that "run deep").

194. Rochelle C. Dreyfus, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Perspective,* 66 SMU L. REV. 505, 523 (2013) (noting that "percolation provides important information to Congress").

195. *See generally* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 163 (1985) ("[A] difficult question is more likely to be answered correctly if it is allowed to engage the attention of different sets of judges deciding factually different cases than if it is answered finally by the first panel to consider it."); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 719 (1984) ("The views of the lower courts on a particular legal issue provide the Supreme Court with a means of identifying significant rulings as well as an experimental base and a set of doctrinal materials with which to fashion sound binding law."). For a more critical perspective on percolation, compare, for example, Todd J. Tiberi, *Supreme Court Denials of Certiorari in Conflict Cases: Percolation or Procrastination?,* 54 U. PITT. L. REV. 861, 866–69, 882–91 (1993) (examining the arguments against percolation).

196. *See* Revesz, *supra* note 188, at 1156 ("[T]he possibility of intercircuit disagreement provides a simple device for signaling that certain hard cases are worthy of additional judicial resources.").

would be free to adopt their own interpretations as long their federal circuit had not yet weighed in on the question. Thus, most of the benefits of percolation would remain even were state courts obligated to follow their regional federal circuit's interpretation of federal law.

2. Autonomy

Allowing state courts to reach independent conclusions about the meaning of federal law grants state courts a degree of autonomy and respect, and puts them on equal footing with lower federal courts. One reason to preserve and protect state sovereignty is to maintain the quality of state governmental institutions. When the federal government takes on more authority, it risks hollowing out state institutions and undermining their place in the civic life of the state. A rule requiring state courts to adhere to the precedent set by their regional court of appeals would subordinate state courts to yet another level of the federal judiciary and would further undermine their interpretive autonomy. Even if such restrictions on state court autonomy do not violate constitutionally grounded federalism principles—and, as discussed in Part III, they likely do not—it is wise policy to give state courts as much autonomy as possible.

Yet no one claims that obligating federal courts to follow state court precedent on the meaning of state law is demeaning to the federal courts or undermines federal judicial autonomy. To the contrary, it may come as a relief to federal courts that they are not required to grapple with the meaning of state law in some cases but rather are instructed to look to state court interpretations of state statutes, regulations, ordinances, and constitutional provisions. For more than seventy years federal courts have faithfully followed state court precedent.[197] Why should it be demeaning to ask state courts to do the same?

C. Conclusion

As just explained, the greatest costs of the current system arise when a state court diverges from the federal court of appeals with jurisdiction over that state, creating two views of federal law that apply within the same geographic jurisdiction. Either Congress or the Supreme Court could establish rules of precedent that would require state courts to follow clear precedent set by its federal circuit, ensuring intrastate uniformity and avoiding the forum shopping and inequitable application of the law that would otherwise result.

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

VI. CONCLUSION

This Article examines the weight that state courts give to lower federal court precedent on questions of federal law and then uses that issue to explore broader questions about the relationship between state and lower federal courts. The conventional wisdom is that state courts are not bound by lower federal court precedent. The rationale for this conclusion is that state courts are coordinate with lower federal courts and not subordinate to them. This Article questions the assumption that state courts have equal status when it comes to interpreting of federal law. Moreover, this Article asserts that even if state courts are properly viewed as lower federal courts' equals, there are still good practical and logistical reasons to require that state courts follow lower federal court precedent—particularly the precedent of the lower federal courts with jurisdiction over that state. .

Certainly, the Madisonian Compromise and the norm of concurrent state court jurisdiction over federal questions suggest that state courts are constitutionally *adequate* fora for the resolution of federal claims, but the fact that state courts are essential expositors of federal law does not render them federal courts' *equals* when doing so. State courts lack the resources, experience, and insulation from political pressure that federal courts enjoy—problems that the Framers of the Constitution recognized and that continue to exist today. Furthermore, the expansion of the size and jurisdiction of the lower federal courts over the last two hundred years, coupled with diminished opportunities for Supreme Court review, suggest that the state courts should be more deferential to the federal courts of appeals. Finally, for purely practical reasons involving the need for intrastate uniformity, a state court should not be free to disregard its own regional court of appeals when addressing the meaning of federal law.

Although the Constitution does not speak clearly regarding state courts' relationship to the lower federal courts, nothing in the Constitution would seem to prevent either Congress or the Supreme Court from establishing such a rule if they chose. At the very least, such a rule could prevent a state court from taking positions at odds with its own regional federal court of appeals, thereby forcing the citizens of a single state to follow two different interpretations of the same federal law and creating a "split" that may not be resolved for years in an era of shrinking Supreme Court dockets. A federal statute or common-law rule requiring state courts to follow lower federal court precedent in some cases would help to clarify the appropriate relationship between state and federal courts in an era in which these two court systems usually share the last word on the meaning of federal law.