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Writing Competition Submission

“Should State Courts be Required to Follow the Decisions of Lower Federal Courts when
Interpreting Questions of Federal Law?”

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Introduction

At first glance, the rule that state courts are not bound by decisions of the lower federal courts in interpreting questions of federal law seems uncontroversial. Yet the roots of that rule are far from clear.¹ The United States Supreme Court has not definitively stated the rule.² While the majority of courts seem to adhere to the rule,³ a few courts have held that state courts are bound by decisions of the lower federal courts under certain circumstances.⁴ Should state

¹ For example, the Nowak and Rotunda treatise on constitutional law states the rule, but cites no authority for it. *See* JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 1.6 (c) (6th ed. 2000).

² *See* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997) (citing *Yniguez v. Arizona*, 939 F.2d 727, 736 (9th Cir. 1991)) (referencing a “remarkable passage” in a 9th Circuit opinion that questioned the rule, then providing a “But cf.” cite that references no majority opinions of the United States Supreme Court that are directly on point); *State v. Burnett*, 755 N.E.2d 857, 860 (Ohio 2001) (“The question of whether a state court is required to follow a federal trial court’s interpretation of federal constitutional law is largely unsettled, and the United States Supreme Court has yet to definitively address the subject.”). *See generally* 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 (1999) (explaining the different methods state courts use in dealing with lower federal court decisional law).

³ *See, e.g.*, *People v. Walker*, 2004 WL 3248429 (Mich. Ct. App. 2005) (“[W]e are not bound by decisions of lower federal courts.”); *Burgess v. E.L.C. Elec., Inc.*, 825 N.E.2d 1, 9 (Ind. Ct. App. 2005) (“[W]e note that decisions of the United States Supreme Court pertaining to federal issues are binding on state courts but that decisions of lower federal courts, although they may be persuasive, are not binding upon state courts.”); *Brown v. State*, 9 A.3d 23, 28 n.3 (N.Y. App. Div. 2004) (“[T]he courts of this state are not bound by the interpretation of the U.S. Constitution by lower federal courts.”); *People v. Romero*, 99 Cal. App.4th 1418, 1430 (2002) (“Although lower federal court decisions are entitled to great weight, we are not bound by their decisions.”); *ACE Prop. & Cas. Ins. Co. v. Comm. of Revenue*, 770 N.E.2d 980, 986 n.8 (Mass. 2002) (“Although we are not bound by decisions of Federal Courts (other than the United States Supreme Court) on matters of federal law, we give respectful consideration to such lower Federal court decisions as seem persuasive.”) (citations and quotations omitted); *State v. Mack*, 66 S.W.3d 706, 710 (Mo. 2002) (“[G]eneral declarations of law made by lower federal courts do not bind this Court.”); *Ex parte Graves*, 70 S.W.3d 103, 124 n.3 (Tex. Crim. App. 2002) (“Moreover, we are not bound by lower federal court opinions interpreting constitutional rights, although they do present persuasive authority.”); *Brotman v. East Lake Creek Ranch*, 31 P.3d 888, 894 (Colo. 2001) (“[W]e are not bound by decisions of lower federal courts.”).

⁴ For example, the Illinois Supreme Court has held that “the decisions of the Federal courts interpreting a Federal act such as the FHSA [the Federal Hazardous Substances Act] are controlling upon Illinois courts, in order that the act be given uniform application.” *Busch v. Graphic Color Corp.*, 662 N.E.2d 397, 403 (Ill. 1996). However, in later cases, the Illinois Supreme Court seems to have tempered that statement. *See, e.g.*, *Weiland v. Telectronics Pacing Syst., Inc.*, 721 N.E.2d 1149, 1154 (Ill. 1999) (“This court need not follow Seventh Circuit precedent interpreting a federal statute where, as here, the Supreme Court has not ruled on the question presented, there is a split of authority

courts be bound by lower federal court decisional law? If not, should they nonetheless follow precedent from the circuit in which they sit as a prudential matter? This paper will begin by examining the closest thing we have to definitive authority regarding the rule—affirmative statements by individual justices of the United States Supreme Court. If it were to be held that state courts are required to follow lower federal court precedent, the source of such a doctrine would have to be the Supremacy Clause of the United States Constitution. Thus, the paper will give a very brief overview of the Supremacy Clause and the institution of judicial review. It will then proceed to examine four arguments for and against the rule, taking into account some of the unique federalism concerns that arise in this area. Next, the paper will examine New Mexico caselaw in order to conduct a practical study of how state courts deal with circuit precedent on questions of federal law. In doing so, the paper will pose the question of whether there are certain areas of substantive federal law in which state courts should give greater deference than usual to the opinions of the lower federal courts.

among the federal circuit courts of appeals, and, we believe, the case from the Seventh Circuit was wrongly decided.”).

See also *People v. Riggs*, 568 N.W.2d 101, 106 (Mich. App. 1997) (“Michigan adheres to the rule that a state court is bound by the authoritative holdings of federal courts regarding federal questions when there is no conflict. However, where an issue has divided the circuits of the federal court of appeals, the Court is free to choose the most appropriate view.”) (citations omitted); *Fall River County v. South Dakota*, 552 N.W.2d 620, 628 (S.D. 1996) (“We are bound by the decisions of the federal courts in their interpretation of a federal statute.”) (quotations omitted); *Scovill Mfg. Co. v. Skaggs Pay Less Drug Stores*, 291 P.2d 936, 938-39 (Cal. 1956) (en banc) (“The decision of the Court of Appeals in the Schwegmann case is a clear and unqualified approval of the McGuire Act and we are bound thereby on matters relating to the federal law.”).

In dicta, subsequently criticized by the U.S. Supreme Court, *see supra* note 2, the Ninth Circuit stated: “Despite the authorities that take the view that the 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. Having chosen to create the lower federal courts, Congress may have intended...the federal courts [] to have the final word on questions of federal law. The contrary view could lead to considerable friction between the state and federal courts as well as duplicative litigation.” *Yniguez v. Arizona*, 939 F.2d 727, 736 (9th Cir. 1991).

I. Statements of the Rule

While the United States Supreme Court has not ruled on whether state courts must follow the decisions of lower federal courts on issues of federal law,⁵ several individual Justices have stated that they need not. The clearest statement of the rule appears in a concurring opinion by Justice Thomas. In *Lockhart v. Fretwell*,⁶ a majority of the Supreme Court reversed the Eighth Circuit's affirmance of a grant of habeus corpus relief (based on a *Strickland*⁷ claim for ineffective assistance of counsel) to a prisoner who had been convicted in the Arkansas courts. The Eight Circuit had ruled that the prisoner met the *Strickland* test, because his trial counsel had failed to raise an argument based on a prior Eight Circuit case that might have afforded relief, even though that case had been subsequently overruled by the Eighth Circuit.⁸ The Supreme Court majority noted that the Eighth Circuit "believed that the Arkansas trial court was bound under the Supremacy Clause to obey the Eighth Circuit's interpretation of the Federal Constitution."⁹ The majority did not address this statement, instead reversing the grant of habeus relief because the defendant had failed to meet the elements of the *Strickland* test.¹⁰

⁵ See *supra* note 2.

⁶ 506 U.S. 364 (1993).

⁷ See *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* provides the test for whether a lawyer's performance violates a defendant's Sixth Amendment right to counsel. To prevail on a *Strickland* claim, a defendant must show (1) that the attorney's performance was deficient, and (2) that the defendant was prejudiced in that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

⁸ *Fretwell*, 506 U.S. at 368.

⁹ *Id.* at 368. In dissent, Justice Stevens did not agree that the Eighth Circuit believed the Arkansas courts to be bound by Eighth Circuit precedent. *Id.* at 385 n. 8. What the Eighth Circuit actually said was as follows: "[S]ince 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 *Collins* had Fretwell's attorney made one." *Fretwell v. Lockhart*, 946 F.2d 571, 577 (1991). "Collins" refers to the Eighth Circuit precedent that the Eighth Circuit later overruled. See *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), *overruled by* *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989).

¹⁰ *Fretwell*, 506 U.S. at 371.

Justice Thomas agreed with the majority’s *Strickland* analysis, but wrote separately to address “a fundamental misunderstanding of the Supremacy Clause on the part of the Court of Appeals.”¹¹ Arguing that the Arkansas courts were not bound to follow decisions of the Eighth Circuit, Justice Thomas said,

The 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 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. An Arkansas trial court is bound by this Court’s (and by the Arkansas Supreme Court’s and Arkansas Court of Appeals’) interpretation of federal law, but if it follows the Eighth Circuit’s interpretation of federal law, it does so only because it chooses to and not because it must.¹²

While it is difficult to infer anything from silence, it is interesting that the majority opinion failed to address this question, even though it agreed that Eighth Circuit had perceived the Arkansas courts to be bound by Eighth Circuit precedent.

Justice Rehnquist has also stated the rule in a concurring opinion. In *Steffel v. Thompson*,¹³ the Supreme Court clarified the proposition, set forth in *Younger v. Harris*¹⁴ and *Samuels v. Mackell*,¹⁵ that absent unusual circumstances, federal courts should not enjoin enforcement of a state criminal statute when there is already a state criminal proceeding pending against the federal court plaintiff. The *Steffel* Court held that a federal court may issue a

¹¹ *Id.* at 375 (Thomas, J., concurring).

¹² *Id.* at 376 (Thomas, J., concurring) (citations omitted). Notably, Justice Thomas provided only three citations for this statement—a concurring opinion by Justice Rehnquist, (*Steffel v. Thompson*, 415 U.S. 452 (1974)) a Seventh Circuit case, (*United States ex rel. Lawrence v. Woods*, 432 F.2d 1072 (1971)) and a law review article (Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U.L. REV. 759 (1979)).

¹³ 415 U.S. 452 (1974).

¹⁴ 401 U.S. 37 (1971).

¹⁵ 401 U.S. 66 (1971).

declaratory judgment that a state statute is unconstitutional when no state criminal proceeding is pending and the federal court plaintiff has shown “a genuine threat of enforcement of a disputed state criminal statute.”¹⁶ Justice Rehnquist concurred in the majority opinion, and added, “I do note that the federal decision [a declaratory judgment holding the state statute unconstitutional] would not be accorded the stare decisis effect in state court that it would have in a subsequent proceeding within the same federal jurisdiction. Although the state court would not be compelled to follow the federal holding, the opinion might, of course, be viewed as highly persuasive.”¹⁷

Most state courts have also ruled that they need not follow circuit precedent.¹⁸ But generally, these courts have not provided much in the way of rationale for their decisions.¹⁹ In the following sections, this paper will first examine the possibility that lower federal court decisional law constitutes the “supreme law of the land” under the Supremacy Clause, and will then discuss various arguments in support of and opposition to the rule that state courts are not bound by lower federal court precedent when interpreting federal law.

II. The Supremacy Clause, the Power of Judicial Review, and the Question of the “Supremacy” of Lower Federal Court Decisions

It has long been clear that under the Supremacy Clause of the United States Constitution, all courts in the United States, state and federal, are bound by the decisions of the United States

¹⁶ 415 U.S. at 475.

¹⁷ *Id.* at 483 n.3 (Rehnquist, J., concurring).

¹⁸ *See supra* note 3.

¹⁹ Zeigler, *supra* note 2, at 1151-52 (“The state courts promptly split on whether they were bound by lower federal court decisions interpreting federal law. Discussions tended to be wholly conclusory. Courts simply stated that they were bound—or not bound—and generally provided neither citation nor analysis.”) (footnotes omitted).

Supreme Court on issues of federal law.²⁰ If it were to be decided that state courts were also bound by decisions of the lower federal courts, the source of such a rule would presumably also be the Supremacy Clause. Thus a brief examination of the history and application of the Supremacy Clause is helpful. The Clause states,

The Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.²¹

Interestingly, the term “Laws” appears to refer only to congressionally enacted legislation, and if so, the Supremacy Clause makes no mention of judge-made law.

The Supremacy Clause’s failure to mention judge-made law is likely a result of the Clause’s goal, which was unrelated judge-made law. The Framers’ goal in adopting the Supremacy Clause was to establish the legislative preemption doctrine—that federal legislation overrides conflicting state legislation.²² The Supremacy Clause derives in part from a proposal rejected by the Constitutional Convention, which would have allowed Congress to “negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union.”²³ Thus, under the rejected proposal, Congress would have had the power to veto state law that it thought to be unconstitutional. The proposal was ultimately rejected

²⁰ See, e.g., *Arizona v. Evans*, 514 U.S. 1, 9 (1995) (“State courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution. In doing so, they are *not* free from the final authority of this Court.”); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 572-73 (1832) (opinion of Justice McLean) (“It appears, then, that on all questions arising under the laws of a state, the decisions of the courts of such state form a rule for the decisions of this court, and that on all questions arising under the laws of the United States, the decisions of this court form a rule for the decisions of the state courts.”).

²¹ U.S. CONST. art. VI, cl. 2.

²² See *FERC v. Mississippi*, 456 U.S. 742, 793-95 (1982) (O’Connor, J., concurring in the judgment in part and dissenting in part).

²³ *Id.* at 794 (O’Connor, J., concurring in the judgment in part and dissenting in part) (quoting 1 Farrand 21).

because delegates thought it would improperly deprive the states of power over local issues.²⁴ As a compromise, the delegates settled on the Supremacy Clause.²⁵ According to Justice O'Connor, the effect of the Supremacy Clause was to give the federal government “the power to enact its own laws and to enforce those laws over conflicting state legislation.”²⁶ Thus, given the goal sought to be achieved by the Supremacy Clause, it is not a surprise that the Clause does not speak directly to the effect of federal court decisions.

Another reason for the Clause’s failure to mention judge-made law is that the Constitution does not explicitly provide for judicial review of legislation;²⁷ rather the Supreme Court gave itself that power in *Marbury v. Madison*.²⁸ But despite the Supremacy Clause’s failure to mention judge-made law, the Supreme Court has made clear that, as a result of the intersection of the Clause and the *Marbury* power of judicial review, its interpretation of the constitution stands on the same footing as the constitution itself. In *Cooper v. Aaron*,²⁹ where the Supreme Court held that resistant Arkansas officials were bound by the Court’s decision in *Brown v. Board of Education*,³⁰ the Court said: “[*Marbury*] declared the basic principle that the

²⁴ *Id.* (“Numerous delegates criticized this attempt to give Congress unbounded control over state lawmaking.”).

²⁵ *Id.*

²⁶ *Id.* at 795 (O’Connor, J., concurring in the judgment in part and dissenting in part).

²⁷ “The United States Constitution (unlike those of many other nations) does not explicitly grant the judicial review power asserted in *Marbury*.” KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 13 (14th ed. 2001).

²⁸ 5 U.S. (1 Cranch) 137 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”). *See also* SULLIVAN AND GUNTHER, *supra* note 27, at 13 (“Critics of *Marbury* stress that Marshall’s opinion lacks reference to authoritative sources for such a power: that the Constitution does not explicitly authorize judicial review; that the Framers did not clearly intend to grant that extraordinary power; and that the pre-Convention theories and practices were not sufficiently clear and widespread to provide legitimation.”).

²⁹ 358 U.S. 1 (1958).

³⁰ 347 U.S. 483 (1954).

federal judiciary is supreme in the exposition of the law of the Constitution....It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the constitution makes it of binding effect on the States ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’”³¹

In light of the Court’s statement that “the federal judiciary” has the final word on the meaning of the constitution, one could certainly argue that all federal judge-made law interpreting the constitution and federal statutory law is “the supreme law of the land.” But a majority of courts that have considered the question have held otherwise.³² Why is this the case? In the following section, this paper will examine some of the possible arguments for and against binding state courts to lower federal court interpretations of federal law.

III. Arguments for and Against the Rule

1. Uniformity Concerns

The importance of uniformity in federal law has long been recognized, and was one of the primary justifications made in support of the conclusion that the Supreme Court has the power to review state court interpretations of federal law. In *Martin v. Hunter’s Lessee*,³³ Justice Story made the following uniformity argument in support of that power:

A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret [federal law]: if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and the constitution of the United States would be different in different states, and might, perhaps never have precisely the same construction,

³¹ *Cooper*, 358 U.S. at 18 (quoting the Supremacy Clause, U.S. CONST. art. VI, cl. 2).

³² See *supra* note 3.

³³ 14 U.S. (1 Wheat.) 304 (1816).

obligation, or efficacy in any two states. The public mischiefs that would attend such a state of things would be truly deplorable[.]³⁴

If uniformity is of such great value, then perhaps it would make sense to bind state courts to the precedent of the circuit court that encompasses their geographical area. As it stands, the constitution is indeed “different in different states.” For example, suppose that the Supreme Court has interpreted the Fourth Amendment to preclude *x*, and has indicated in dicta that *y* may also be precluded for the same reasons. The Colorado Supreme Court has held that the Fourth Amendment does preclude *y*, but the New Mexico Supreme Court has held that it does not.³⁵ Thus, a criminal defendant in Colorado has greater protections under the federal constitution than does a criminal defendant in New Mexico. This problem could be obviated if both New Mexico and Colorado state courts were required to adhere to Tenth Circuit precedent.

This argument, however, has two main shortcomings. First, while uniformity would be enhanced, federal law would still not be uniform across the nation. Different federal circuit courts would likely disagree on the issue until the Supreme Court resolved it. Thus a New Mexico defendant might have the same protections as a Colorado defendant, but would still have

³⁴ *Id.* at 347-48.

³⁵ State courts are not permitted to interpret the federal constitution so as to impose restrictions on state action that the U.S. Supreme Court has declined to impose. *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975) (“[A] state may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them.”); *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 42, 25 P.3d 225, 242 (Baca, J., concurring in the result) (“New Mexico courts do not have the authority to depart from United States Supreme Court precedent by providing greater protection under the Fourth Amendment.”). Presumably, however, when the Supreme Court has left a question open, rather than definitively answering it, a state is permitted to answer the question as a matter of federal constitutional law. *See, e.g., J & J Const. Co. v. Bricklayers and Allied Craftmen, Local 1*, 664 N.W.2d 728, 757 (Mich. 2003) (Cavanagh, J., dissenting) (“The majority’s reliance on *Sullivan* [which reiterated that states could not impose restrictions on state action under the federal constitution that the Supreme Court has ‘specifically refrained’ from imposing] is also misplaced because the United States Supreme Court has not ‘specifically refrained’ from applying the actual-malice standard to private-figure plaintiffs in Petition Clause defamation claims. This remains, as acknowledged by the majority, a question not yet decided by the United States Supreme Court.”). Of course, states are also free to use their own constitutions to offer protections greater than those mandated by the federal constitution. *Hass*, 420 U.S. at 719 (“[A] state is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.”).

protections different from those afforded to a defendant in a state within a different circuit.

Second, uniformity is arguably sufficiently furthered by having one court (the Supreme Court) that acts as the final word on all matters of federal law. Indeed, in *Martin*, Justice Story spoke of a “revising authority,” indicating that one reviewing court is sufficient to harmonize differing interpretations of federal law.³⁶ Nonetheless, until the Supreme Court does harmonize such differing interpretations, there will be a lack of uniformity in different courts, which could result in inefficiency and abuses of the system.

2. Forum Shopping

One practical downside to the lack of uniformity that could result from not requiring state courts to follow circuit precedent is that similarly situated litigants might be subject to different interpretations of federal law depending on whether the litigation takes place in state or federal court. This situation could encourage forum shopping. Consider the following hypothetical.³⁷

The Albuquerque Police Department has a valid warrant to search Dudley Defendant’s house. Several officers knock on his door, wait fifteen seconds, and then break the door down and enter the house. Ultimately, no charges are filed against Dudley, but he decides to file suit against the police officers and the City of Albuquerque under 42 U.S.C. § 1983, on the grounds that they violated his Fourth Amendment right to be free from unreasonable searches and seizures. Dudley also includes a claim for trespass under state tort law. In *Smith v. Jones*, the U.S. Supreme Court ruled that police officers must “knock and announce” themselves before breaking into a suspect’s residence, and that Fourth Amendment rights are violated if the police do not wait at least 5 seconds between knocking and entering the residence with force. In *Smith*, the Supreme Court declined to decide exactly what period of time *would* satisfy the Fourth Amendment, but indicated in dicta that 5 seconds was likely not nearly long enough. Subsequently, the Tenth Circuit, using the policy and rationale of *Smith*,

³⁶ In Federalist 82, Hamilton referred to the Supreme Court as a tribunal “destined to unite and assimilate the principles of national justice and the rules of national decisions.” THE FEDERALIST PAPERS 419-20 (Garry Wills ed., Bantam Books 1982) (1787-88). Interestingly, however, Hamilton also saw no reason why an appeal would not lie from a state court to a lower federal court. *Id.* at 420. As discussed in Part III.4 *supra*, the Supreme Court’s *Rooker-Feldman* doctrine has foreclosed this possibility.

³⁷ The legal principles used in this hypothetical are fictitious. They do *not* attempt to provide a correct statement of Fourth Amendment law or state tort law, and are presented for purposes of illustration only.

ruled that it is sufficient if the police knock and wait 10 seconds before forcefully entering a residence. The New Mexico Supreme Court, also interpreting the policy and rationale of *Smith*, has decided that a forcible entry violates the Fourth Amendment unless the police first knock and wait at least 20 seconds before entering.³⁸

Under these facts, Dudley’s success could depend in part on where he files his claim.³⁹ If he files in federal district court in New Mexico, his § 1983 claim should be dismissed on a Rule 12(b)(6) motion—he has failed to state a claim on which relief can be granted because under the Tenth Circuit precedent, a wait of 15 seconds does not violate a suspect’s Fourth Amendment rights. If, however, Dudley files in New Mexico state court, his § 1983 claim will not fail as a matter of law, since the New Mexico Supreme Court has interpreted *Smith* to mean that police must wait at least 20 seconds before making a forcible entry.⁴⁰

Thus, under the facts of this hypothetical, Dudley may be encouraged to “forum shop.”⁴¹ As a practical matter, however, the attempt to forum shop is unlikely to succeed. If Dudley filed his suit in New Mexico state court, the defendants would have a right to remove the action to the New Mexico federal district court. Under 28 U.S.C. § 1441, a civil action that could have been brought in federal court is removable. When the claim arises under federal law, as a suit under §

³⁸ On the ability of state courts to answer federal constitutional questions that have been posed but not answered by the U.S. Supreme Court, see note 35 *supra*.

³⁹ Dudley could bring both of these claims in state or federal court. As noted below, see *infra* note 51, state courts have, and indeed must exercise, jurisdiction over federal causes of action such as suits under § 1983. A federal court would have jurisdiction over the state law claim under 28 U.S.C. § 1367, which gives federal courts jurisdiction over pendent state law claims, so long as those claims form part of the same “case or controversy” as the federal claims.

⁴⁰ It should be noted that, whether brought in state or federal court, Dudley’s claims against the individual police officers might be defeated by a qualified immunity defense. Qualified immunity protects individual state actors from suit when the constitutional right they are alleged to have violated is not defined by “clearly established” law. *See, e.g., Hope v. Pelzer*, 536 F.3d 730, 739 (2002) (“Despite their participation in the constitutionally impermissible conduct, respondents may nevertheless be shielded from liability for civil damages if their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”) (citations and quotations omitted).

⁴¹ *See Daddow v. Carlsbad Mun. Sch. Dist.*, 120 N.M. 97, 111, 898 P.2d 1235, 1249 (1995) (Frost, J., specially concurring) (“[T]he majority unnecessarily places us in conflict with the Tenth Circuit and raises the possibility that a federal claim could successfully be brought in state court which would otherwise fail in federal court.”).

1983 does, the action is removable without regard to the citizenship of the parties.⁴² Thus, Dudley’s attempt to “forum shop” would likely be defeated—the defendants could remove the action to the federal district court, which would apply Tenth Circuit precedent and dismiss the § 1983 claim.

The question of forum shopping would become more complicated, however, if Dudley decided to forego his § 1983 claim and bring only his state law trespass claim in state court. In response to Dudley’s trespass claim, the officers could set up the following defense: (1) trespass constitutes unlawful presence on the property of another;⁴³ (2) we had a valid warrant and we did not violate Dudley’s Fourth Amendment rights; (3) therefore we were lawfully on his property and did not commit trespass. Step 2 in this defense presents a question of federal law—the police officers were only “lawfully” on the property if indeed Dudley’s federal constitutional rights were not violated.⁴⁴ Answering this question will require an interpretation of federal law, specifically, the law governing what period of time is sufficient to comport with the Fourth Amendment knock and announce rule.

But despite the need to interpret federal law, the trespass claim arises only under state law, and, due to the well-pleaded complaint rule, would be unremovable. The well-pleaded complaint rule dictates that federal question jurisdiction is present only if the plaintiff’s right to

⁴² 28 U.S.C. § 1441 (b) (“Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.”).

⁴³ “Every unauthorized entry upon the land of another is a trespass which entitles the owner to a verdict for some damages.” *North v. Pub. Serv. Co. of N.M.*, 94 N.M. 246, 247 (1980) (opinion of Judge Sutin).

⁴⁴ *See, e.g., Collier v. City of Portland*, 644 P.2d 1139, 1142 (1982) (action against police officers for trespass, holding that “Having probable cause to believe that a burglary was being committed and that the perpetrator was still on the premises, the police were privileged to enter plaintiff’s residence. That being so, defendant was entitled to a directed verdict on the cause of action for trespass to property.”) (footnotes omitted); *Antikiewicz v. Motorists Mut. Ins. Co.*, 283 N.W.2d 749, 753 (Mich. App. 1979) *vacated on other grounds*, 285 N.W.2d 659 (1979) (“Normally, a public officer who is on the premises of another pursuant to legal authorization is not liable for trespass. Such officer becomes liable, however, where he acts in excess of his authority.”).

relief depends on federal law.⁴⁵ The fact that a defense based on federal law is sure to arise is insufficient to create federal question jurisdiction.⁴⁶ Thus, by bringing only a claim based on state tort law, Dudley can insulate his lawsuit from removal, thereby ensuring that he will gain the benefit of the New Mexico Supreme Court's more favorable interpretation of the U.S. Supreme Court's knock and announce rule.

The possibility of forum shopping provides support for the argument that state courts should be bound by circuit precedent—plaintiffs should not be able to obtain a more favorable interpretation of federal law by filing in state court. On the other hand, it is important to acknowledge the limited circumstances in which this problem can arise. Many of the cases that require state courts to interpret federal law are state criminal prosecutions. Obviously, a criminal defendant has no choice of forum in the first place. In terms of civil actions, any claim that arises under federal law is removable to federal court.⁴⁷ Thus the plaintiff can try to forum shop, but is likely to be thwarted in that attempt. It is only in cases such as the hypothetical above, where the interpretation of federal law is required even though the case would be barred from federal court by operation of the well-pleaded complaint rule, that not binding state courts to circuit precedent could truly result in forum shopping. This limited possibility of forum shopping is arguably not sufficient to justify the intrusion into state court decision-making that would result from depriving state courts of the opportunity to interpret federal law as they see fit in the absence of governing Supreme Court precedent. That opportunity derives from the unique

⁴⁵ *See, e.g., Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (“Under our longstanding interpretation of the current statutory scheme, the question whether a claim ‘arises under’ federal law must be determined with reference to the ‘well-pleaded complaint.’”).

⁴⁶ *Id.* (“A defense that raises a federal question is inadequate to confer federal jurisdiction.”).

⁴⁷ 28 U.S.C. § 1441(b)

role of state courts in our system of dual sovereignty, which is addressed in the following section.

3. The Madisonian Compromise and the Role of State Courts in Our System of Dual Sovereignty

Article III of the constitution demonstrates that the Framers envisioned an important role for state courts in litigation involving federal law. Article III established the Supreme Court, but did not create lower federal courts. Rather, Article III merely states that, “The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”⁴⁸ This clause represents what has come to be known as the Madisonian Compromise. It was a compromise in the sense that one faction at the Constitutional Convention believed that lower federal courts were necessary since state courts could not be trusted to uphold federal law,⁴⁹ while another faction believed that state courts would be well suited to deciding cases involving federal law, and that the existence of lower federal courts would unduly encroach on state sovereignty.⁵⁰

In light of the Madisonian Compromise, the Framers clearly assumed that state and federal courts would have concurrent jurisdiction over cases involving federal law.⁵¹ This assumption stemmed from two propositions, first, that state courts were courts of general

⁴⁸ U.S. CONST. Art. III, § 1.

⁴⁹ ERWIN CHEMERINSKY, FEDERAL JURISDICTION 3 (4th ed. 2003) (“Madison argued that state judges were likely to be biased against federal law and could not be trusted, especially in instances where there were conflicting state and federal interests.”).

⁵⁰ *Id.* (Lower federal courts “were regarded as an encroachment upon the rights of individual states. It was claimed that the state courts were perfectly competent for the work required....”) (quotations omitted).

⁵¹ In the Federalist 82, Alexander Hamilton noted that, “in every case in which they were not expressly excluded by the future acts of the national legislature, [the state courts] will of course take cognizance of the causes to which those acts may give birth.”). FEDERALIST PAPERS, *supra* note 36, at 419. Not only do states have jurisdiction, unless divested of it by Congress, to entertain claims arising under federal law, but they in fact have no discretion to decline to exercise that jurisdiction. *See, e.g.,* Testa v. Katt, 330 U.S. 386, 393 (1947) (“[A] state court cannot refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.”) (citations and quotations omitted).

jurisdiction, presumed competent to hear all cases,⁵² and second, that the system of dual sovereignty meant that state governments and the federal government were “parts of one whole.”⁵³ Under the second proposition, a state court ruling on a question of federal law would not be interpreting the law of a foreign sovereign, but would simply be interpreting its own law.

Thus, despite the distrust of state courts that some of the delegates to the Constitutional Convention harbored, the Madisonian Compromise clearly signals that state courts were intended to play an important role in the litigation of claims involving federal law—if it was at least possible that the Supreme Court would be the *only* federal court,⁵⁴ then it was likely that the bulk of the work of litigating federal claims would be entrusted to the state courts.⁵⁵ If there were no lower federal courts, the answer to the question posed by this paper would be an easy “no”—if lower federal courts did not exist, there would be no lower federal court precedent to which state courts might be bound. Thus the Madisonian Compromise seems to weigh heavily against binding state courts to lower federal court precedent.

⁵² FEDERALIST PAPERS, *supra* note 36, at 419. (“The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe....”).

⁵³ *Id.*

⁵⁴ Notably, with the exception of a few narrow categories, Article III only grants the Supreme Court appellate, and not original, jurisdiction. Thus, in most cases involving federal law, the Supreme Court would lack jurisdiction to sit as a trial court, even if it had the time and resources to do so. *See* U.S. CONST. Art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

⁵⁵ Scholars also note that because Congress did not create general “federal question jurisdiction” until 1875, the majority of cases involving federal questions were likely litigated in state court prior to that time. *See, e.g.,* Zeigler, *supra* note 2, at 1148.

But more broadly, the Madisonian Compromise raises questions regarding the parity of state and federal courts that have persisted into the modern era.⁵⁶ Are state and federal courts really equal in their abilities? Can state courts really be trusted to render decisions that are faithful to federal law and policy? Those who answer this latter question in the negative would likely approve of a rule that requires state courts to apply circuit precedent on questions of federal law. If state courts are not to be trusted, it makes sense to “micromanage” them by requiring them to apply circuit law rather than developing their own answers to questions of federal law that have not yet been answered by the U.S. Supreme Court.

The Supreme Court has often asserted that state courts are just as competent as federal courts in applying federal law. For example, in *Stone v. Powell*,⁵⁷ the Supreme Court stated:

Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. . . . there is no intrinsic reason why the fact that a man is a federal judge should make him more competent or conscientious . . . than his neighbor in the state courthouse.⁵⁸

Justice Scalia, in particular, has often noted the parity between state and federal courts. Arguing against a rule that treats habeas corpus petitions coming out of state convictions differently from those coming out of federal convictions, he said,

T[he] structure [of our national system] establishes this Court as the supreme judicial interpreter of the Federal Constitution and laws, but gives other federal courts no higher or more respected a role than state courts in applying that ‘Law

⁵⁶ See generally CHEMERINSKY, *supra* note 49, § 1.5.

⁵⁷ 428 U.S. 465 (1976).

⁵⁸ *Id.* at 494 n. 35 (citations and quotations omitted).

of the Land’—which it says all state courts are bound by, and all state judges must be sworn to uphold. It would be a strange constitution that regards state courts as second-rate instruments for the vindication of federal rights and yet makes no mandatory provision for lower federal courts (as our Constitution does not.)⁵⁹

In keeping with the notion of parity, there are several doctrines, both statutory and judge-made, that require federal courts to stay their hands, in part out of deference to the ability of state courts to interpret federal law. For example, the Anti Injunction Act⁶⁰ dictates that a federal court may not enjoin a proceeding pending in state court unless one of three narrow exceptions is met.⁶¹ Similarly, the judge-made abstention doctrines⁶² are designed to ensure that federal courts do not improperly interfere with state courts, and that state courts are left to interpret federal law as they see fit when a case is properly before them.⁶³ The Anti Injunction Act and the abstention doctrines demonstrate mechanisms that have been put in place, either by Congress

⁵⁹ *Withrow v. Williams*, 507 U.S. 680, 723 (Scalia, J., dissenting).

⁶⁰ 28 U.S.C. § 2283.

⁶¹ “A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” *Id.* Interestingly, however, the Supreme Court has found that suits brought under 42 U.S.C. § 1983, the federal statute that has served as the primary vehicle for civil rights litigation over the past 50 years, are exempted from the Anti Injunction Act. *Mitchum v. Foster*, 407 U.S. 225 (1972). The Court based this holding on the legislative history of § 1983, noting Congress’s recognition that state courts could *not* always be trusted to faithfully apply federal law and protect federally granted rights: “[The] legislative history [of § 1983] makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.” *Id.* at 242.

⁶² The abstention doctrines counsel that under certain circumstances where a federal court does have jurisdiction, it should decline to exercise that jurisdiction out of deference to state courts. There are several different kinds of abstention. For an explanation of each type, see generally CHEMERINSKY, *supra* note 49, chapters 12-14.

⁶³ The type of abstention that best demonstrates this principle is so-called “Younger” abstention. In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held that, absent a showing of bad faith or harassment, a federal court should not enjoin a pending state criminal proceeding on the grounds that the state criminal statute being enforced is facially unconstitutional. *Id.* at 54. The Court based its decision not only on notions of comity and the traditional requirements for obtaining injunctive relief, but also on what it referred to as “Our Federalism,” which it characterized as “a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.” *Id.* at 44. The Court further noted that the criminal defendant had every right argue in the state court criminal proceeding that the state statute was unconstitutional. *Id.* at 49.

or by the federal courts, to respect the decision-making of state courts, and to avoid “micromanaging” state court proceedings.

Nonetheless, there are other mechanisms in our legal system that undermine the notion that state courts are equally competent and should be trusted to faithfully interpret federal law. The most notable among these mechanisms is the writ of habeas corpus. The writ allows a prisoner being held in either state or federal custody⁶⁴ to petition a federal court for release, arguing that he or she is being held in violation of federal law.⁶⁵ A habeas corpus proceeding, which can be brought only after a prisoner has exhausted all state remedies,⁶⁶ is a civil action that provides for collateral attack of state court proceedings.⁶⁷ As such, it is a major exception to the general rule that lower federal courts may not review judgments of state courts.⁶⁸ Proponents of habeas relief “expressly challenge the parity between federal and state courts and argue that structural differences between federal and state courts mandate that federal courts be available to protect federal rights.”⁶⁹ Thus, the availability of habeas relief demonstrates that our system does not always trust state courts to fairly interpret and protect federal rights.⁷⁰

⁶⁴ Initially, federal habeas corpus proceedings were available only to those held in federal custody, but following the Civil War, Congress expanded the writ to allow for review of state court convictions. CHEMERINSKY, *supra* note 49, § 15.2.

⁶⁵ *Id.* § 15.1.

⁶⁶ *See generally id.* § 15.4.2 (“An extremely important limitation on the power of federal courts to hear habeas corpus petitions is the requirement that petitioners in state custody exhaust all available state court procedures prior to seeking federal court review.”).

⁶⁷ *Id.* § 15.1.

⁶⁸ *See* Part III.4, *infra*, discussing the *Rooker-Feldman* doctrine.

⁶⁹ *Id.* § 15.1, at 863-64.

⁷⁰ There are other examples of how we do not always trust state courts to interpret federal law. On occasion, Congress has provided for federal jurisdiction in cases that would otherwise be relegated completely to state court. One example is the Labor Management Relations Act of 1947, which created federal jurisdiction for contract disputes between employers and labor organizations. 29 U.S.C. § 185(a) (“Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having

On balance, however, our system is based on a presumption that state courts are proper arbiters of federal rights and can be trusted to safeguard those rights. Since that presumption is so fundamental to our system, it seems to make most sense to allow state courts to fashion their own interpretations of federal law, absent governing Supreme Court precedent, rather than “micromanaging” state courts by requiring them to follow lower federal court decisional law. Indeed, state courts arguably have an *obligation* to exercise their power to interpret federal law in an independent fashion, rather than giving blind deference to the opinions of the lower federal courts. The Ohio Supreme Court came to this conclusion in *State v. Burnett*.⁷¹ In *Burnett*, a criminal defendant challenged a section of the Cincinnati Municipal Code on constitutional grounds.⁷² In a prior unrelated case, the U.S. District Court for the Southern District of Ohio had struck down the ordinance as unconstitutional.⁷³ The Ohio Supreme Court decided that it was not bound by the federal district court decision, and in fact determined that it had a duty to conduct its own independent analysis of the defendant’s constitutional arguments.⁷⁴ Noting that the U.S. Supreme Court has yet to definitively answer the question of whether state courts are bound by lower federal court precedent, the court said, “we are reluctant to abandon our role in the system of federalism created by the United States Constitution until the United States Supreme Court directs us otherwise. Both inferior federal courts and state courts serve as laboratories for experimentation to devise various solutions where the best solution is far from

jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.”). *See also* *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957). Another principle demonstrating a lack of faith in state courts is the Supreme Court’s holding that § 1983 litigation is not subject to the prohibitions of the Anti Injunction Act. *See supra* note 61.

⁷¹ 755 N.E.2d 857 (Ohio 2001).

⁷² *Id.* at 421 (citing Chapter 755 of the Cincinnati Municipal Code).

⁷³ *Id.* at 421-22 (citing *Johnson v. Cincinnati*, 119 F.Supp2d 735 (S.D. Ohio 2000)).

⁷⁴ *Id.* at 424.

clear.”⁷⁵ Given the unique role of state courts in our nation’s system of dual sovereignty, perhaps the Ohio Supreme Court was correct in recognizing its responsibility to conduct an independent constitutional analysis. Another facet of the unique relationship between state and federal courts that bears on the proper treatment of circuit precedent in state courts is the fact that, generally, lower federal courts may not review state court judgments. That facet is taken up in the next section.

4. State Courts Do Not Occupy an “Inferior” Relationship to Lower Federal Courts

Under the *Rooker-Feldman* doctrine, lower federal courts lack jurisdiction to review final judicial decisions of state courts. In *Rooker v. Fidelity Trust Co.*,⁷⁶ the plaintiffs filed a bill in equity in a United States District Court to have a judgment of the Indiana Supreme Court declared null and void on the grounds that the judgment violated various provisions of the United States Constitution.⁷⁷ The Supreme Court held that lower federal courts have only original jurisdiction, and thus lack jurisdiction to review the judgments of state courts: “Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.”⁷⁸

⁷⁵ *Id.* (citations and quotations omitted).

⁷⁶ 263 U.S. 413 (1923).

⁷⁷ *Id.* at 415.

⁷⁸ *Id.* at 416. *Rooker* was reaffirmed more recently in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In *Feldman*, the Supreme Court clarified what constitutes a judicial proceeding in state court, from which an appeal to the lower federal courts does not lie. While *Rooker* itself only speaks to the inability of federal *district courts* to review state court judgments, it seems to have also been interpreted to preclude such review by federal appellate courts. See CHEMERNINSKY, *supra* note 49, § 15.1 n.1 (referring to the holding in *Rooker* as, “federal courts lack jurisdiction to review state court decisions.”).

The *Rooker-Feldman* doctrine serves to afford deference to state courts, and to promote federalism.⁷⁹ It also means that state courts are not “lower” courts with respect to the lower federal courts, because under the common law structure, “lower” court decisions are reviewable by “higher” courts.⁸⁰ Both courts⁸¹ and commentators⁸² have recognized that the inability of lower federal courts to review state court judgments weighs against binding state courts to lower federal court decisions. Few courts that have discussed the issue have provided much analysis, but the conclusion has common sense appeal—it would simply be inconsistent with the traditional common law hierarchy to bind one court to precedent from another court that does not exercise some sort of supervisory control over the first court.

IV. How New Mexico Courts Treat Tenth Circuit Law—A Casestudy of the Rule in Practice

Even if state courts should not be *bound* by lower federal court decisions, should those decisions nonetheless be especially persuasive authority for a state court that must interpret federal law? The arguments that could be made for binding state courts to lower federal court precedent, such as furthering uniformity and discouraging forum shopping, also serve as reasons

⁷⁹ See, e.g., *Gilbert v. Ferry*, 298 F.Supp 2d 606, 613 (E.D. Mich. 2003) (“The *Rooker-Feldman* Doctrine promotes firmly-held notions of federalism and comity by preserving the integrity of the state court decision-making process and the repose of state court judgments.”) (citations and quotations omitted).

⁸⁰ Cf. *Alexander v. Delgado*, 84 N.M. 717, 718, 507 P.2d 778, 779 (1973) (“[I]t is not considered good form for a lower court to reverse a superior one....The general rule is that a court lower in rank than the court which made the decision invoked as a precedent cannot deviate therefrom and decide contrary to that precedent, irrespective of whether it considers the rule laid down therein as correct or incorrect.”) (citations and quotations omitted).

⁸¹ See, e.g., *Hinterlong v. Baldwin*, 720 N.E.2d 315, 323 (Ill. Ct. App. 1999) (“Federal courts exercise no appellate jurisdiction over state courts; therefore decisions of the lower federal courts are not binding on state courts....”); *State v. Mechtel*, 499 N.W.2d 662 (Wis. 1993) (“[B]ecause lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.”);

⁸² See, e.g., Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 825 (1994) (“But the state and territorial judges are not bound by precedents established by courts that do not have the authority to review those judges’ decisions, since, as in the Article III regime, authority to establish precedent follows the path of appellate review. Thus a state court need not follow the holdings of any inferior federal court....”).

why state courts perhaps should, as a prudential matter, defer to the decisions of the lower federal courts on issues of federal law. This section will examine how New Mexico courts have treated lower federal court decisional law, to see whether our state does pay special deference to Tenth Circuit decisions in cases requiring the interpretation of federal law.

New Mexico courts have stated that they are not bound by Tenth Circuit opinions in interpreting federal law.⁸³ However, there have been statements to the contrary as well.⁸⁴ On balance, New Mexico courts seem to recognize that they are not bound by Tenth Circuit decisions, but it seems as though, when they want to follow those decisions, they tend to use language indicating that deference is due to the circuit.

The New Mexico case that best demonstrates these conflicting views is *State v. Cardenas-Alvarez*.⁸⁵ In that case, the defendant was stopped at a border patrol checkpoint in southern New Mexico by a federal agent.⁸⁶ After asking the defendant several questions, the agent became suspicious, and ordered the defendant to a “secondary inspection area.”⁸⁷ The agent then obtained the defendant’s consent to search the vehicle and to allow a drug dog to sniff around the vehicle.⁸⁸ Federal agents eventually discovered 85 pounds of marijuana in the

⁸³ “[O]ur courts are not required to adopt the reasoning of the Tenth Circuit.” *State v. Frank*, 2002-NMSC-026, ¶ 22, 52 P.3d 404, 409.

⁸⁴ *See, e.g., State v. Snyder*, 1998-NMCA-166, ¶ 9, 967 P.2d 843, 846 (“In applying federal law, we follow the precedent established by the federal courts, particularly the United States Court of Appeals for the Tenth Circuit.”); *State v. Fierro*, 1996-NMCA-028, ¶ 7, 911 P.2d 1202, 1203 (“[D]ecisions of [the] Tenth Circuit Court of Appeals effectively govern law applied in this state that would be reviewable in habeas corpus proceedings.”).

⁸⁵ 2001-NMSC-017, 25 P.3d 225.

⁸⁶ *Id.* ¶ 2, 25 P.3d at 227.

⁸⁷ *Id.* ¶ 3, 25 P.3d at 227.

⁸⁸ *Id.* ¶ 4, 25 P.3d at 227.

defendant's gas tank.⁸⁹ At the trial, the defendant moved to suppress the drugs, arguing that the agent did not have the "reasonable suspicion of criminal activity" that would have been required to detain him for more than the "initial questioning."⁹⁰ The trial judge denied the motion, but the court of appeals reversed the conviction on the ground that the extended detention violated the defendant's Fourth Amendment rights.⁹¹ The New Mexico Supreme Court affirmed the ruling of the court of appeals, but on different grounds.⁹²

As the court in *Cardenas-Alvarez* noted, New Mexico uses the "interstitial" approach to constitutional questions.⁹³ Under the interstitial approach, a court should first determine whether a defendant's federal constitutional rights have been violated.⁹⁴ Then, only if that question is answered in the negative, the court should go on to determine whether state constitutional rights have been violated.⁹⁵ The majority in *Cardenas-Alvarez* found that the defendant's federal constitutional rights had not been violated, but that his rights under the New Mexico Constitution had been.⁹⁶ Justice Serna concurred in the result, but felt that the defendant's Fourth Amendment rights had been violated, making it unnecessary to reach the state constitutional

⁸⁹ *Id.*

⁹⁰ *Id.* ¶ 5, 25 P.3d at 228.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* ¶ 6, 25 P.3d at 228.

⁹⁴ *Id.*

⁹⁵ *Id.* ¶ 7, 25 P.3d at 228.

⁹⁶ *Id.* ¶ 5, 25 P.3d at 228.

question.⁹⁷ It is useful to first examine Justice Serna’s opinion, as it nicely demonstrates the contrasting views on how Tenth Circuit precedent should be used.

Justice Serna stated that the majority “relie[d] on Tenth Circuit case law” to reach its decision that the Fourth Amendment had not been violated.⁹⁸ He felt that the majority had correctly interpreted the Tenth Circuit cases, but that those Tenth Circuit cases had themselves misinterpreted United States Supreme Court precedent.⁹⁹ Justice Serna noted that New Mexico courts are bound by the Supreme Court’s interpretation of federal law, but stated, “where the issue has not been explicitly resolved by the Supreme Court, we are not bound in our search for the meaning of the Fourth Amendment by the Tenth Circuit’s interpretation of Supreme Court precedent. Tenth Circuit case law on the subject is merely persuasive, albeit substantially persuasive, authority.”¹⁰⁰ He felt that prior New Mexico cases had correctly interpreted Supreme Court precedent in this area, and that those cases, rather than the Tenth Circuit cases, should be followed.¹⁰¹

The majority indeed “relied” on the Tenth Circuit cases in reaching its conclusion that the defendant’s Fourth Amendment rights had not been violated. The part of the majority opinion that deals with the Fourth Amendment relies exclusively on Tenth Circuit cases. In fact, it repeatedly uses the phrase “under federal law,” and then cites only Tenth Circuit cases.¹⁰² In a

⁹⁷ *Id.* ¶ 57, 25 P.3d at 248-49 (Serna, J., concurring in result).

⁹⁸ *Id.* ¶ 58, 25 P.3d at 249 (Serna, J, concurring in result).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (citations omitted). In reaching this conclusion, Justice Serna cited Justice Thomas’s concurring opinion in *Lockhart*, see text accompanying note 12, *supra*.

¹⁰¹ *Id.*

¹⁰² See, e.g., *id.* ¶ 7 (“Under federal law, Defendant’s detention constituted a routine border checkpoint stop....”); ¶ 9 (“Under federal law, Defendant’s detention was not excessive in scope or duration.”); ¶ 10 (“Because federal law

footnote, the majority addressed Justice Serna’s conclusion that prior New Mexico cases, rather than the Tenth Circuit cases, demonstrated the proper approach under the Fourth Amendment: “While our Court of Appeals’ cases represent a sound approach to border checkpoints under the New Mexico Constitution, we believe that in light of [the Tenth Circuit cases], they misinterpret the federal law they purport to apply.”¹⁰³ Interestingly, however, the court of appeals case that the majority refers to as having been relied on by Justice Serna was clearly decided under the Fourth Amendment and makes no mention of the New Mexico Constitution.¹⁰⁴

Notably, while the majority opinion relies exclusively on Tenth Circuit cases, it makes no mention of being bound by those cases.¹⁰⁵ Nonetheless, the majority’s reliance on the Tenth Circuit cases, and its repeated use of the phrase “under federal law,” suggests that the majority may have viewed those cases as constituting *the* “federal law” that it was required to apply. In contrast, Justice Serna viewed the Tenth Circuit cases as “merely persuasive,” pointing out that the New Mexico Supreme Court was free to ignore them. Thus *Cardenas-Alvarez* may demonstrate a disagreement among members of the court regarding the appropriate treatment of Tenth Circuit precedent.

There is, however, another possibility: the majority and Justice Serna may have only disagreed about the substantive law itself, rather than about the proper role of circuit precedent in

does not protect the right asserted by Defendant....”); ¶ 10 (“Under federal law the dismantling of a vehicle is generally found to be reasonable and within the parameters of a general consent.”).

¹⁰³ *Id.* ¶ 9, 25 P.3d at 229 n.1.

¹⁰⁴ *See State v. Estrada*, 111 N.M. 798, 799 (Ct. App. 1991) (“The question in this case is whether the fourth amendment to the United States Constitution was violated when defendant was referred to the secondary area and asked to exit his car while the dog sniff was performed.”).

¹⁰⁵ The majority opinion was authored by Justice Franchini. Interestingly, in an opinion that he had authored several years previously, the court declined to follow Tenth Circuit law on a federal question. *See Daddow v. Carlsbad Mun. Sch. Dist.*, 120 N.M. 97, 898 P.2d 1235 (1995), discussed at notes 119-25 *infra*. Thus it seems unlikely that the *Cardenas-Alvarez* majority actually thought itself bound by the Tenth Circuit cases.

state court decision-making. Justice Serna would not have applied the Tenth Circuit cases, because he believed that the Tenth Circuit had gotten it wrong. The majority, while it did not provide much discussion on the point, must have believed that the Tenth Circuit had gotten it right. Thus, the majority and concurring opinions demonstrate that the way in which a court treats circuit precedent may depend on the desired outcome of the case. In other words, the *Cardenas-Alvarez* majority may have simply followed the Tenth Circuit cases because it agreed with their reasoning, just as it might follow the reasoning of any other out-of-jurisdiction case with which it agreed. But in order to strengthen its decision, the majority repeatedly used the phrase “under federal law,” hinting, without ever saying so, that those cases were determinative.

Other New Mexico cases involving contraband seizure by federal agents raise the interesting question of whether there are certain substantive areas of the law in which extra deference to circuit precedent is warranted. In *State v. Fierro*,¹⁰⁶ the defendant was stopped by a Border Patrol agent, who apparently seized some marijuana from her car. The court noted that such a stop must be “justified by specific articulable facts warranting a reasonable suspicion that unlawful activity is afoot,”¹⁰⁷ and, relying on a Tenth Circuit case that involved “strikingly similar” facts, held that the reasonable suspicion must be “particularized to the defendant.”¹⁰⁸ To support its reliance on the Tenth Circuit case, the court cited to a previous New Mexico case, *State v. Lucero*,¹⁰⁹ and included the following parenthetical citation to that case: “(decisions of [the] Tenth Circuit Court of Appeals effectively govern law applied in this state that would be

¹⁰⁶ 1996-NMCA-028, 911 P.2d 1202.

¹⁰⁷ *Id.* ¶ 4, 911 P.2d at 1203.

¹⁰⁸ *Id.* ¶ 5, 911 P.2d at 1203 (citing *United States v. Mansisvais*, 907 F.2d 984 (10th Cir. 1990)).

¹⁰⁹ 97 N.M. 346, 639 P.2d 1200 (Ct. App. 1981).

reviewable in habeas corpus proceedings.)”¹¹⁰ Judge Hartz wrote a brief special concurrence where he “agreed” that the Tenth Circuit case relied on by the majority was “controlling.”¹¹¹ He further stated that because both cases involved “agents of the United States Border Patrol, who are bound to obey federal law, we should be particularly deferential to opinions of the United States Court of Appeals for the Tenth Circuit.”¹¹²

The *Fierro* court’s parenthetical reference to *Lucero* raises the inference that extra deference is due to Tenth Circuit law when there is a possibility of habeas review. Aside from that parenthetical, the court made no reference to habeas review, or the proper treatment of circuit cases. Other courts, however, have noted that it makes sense to give extra deference to circuit precedent when it is possible that a case will eventually end up in the circuit court on a habeas petition. The rationale for this deference is that it would be inefficient for a state court to refuse relief on a ground on which the relevant federal court would later grant habeas relief.¹¹³

As a practical matter, however, the *Fierro* court’s reference to *Lucero* is troubling in two ways. First, any concern about the court’s decision being overturned on habeas review is misplaced, as the U.S. Supreme Court has ruled that Fourth Amendment exclusionary rule claims

¹¹⁰ *Fierro*, 1996-NMCA-028, ¶ 7, 911 P.2d at 1203.

¹¹¹ *Id.* ¶ 10, 911 P.2d at 1203 (Hartz, J., specially concurring).

¹¹² *Id.*

¹¹³ See, e.g., *Com. v. Negri*, 213 A.2d 670, 672 (Penn. 1965) *overruled on other grounds by Com. v. Senk*, 223 A.2d 97 (Penn. 1966) (“[I]n view of the wide spread confusion in this area of the law and the failure of the Supreme Court to clarify it, the decision of the Third Circuit Court of Appeals is on the matter, for all practical purposes, the ultimate forum in Pennsylvania. If the Pennsylvania courts refuse to abide by its conclusions, then the individual to whom we deny relief need only to ‘walk across the street’ to gain a difference [sic] result. Such an unfortunate situation would cause disrespect for the law. It would also result in adding to the already burdensome problems of the Commonwealth’s trial courts, which look to us for guidance. Finality of judgments would become illusory, disposition of litigation prolonged for years, the business of the courts unnecessarily clogged, and justice intolerably delayed and frequently denied.”).

are generally not reviewable on habeas.¹¹⁴ Second, the parenthetical citation to *Lucero* is an inaccurate characterization. *Lucero* involved a claim of ineffective assistance of counsel. The *Lucero* court noted that the test in New Mexico for ineffective assistance of counsel was the “sham, farce, or mockery” test.¹¹⁵ That test that been used in the Tenth Circuit for some time, but the circuit had subsequently replaced it with a less stringent test.¹¹⁶ The *Lucero* court did refer to the Tenth Circuit as “the federal appellate court which decides complaints in our geographical area concerning State violations of constitutional rights under habeus corpus proceedings.”¹¹⁷ However the court made no further mention of habeus proceedings or the function of Tenth Circuit caselaw in New Mexico state courts. In fact, the court *declined* to adopt the less stringent Tenth Circuit test, noting that if the rule was going to be changed, that was a decision for the New Mexico Supreme Court and not the court of appeals.¹¹⁸

Given the serious inaccuracies in the *Fierro* court’s citation to *Lucero*, it seems likely that the court simply made a mistake. On the other hand, it is at least possible that the court’s mischaracterization of *Lucero* was influenced by its desire to justify its heavy reliance on Tenth Circuit precedent. If so, *Fierro* presents another example of the way in which New Mexico courts’ characterization of Tenth Circuit law is dependant on the outcome desired in a particular case.

Judge Hartz’s special concurrence in *Fierro* also suggests that perhaps when unique federal interests are implicated, more deference to federal law is appropriate. While Judge Hartz

¹¹⁴ *Stone v. Powell*, 428 U.S. 465 (1976). See also CHEMERINSKY, *supra* note 49, § 15.1.

¹¹⁵ 97 N.M. at 351, 639 P.2d at 1205.

¹¹⁶ *Id.* (citing *Dyer v. Crisp*, 613 F.2d 275 (10th Cir. 1980)).

¹¹⁷ *Id.*

¹¹⁸ *Id.* (citing *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973)).

did not give any explanation for his statement, one can imagine policy reasons that underlie his concern. For example, it makes sense for the conduct of federal agents to be governed by one uniform standard. Perhaps agents are routinely transferred between different border checkpoints. If so, it would be difficult for them to familiarize themselves with the laws of different states in order to make sure that their conduct conforms to the laws of the state in which they are working on a particular occasion. On the other hand, Judge Hartz's suggestion that the law should be uniform because federal agents are "bound to obey federal law" may raise a false problem, since state actors are certainly bound to follow federal constitutional law as well. From a cynical point of view, this false problem again raises the inference that New Mexico courts counsel deference to circuit precedent only when they happen to agree with that precedent.

On other occasions, however, New Mexico courts have felt free to diverge from Tenth Circuit law. In *Daddow v. Carlsbad Municipal School District*,¹¹⁹ the New Mexico Supreme Court had to decide whether a local school board was an "arm of the state," so as to benefit from Eleventh Amendment sovereign immunity. Under U.S. Supreme Court caselaw, the "arm of the state" inquiry is a question of federal law, but is determined with reference to the state law that defines and governs the entity at issue.¹²⁰ Prior to the *Daddow* case, the Tenth Circuit had decided that school boards in New Mexico were arms of the state.¹²¹ In *Daddow*, the New Mexico Supreme Court declined to follow the Tenth Circuit case, concluding that the circuit had

¹¹⁹ 120 N.M. 97, 898 P.2d 1235 (1995).

¹²⁰ See, e.g., *Regents of the Univ. of Calif. v. Doe*, 519 U.S. 425, 430 (1997) ("Ultimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State...is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency's character.").

¹²¹ *Martinez v. Bd. of Educ. of Taos Mun. Sch. Dist.*, 748 F.2d 1393 (1984), *overruled by* *Duke v. Grady Mun. Sch.*, 127 F.3d 972 (1997).

failed to consider all of the factors made relevant by Supreme Court precedent.¹²² Justice Frost specially concurred, finding that there was no need to reach the arm of the state question. But, he said, the majority holding “unnecessarily places us in conflict with the Tenth Circuit and raises the possibility that a federal claim could successfully be brought in state court which would otherwise fail in federal court.”¹²³ Thus, Justice Frost seemed concerned about the possibility of forum shopping, as discussed in Part III.2 above.

Daddow demonstrates that the New Mexico Supreme Court is comfortable ignoring Tenth Circuit precedent when it feels the circuit is incorrect. It is interesting to note, however, that the court did so in this case where the “federal question” it had to answer is determined by reference to state law.¹²⁴ It has long been established that state courts are the final arbiters of the meaning of state law.¹²⁵ Thus while the New Mexico Supreme Court is obviously bound by U.S. Supreme Court precedent regarding what factors should be considered in determining whether an entity is an arm of the state, the court is the final arbiter of the meaning of the state statutes that must be analyzed to finally answer that question. As such, the court may have felt freer than usual to depart from Tenth Circuit precedent.

¹²² *Daddow*, 120 N.M. at 105, 898 P.2d at 1243.

¹²³ *Id.* at 111, 898 P.2d at 1249 (Frost, J., specially concurring). Interestingly, the Tenth Circuit later overruled the *Martinez* case, relying on but not completely deferring to *Daddow*, and determined that in the Tenth Circuit, local school boards are not considered arms of the state. *See Duke v. Grady Mun. Sch.*, 127 F.3d 972 (1997).

¹²⁴ A similar circumstance would be likely to arise in the context of procedural due process claims. In this area, the first inquiry (whether there is a protected liberty or property interest at stake), is determined wholly by reference to state law. The second inquiry, whether due process was afforded prior to the deprivation of that right, is wholly a question of federal constitutional law. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1984).

¹²⁵ “The Supreme Court is the authoritative arbiter of the meaning of federal law, but state courts play that role concerning state law. The Supreme Court can review state court decisions of all federal law questions, but state court decisions regarding state law are unreviewable.” CHEMERINSKY, *supra* note 49, § 10.2. *Cf. Gooding v. Wilson*, 205 U.S. 518, 520 (1972) (“Only the Georgia courts can supply the requisite construction, since of course we lack jurisdiction authoritatively to construe state legislation.”) (citations and quotations omitted).

On balance then, it seems that New Mexico are well aware that they are not bound by Tenth Circuit precedent. However, the language that they use in discussing circuit precedent often seems to depend on what approach is best suited to the outcome desired in the particular case. Thus, one could argue that Tenth Circuit law receives little more deference from the New Mexico courts than any other out-of-jurisdiction caselaw, but that when it suits them, the courts pay lip service to the idea that extra deference is owed. As several New Mexico judges and justices have noted, diverging from circuit precedent defeats uniformity and has the potential to encourage forum shopping. Nonetheless, like the Ohio Supreme Court in *State v. Burnett*,¹²⁶ New Mexico courts seem to have taken seriously their responsibility to conduct their own independent analysis of federal law.

V. Conclusion

Although there seems to be no real pedigree for the rule that state courts are not bound by lower federal court decisions on questions of federal law, the courts who have adopted that rule seem to have gotten it right. Despite concerns about lack of uniformity and the potential for forum shopping, our federalist system seems to counsel giving state courts the opportunity to interpret federal law as they see fit in the first instance. If they get it wrong, the Supreme Court can then step in, correct the error, and provide a uniform rule for all courts. In the meantime, state courts have an obligation to interpret federal law in a manner that affords deference to circuit precedent where appropriate, but preserves the role of the state court as an independent decision maker within a federalist system.

¹²⁶ See discussion accompanying notes 71-75 *supra*.